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THE ROLE OF *EX TURPI CAUSA* IN TORT LAW

The defence of *ex turpi causa* is well-established in contract law, but its application in the realm of tort law is less certain. This article examines the various criteria applied by courts when considering whether or not to invoke the maxim in tort cases, and it also considers the differing approaches taken by courts in determining both the stage at which *ex turpi causa* should be invoked and the specific role which policy should play in *ex turpi causa* situations. The article also questions the appropriateness of making *ex turpi causa* a full, rather than a partial, defence to actions in tort.

I. INTRODUCTION

THE concept of *ex turpi causa non oritur actio*[1] – that a person who suffers damage at the hands of another, but who has himself acted in an unconscionable manner, should be deprived of any remedy which the law might otherwise have provided – has long been accepted at common law as a valid basis for refusing civil claims, particularly claims founded in contract. Its role in tort law has, however, never really been satisfactorily expounded, nor are its boundaries with respect to this area of law clear. As Buxton LJ observed recently in the English Court of Appeal decision of *Reeves* v *Commissioner of Police of the Metropolis*,[2] it is a defence with limits which are "very difficult to state or rationalise, it being recognised as sitting more easily in the law of contract than of tort". Buxton LJ's view closely reflects that of Chief Justice Yong Pung How, who, in the case of *Ooi Han Sun* v *Bee Hua Meng*,[3] stated that: "... the maxim of *ex turpi causa* ... will apply in the law of contract to prevent a plaintiff founding a claim on an illegal act or agreement. It is clear, however, that the maxim has only a very limited application in tort ..." Indeed, there are those who would go even further and agree with the observation of Lord Porter in *National Coal Board* v *England*[4] that: "the adage ... is generally applied to a question

1 A Latin expression translated as 'no action can be founded on a base cause', commonly reduced to the phrase '*ex turpi causa*'.

2 [1998] 2 WLR 401, at 413 ("*Reeves*' case").

3 [1991] 3 MLJ 220, at 223 ("*Ooi Han Sun's* case").

4 [1954] AC 403, at 419. Lord Porter's dictum was referred to by Buxton LJ in *Reeves*' case, *supra*, note 2, at 413.

of contract and I am by no means prepared to concede where concession is not required that it applies also to the case of tort."[5]

This article will examine the defence of *ex turpi causa* and will consider its rather uncertain and precarious position in tort law. It will also discuss whether, conceptually, *ex turpi causa* ought to be regarded as a defence at all, and whether the value judgments which it requires courts to make are appropriate or workable in modern societies where moral absolutes are becoming increasingly unacceptable.

II. The Nature of *Ex Turpi Causa*

One of the best analyses of *ex turpi causa* is to be found in the judgment of Kerr LJ in *Euro-Diam Ltd* v *Bathurst*.[6] Although the case actually involved a contractual dispute, the analysis also reflects the way in which the maxim is applied in tort:

> The *ex turpi causa* defence ultimately rests on a principle of public policy that the courts will not assist a plaintiff who has been guilty of illegal (or immoral) conduct of which the courts should take notice. It applies if in all the circumstances it would be an affront to the public conscience to grant the plaintiff the relief which he seeks because the court would thereby appear to assist or encourage the plaintiff in his illegal conduct or to encourage others in similar acts.[7]

5 For an even stronger expression of this view, see the decision of the High Court of Australia in *Smith* v *Jenkins* (1970) 44 ALJR 78. In that case, Windeyer J made a lengthy examination of *ex turpi causa*, and concluded that the *causa* of the maxim related to the causa of contract law (and to dispositions of property), but certainly *not* to tort law. He cited with approval Professor Heuston's opinion, as expressed in *Salmond on Torts*, that numerous problems accompanied its use in tort law and he stated (at 83) that: "The intrusion of this Latin maxim into learned commentary, and also into judgments, has caused a confusion which would not have occurred if the writers had ... not taken the maxim into territory where it does not belong." A similar view is apparent in the judgments in the Australian High Court decision in *Jackson* v *Harrison* (1978) 19 ALR 129. Other judges, however, consider that the maxim has been applied for so many years in so many areas outside contract that there is no longer any point in debating the issue. See, *eg*, the statement by Dillon LJ in *Pitts* v *Hunt* [1991] 1 QB 24, at 57: "That a defence of illegality can be pleaded to a case founded in tort is, in my judgment, clear, whether or not the defence is correctly called *ex turpi causa.*"

6 [1990] 1 QB 1 ("the *Euro-Diam* case").

7 *Ibid*, at 35. Buxton LJ in *Reeves*' case (*supra*, note 2 and *infra*, text at note 56), also referred, at 413, to this analysis, as adopted by Lloyd LJ in the case of *Kirkham* v *Chief Constable of the Greater Manchester Police* [1990] 2 QB 283 ("*Kirkham's case*"). Note, though, that although Kerr LJ's framing of the maxim is widely espoused, the validity of the "public conscience" aspect of it was doubted by Lords Goff of Chieveley, Lord Keith of Kinkel

Kerr LJ's analysis is noteworthy for its confirmation that the defence is not nowadays – nor, arguably, has ever been[8]– confined to illegal acts on the part of a plaintiff, but also covers acts which, although not illegal, are nevertheless regarded as so socially unacceptable that the plaintiff should be deprived of a remedy for the wrong he has suffered. It also explains the popular reversion, when describing the defence, to the old Latin maxim '*ex turpi causa*' – arguably more appropriately associated with contract – in preference to the more straightforward label of 'illegality', which, although still used, tends to misrepresent the defence when used in situations which do not actually involve any criminal offence on the part of the plaintiff.

At one level, it is quite right that a defence to a civil complaint, and a defence which is, moreover, based on the concept that the plaintiff has acted wrongly, should focus primarily on his moral culpability, rather than on the technical question of whether he has in fact committed a crime. At another level, however, basing the decision to refuse a claim on the plaintiff's moral blameworthiness opens its own can of worms. The obvious problem with extending the defence to the area of moral reprehensibility is that, even more than in the case of illegal acts – which themselves often give rise to difficulties of degree[9] – there is no easy line to be drawn between those forms of behaviour which are, and those which are not, sufficiently serious to justify refusing the plaintiff's claim. In addition, questions of the proportionality of the plaintiff's wrong when compared with the extent of his damage and the wrong of the defendant, and of whether his wrong

and Lord Browne-Wilkinson in the House of Lords in the case of *Tinsley* v *Milligan* [1994] 1 AC 340. They preferred the views of Ralph Gibson LJ, the dissenting judge in the Court of Appeal in the same case ([1992] Ch 310), who observed, at 344, that "the force of the deterrent effect is in the existence of the known rule and its stern application". For further discussion of this point, see *infra*, text at note 65 *et seq.*

8 There are several older tort cases in which the defence of *ex turpi causa* was also based on the concept of immorality rather than illegality as such. See, *eg*, *Hegarty* v *Shine* (1878) 2 LR Ir 273, in which a woman who contracted venereal disease from a man with whom she was having an extra-marital relationship was held to be barred from succeeding in her action against him in trespass, even though he had misrepresented his condition to her. It is noteworthy that the dissenting judge in that case, May CJ, objected (at 284) to the use of the maxim on the ground that: "That principle, I think, governs cases of contract ... But the present case is founded on tort". In his discussion in *Smith* v *Jenkins*, *supra*, note 5, of the tort/contract dichotomy, however, Windeyer J suggested that *Hegarty* v *Shine* could be seen as a contract case, since "the decision turned really on the case having originated in an immoral arrangement."

9 As Mason J observed in *Jackson* v *Harrison, supra*, note 5, at 142: "... there arises the difficulty, which I regard as insoluble, of formulating a criterion which would separate cases of serious illegality from those which are not serious. Past distinctions drawn between felonies and misdemeanours ... offences punishable by imprisonment and those which are not, non-statutory and statutory offences offer no acceptable discrimen."

was integrally connected with the harm which he suffered, have dogged the courts for years. Moreover, of late, the courts have experienced considerable problems in determining the role which *ex turpi causa* should play in deciding actions – particularly negligence actions. Many of these difficulties appear to stem from a fundamental uncertainty about the true nature of *ex turpi causa*, and from the uneasiness felt by many judges when faced with the prospect of sitting in moral judgment on a person who has come to court with a genuine legal complaint.

III. The Joint Illegal Enterprise Cases and the Stage at Which *Ex Turpi Causa* Becomes Relevant

Where actions in trespass to the person are concerned, there is little room for debate about the stage at which *ex turpi causa* should fall to be considered. Since trespass is a straightforward tort conceptually, the only way to deal with the plaintiff's fault is to treat it as a defence to the defendant's completed tort. In actions for negligence, however, where various elements have to be satisfied before a *prima facie* case is even established, the courts have formulated differing approaches to deciding when *ex turpi causa* should be used. As well as the traditional approach of treating *ex turpi causa* as a defence, the courts have, on occasions, used it either to negate the plaintiff's claim at the duty stage, or to declare that no standard of care can be determined at the breach stage.

The idea that *ex turpi causa* should be considered with respect to the elements of a claim has gained particular favour in 'joint illegal enterprise' cases. These actions, in which a wrongdoer is injured by his fellow wrongdoer during the course of committing a crime, make up a high proportion of *ex turpi causa* cases. For example, in *Ashton* v *Turner*,[10] a case involving a plaintiff who was injured when the defendant driver crashed the car in which they were both escaping from the scene of a crime, Ewbank J denied the plaintiff's claim on the basis that the courts would, in certain circumstances, refuse to "recognise the existence of a duty of care by one participant in a crime to another participant in the same crime, in relation to an act done in connection with the commission of that crime. That law is based on public policy".[11] Ewbank J's decision was influenced in large part by decisions of the Australian High Court in which *ex turpi causa* arguments had been considered at the duty stage.[12]

[10] [1981] QB 137.

[11] *Ibid*, at 146.

[12] See, *eg* , *Godbolt* v *Fittock* [1963] SR (NSW) 617 and *Smith* v *Jenkins, supra*, note 5. In *Smith* v *Jenkins*, the Australian High Court, having expressed its disapproval of the use

The Australian High Court has also been responsible for developing another approach – that of treating *ex turpi causa* as a factor making it impossible to determine the appropriate standard of care in an action between joint wrongdoers. In the case of *Jackson* v *Harrison*[13] – where the defendant whose negligent driving had injured the plaintiff sought unsuccessfully to escape liability on the ground that the plaintiff was aware that the defendant's license had been suspended – Mason J observed:

> If a joint participant in an illegal enterprise is to be denied relief against a co-participant for injury sustained in that enterprise, the denial of relief should be related not to the illegal character of the activity but rather to the character and incidents of the enterprise and to the hazards which are necessarily inherent in its execution. A more secure foundation for denying relief, though more limited in its application – and for that reason fairer in its operation – is to say that the plaintiff must fail when the character of the enterprise which the parties are engaged in is such that it is impossible for the court to determine the standard of care which is appropriate to be observed.[14]

Some years later, Balcombe J adopted this approach when giving his judgment in the English Court of Appeal in the case of *Pitts* v *Hunt*.[15] In *Pitts* v *Hunt*, the defendant was riding his motorcycle in a drunken and dangerous manner, encouraged by the equally drunk plaintiff, who was his pillion passenger. In the ensuing accident, the defendant was killed and the plaintiff was badly injured. Balcombe LJ held that "the circumstances ... were such as to preclude the court from finding that the deceased owed a duty of care to the plaintiff",[16] but he also held himself to be "in complete agreement" with Mason J in *Jackson* v *Harrison* in considering that the circumstances made it impossible to determine the standard of care which the defendant ought to have exercised towards the plaintiff.[17] He held that,

of *ex turpi causa* as a defence in tort, concluded that the only appropriate way to treat a plaintiff's wrongful (in that case, criminal) conduct was in "the refusal of the law to erect a duty of care as between persons jointly participating in the performance of an act contrary to the provisions of a statute making their crime punishable by imprisonment" (*per* Barwick CJ at 78).

13 *Supra*, note 5.

14 *Ibid*, at 142-143.

15 *Supra*, note 5.

16 *Supra*, note 5, at 51.

17 *Ibid*. Of the other two judges, Dillon LJ, after a detailed examination of English and Australian cases, appeared to approve of the standard of care approach, but actually decided the issue (at 60) on the ground that the action failed because it arose directly *ex turpi causa* – *ie*,

for this reason, the action failed. More recently, the *Jackson* v *Harrison* standard of care approach was again adopted – on very similar facts to those in *Jackson* v *Harrison* itself – in the decision of the Court of Appeal of Brunei in the case of *Emran bin Haji Abdul Rahman* v *Keasberry*.[18]

These approaches both work quite satisfactorily in cases involving joint wrongdoers. They are completely inappropriate, however, in cases where the plaintiff and the defendant are not acting in collusion, and where their respective wrongs are entirely separate.[19] Indeed, it is clear that many adherents of both the duty and standard approaches, who oppose the use of *ex turpi causa* as a defence in tort law, would be prepared to take account of a plaintiff's wrongdoing *only* in cases involving joint criminal enterprises. They would not be prepared to take wrongful conduct into account at all in any other type of situation.[20] And even some judges who regard *ex turpi causa* as a defence take the view that it should be available only in cases of criminal enterprises, which – given the nature of the cases – in practice nearly always means joint illegal enterprises between the plaintiff and the defendant.[21] One such judge is Chief Justice Yong Pung How who, in *Ooi Han Sun*'s case observed:

it was intrinsically connected with the damage which the plaintiff sustained. Beldam LJ (at 46-47) held that the plaintiff's claim was precluded on grounds of public policy (although he did not appear to favour treating this policy as negativing the duty of care altogether). The benefit of Balcombe LJ's refusal to set a standard of care in cases involving joint tortfeasors is that it appeals to those judges who (like Dillon LJ) wish to avoid making any assessment with respect to the morality or otherwise of the actions of the plaintiff and his co-criminal. And it is, as Michael A Jones in his *Textbook on Torts* (5th ed, 1996) points out (at 478), not really surprising that courts should be unwilling to undertake the distasteful task of setting the standard of care between two criminals. As Owen J observed in *Smith* v *Jenkins*, *supra*, note 5 at 89: "It would, I think, be an odd state of affairs if in a case such as that put by Lord Asquith in *National Coal Board* v *England* (*supra*, note 4, and *infra*, note 30), a court was called upon to consider and decide the standard of care to be expected, in particular circumstances, of a prudent safe-breaker or whether in the case suggested by Scrutton LJ in *Hillen* v *ICI (Alkali) Ltd* [1934] 1 KB 455 at 467, the smuggler who had not warned his confederates of a defect in the rope which they were using in the course of hiding smuggled goods had acted with the degree of care to be expected, in the circumstances, of a reasonably careful smuggler".

18 Civil Appeal No 5 of 1995, 13 December 1995.

19 See, *eg*, the case of *Marshall* v *Osmond* [1983] QB 1034, where the court was quite willing to set a standard of care in a situation where a criminal suspect was injured while attempting to flee from the police.

20 See, *eg*, the judgment of Windeyer J in *Smith* v *Jenkins, supra*, note 5, at 80-89.

21 This will not always be the case, however. See, *eg*, *Clunis* v *Camden and Islington Health Authority* [1998] 2 WLR 902 ("*Clunis's case*"), which is discussed *infra*, text at note 67 *et seq.*

> ... in general, the fact that the plaintiff is involved in some wrongdoing does not of itself provide the defendant with a good defence ... The only exceptions would appear to be the limited range of cases in which, on the facts of the case, an injury can be held to have been directly incurred in the course of the commission of a crime.[22]

As examples of the "only exceptions" to the general rule against the application of *ex turpi causa* in tort law, the Chief Justice cited the cases of *Godbolt* v *Fittock*,[23] *Smith* v *Jenkins*,[24] *Ashton* v *Turner*[25] and *Pitts* v *Hunt*[26]– all joint illegal enterprise cases.

It is, of course, possible to take issue with the idea that *ex turpi causa* should be relevant *only* in situations involving joint tortfeasors. After all, why should a defendant who does the same wrong thing as the plaintiff escape liability altogether while the defendant whose wrong is different from that of the plaintiff remains fully liable? In a maxim which focuses on the nature and extent of the plaintiff's wrong, the question of whether that wrong is the same as the defendant's wrong should not be the determining factor. As long as the plaintiff's wrong is truly connected with and proportionate to the damage which he suffers, it seems both arbitrary and artificial to distinguish in such a dramatic way between joint illegal enterprise situations, where the claim will be destroyed, and others, where it will not. It may well be easier on the whole to establish the necessary elements of connection and proportionality in joint illegal enterprise cases, but that is no reason to exclude all other situations from the outset.

Whatever one's view on this point, it is certainly possible to argue that there is little significance to whether *ex turpi causa* is considered at the elements or the defences stage in legal proceedings. On the other hand, the stage at which it comes into play might be more than simply a matter of semantics. For a judge might feel that he has less discretion to overlook conduct of an *ex turpi causa* nature when he is dealing with the elements of a tort than when he is considering the application of defences.[27] A court

[22] See *supra*, note 3, at 223. The case involved a plaintiff who was injured in a road accident caused by the defendant. It transpired that the plaintiff was working in Singapore without a work permit. The defendant's argument that the plaintiff's claim should be defeated by reason of *ex turpi causa* was rejected by the High Court.

[23] *Supra*, note 12.

[24] *Supra*, note 5.

[25] *Supra*, note 10.

[26] *Supra*, note 5.

[27] For further discussion of this point, see Jones, *supra*, note 17, at 477-479. Note, however, that although conduct of an *ex turpi causa* nature is more likely to be taken into account at the elements stage, if it *is* taken into account at the defences stage, it will lead to the same result. See, *eg*, the dictum of Windeyer J in *Smith* v *Jenkins*, *supra*, note 5, at 89:

which adopts an elements approach might therefore be more likely to hold that the plaintiff's claim is automatically barred either by reason of his unconscionable conduct – where the court focuses on duty – or by the nature of the activity in which he was participating – where the court focuses on standard.

While both elements approaches can be criticised for their rigidity (and for the fact that this rigidity apparently applies only in joint illegal enterprise cases), the alternative defences approach (which is not as frequently restricted to joint illegal enterprise cases) can equally be attacked for the subjectivity and arbitrariness inherent in leaving the matter entirely to judicial discretion.

If one were forced to choose between the elements or the defences approaches, however, it is suggested that the defences approach is preferable for two reasons. The first is that it allows the concept of *ex turpi causa* to be applied consistently throughout tort law, irrespective of the type of complaint involved. To use the maxim at one stage in the proceedings in actions involving the intentional torts, but at a different (earlier) stage in actions for negligence is both confusing and unsatisfactory. The second reason for preferring the defences approach is that, as has been indicated above, the maxim when used as a defence appears less likely intrinsically to require a court to prejudge the issue before it. Given the difficult nature of most *ex turpi causa* situations, there is something to be said for the ability of the court to use its discretion, rather than being forced at the outset to state that it is impossible to allow the claim.

Determining the function of *ex turpi causa* is not, however, always as simple as choosing between an elements or a defences approach. It is the way in which *ex turpi causa* is used, rather than the stage at which it is raised, which is the real key to whether or not it is likely to defeat a claim. For even a judge who adopts a defences approach to *ex turpi causa* may decide *not* to exercise discretion in its application. Indeed, the principal debate in this area relates to whether there should be firm rules applied across-the-board in *ex turpi causa* situations (whether or not such situations are limited to those involving joint wrongdoers) or whether there should be the flexibility to deal with *ex turpi causa* situations (of any kind) on an individual basis. Much of this debate in turn depends on whether one favours the view that *ex turpi causa* should be used as a broad deterrent against certain types of activity[28] or whether one prefers the alternative

" ... there is no right of action by one criminal against another for negligence. However, the result is the same if one takes the view – which I do not – that in juristic analysis the effect of illegality is , from considerations of public policy, privative, a taking away of right."

[28] As, *eg*, advocated by Ralph Gibson LJ, the dissenting judge in the Court of Appeal in *Tinsley* v *Milligan*, *supra*, note 7 and, more recently, by Beldam LJ in *Clunis's* case, *supra*, note 21 and *infra*, note 67 *et seq.*

approach that it is simply a moral principle to be invoked on an *ad hoc* basis.[29]

IV. The Need for Connection and Proportionality in *Ex Turpi Causa* Situations

In theory, all judges agree that only where the plaintiff's wrong is actually connected with the damage which he suffers should that wrong be taken into account in deciding whether or not to bar his claim against the defendant. This can be explained quite simply in terms of causal connection, and even the most ardent adherent of *ex turpi causa* as a tool to discourage socially abhorrent behaviour would presumably concede that the law can go only so far in scrutinising the lives of those who seek damages before the courts. To refuse a plaintiff's legitimate claim for one thing because of his unconnected and irrelevant immoral or criminal conduct in relation to something else smacks too much of big brother to be acceptable in any civilised society.[30] Moreover, as Dillon LJ observed in *Pitts* v *Hunt*,[31] the benefit of an approach to *ex turpi causa* which focuses on whether the plaintiff's wrong is truly connected with the injury which he has suffered, rather than on the nature of the wrong itself, is that it offers an alternative to the unpleasant and distasteful process of "grading illegalities according to moral turpitude".[32]

The problem in practice, though, is to decide which wrongs are sufficiently tied up with the damage complained of to justify refusing a plaintiff's claim. In contract claims the contract itself provides the focus to what is and is not relevant, but in tort claims the edges are more fuzzy. Therefore, tort cases which involve consideration of the connection between the plaintiff's

[29] See discussion, *infra*, text at note 43 *et seq*.

[30] See, *eg*, the famous statement of Lord Asquith in *National Coal Board* v *England*, *supra*, note 4, at 429: "If two burglars, A and B, agree to open a safe by means of explosives, and A so negligently handles the explosive charge as to injure B, B might find some difficulty in maintaining an action for negligence against A. But if A and B are proceeding to the premises which they intend burglariously to enter, and before they enter them, B picks A's pocket and steals A's watch, I cannot prevail upon myself to believe that A could not sue in tort ... The theft is totally unconnected with the burglary". See also W V H Rogers, *Winfield & Jolowicz on Tort*, who observes: "Where the illegality is really unconnected with the tort, that may be enough to lead to the conclusion that it should be ignored. If I buy a bottle of whisky outside licensing hours and you subsequently steal it, my illegality is merely part of the history, and there is no reason why I should not sue for conversion" (14th ed, 1994, at 741).

[31] *Supra*, note 5. Dillon LJ acknowledged that he was adopting the views expressed by Bingham LJ in *Saunders* v *Edwards* [1987] 1 WLR 1116, for further discussion of which, see *infra*, text at note 38.

[32] *Supra*, note 5, at 56.

wrong and the damage which he suffers, almost always also involve consideration – whether tacit or overt – of other factors. These factors include looking at the nature of the plaintiff's wrong (the 'grading according to moral turpitude' so disliked by Dillon LJ) and taking account of the scale of his wrong when compared with the extent of his injury and the wrong of the defendant. For this reason, *ex turpi causa* arguments are more likely to succeed – even when made before judges who consider the maxim to be applicable in a whole range of situations – in cases involving joint illegal enterprises than in those involving separate and distinct wrongs on the part of the plaintiff and the defendant. But even in joint illegal enterprise cases, the mere fact of the enterprise will not be sufficient to result in the maxim being applied. The court looks for something more.

In *Ashton* v *Turner*,[33] for example, injuries sustained in the accident which occurred while the plaintiff and the defendant were fleeing the scene of a crime *were* held to be sufficiently connected with the plaintiff's wrong for his claim to fail, while in *Jackson* v *Harrison*,[34] injuries sustained by the plaintiff in an accident caused by the defendant driver whom he knew had been barred from driving were not. In each case, an argument can be made out that the plaintiff's wrong – in travelling in a vehicle in circumstances when he should not have done so – *was* connected with the damage which he suffered, since he would not have been injured had he not been in the vehicle at the relevant time. What really distinguishes the two cases is that in *Ashton* v *Turner* the plaintiff was as active a participant in the relevant crime as was the defendant, and his fault was equal to that of the defendant, whereas in *Jackson* v *Harrison*, the plaintiff was merely a passive (albeit complaisant) participant in the defendant's crime, and he was clearly far less blameworthy than was the defendant driver.[35]

In cases not involving joint tortfeasors, the requirement that there must be both connection and proportionality frequently leads to the rejection of *ex turpi causa* arguments. An example of this can be found in the judgment of Rougier J in the English High Court in the case of *Revill* v *Newbery*.[36]

[33] *Supra*, note 10.

[34] *Supra*, note 5.

[35] The cases were also decided differently because in *Ashton* v *Turner* the court determined that a joint illegal enterprise between two criminals fleeing the scene of the crime would negate the duty of care which one would otherwise have owed the other, while in *Jackson* v *Harrison* the court held that it was not impossible to determine the standard of care which a disqualified driver could be expected to exercise towards a passenger in his car – even one who knew that he ought not to have been driving. For discussion of *ex turpi causa* cases decided on the basis of duty and standard of care, see *supra*, text at note 10 *et seq*.

[36] [1996] QB 567 (Court of Appeal judgment referring to the decision of the trial court).

In that case, the elderly defendant shot through a hole in the door of his shed at the plaintiff trespasser who had entered his property to steal from him. Rougier J concluded that the defence of *ex turpi causa* could not succeed on the facts of the case because it could apply only to situations where: "the injury complained of was so closely interwoven in the illegal or criminal act as to be virtually part of it or if it was a direct uninterrupted consequence of that illegal act." His decision was, however, based at least as much on the fact that: "The discharge of a shotgun towards burglars who are not displaying any intention of resorting to violence to the person is, in my judgment, out of all proportion to the threat involved".[37]

And there is no better case for illustrating the link between the various factors than the English Court of Appeal decision in *Saunders* v *Edwards*.[38] In that case, the defendant sold the lease of a flat to the plaintiffs. In doing so, he fraudulently misled the plaintiffs into believing that the flat had a roof terrace, which it did not. In order to reduce the stamp duty payable on the transaction, the plaintiffs suggested that considerably more of the purchase price than was realistic should be attributed to chattels which were being sold with the flat. The defendant agreed to this suggestion. When the plaintiffs discovered that the flat did not actually possess a roof terrace, they sued the defendant for fraudulent misrepresentation, and won the action. On appeal to the Court of Appeal, the defendant argued that the plaintiffs' claim should be defeated by reason of their illegal act in deliberately miscalculating the value of the chattels in order to avoid payment of tax. This argument was rejected. The court held that the plaintiffs' loss, which was caused by the defendant's fraud, would have been the same irrespective of the way in which the price between the flat and the chattels had been apportioned. There was therefore no connection between the plaintiffs' illegal act and the damage which they suffered. Bingham LJ summarised the matter thus: "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."[39]

[37] *Ibid*, at 571.

[38] *Supra*, note 31.

[39] *Ibid*, at 1134. As examples of true *ex turpi causa* cases where the plaintiff's wrong was genuinely connected with the damage suffered, Bingham LJ cited *Alexander* v *Rayson* [1936] 1 KB 169, *JM Allan (Merchandising) Ltd* v *Cloke* [1963] 2 QB 340, *Ashmore Benson Pease & Co Ltd* v *AV Dawson Ltd* [1973] 1 WLR 828 and *Thackwell* v *Barclays Bank plc* [1986] 1 All ER 676. As examples of cases where allegedly wrongful conduct on the part of the plaintiff was merely incidental, he cited *Bowmakers Ltd* v *Barnet Instruments Ltd* [1945] KB 65, *St John Shipping Corp* v *Joseph Rank Ltd* [1957] 1 QB 267, Sajan *Singh* v *Sardara Ali* [1960] AC 167 and *Shelley* v *Paddock* [1980] QB 348.

The decision was not, however, restricted to the question of whether the plaintiffs' wrong was truly connected with, or merely incidental to, the damage sustained. The court paid equal attention to the issue of proportionality – balancing the extent of the plaintiffs' wrong against both the amount of their loss and the greater wrong of the defendant. In considering the *ex turpi causa* argument, Bingham LJ made the following observation:

> Where issues of illegality are raised, the courts have ... to steer a middle course between two unacceptable positions. On the one hand it is unacceptable that any court of law should aid or lend its authority to a party 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 or how disproportionate his loss to the unlawfulness of his conduct.[40]

Bingham LJ's observation in *Saunders* v *Edwards* brings us back to the thorny issue of the 'public conscience' test, alluded to by Kerr LJ in the *Euro-Diam* case.[41] The test, whether articulated or not, is at the heart of many *ex turpi causa* decisions.[42] For even when the requirements of connection and proportionality are taken into account and are deemed to be satisfied, the overriding question for judges who, unlike Dillon LJ, *are* prepared to consider the degree of wrongdoing on the part of a plaintiff, is whether

[40] *Supra*, note 31, at 1134. Note that similar reasoning was adopted in the case of *Lane* v *Holloway* [1968] 1 QB 379, where the Court of Appeal held that a frenzied attack was out of all proportion to the relatively trivial act which provoked it, and to the damage sustained by the plaintiff, and they therefore refused to reduce the plaintiff's damages to reflect the defendant's plea of contributory negligence. As Jones, *supra*, note 17, points out (at 477) such reasoning must carry even more weight in an *ex turpi causa* situation, where the plaintiff risks losing his damages altogether – as opposed to merely having them reduced.

[41] *Supra*, note 6, at 35. Note that Kerr LJ was also one of the judges in the Court of Appeal in *Saunders* v *Edwards*, where he based his judgment (at 660) on the fact that: "the moral culpability of the defendant greatly outweighs any on the part of the plaintiffs. He cannot be allowed to keep the fruits of his fraud."

[42] For a slightly earlier analysis of the public conscience test, see the judgment of Hutchison J in *Thackwell* v *Barclays Bank plc* [1986] 1 All ER 676, who described (at 678) the test as involving: "the court looking at the quality of the illegality relied on by the defendant and all the surrounding circumstances, without fine distinctions, and seeking to answer two questions: first, whether there had been illegality of which the court should take notice, and, second, whether in all the circumstances it would have been an affront to the public conscience if by affording him the relief sought the court was seen to be indirectly assisting or encouraging the plaintiff in his criminal act."

– and if so when – a claim is to be treated as so unmeritorious that it does indeed justify the law in "drawing up its skirts and refusing all assistance". And in seeking an answer to this question the courts invariably find themselves struggling in the mire of public policy.

V. Policy and *Ex Turpi Causa*

Although most courts clearly *do* look to broad issues of public policy when dealing with pleas of *ex turpi causa*, there is no obvious consensus about the weight which ought to be attached to policy considerations, or the role which they should play. Bingham LJ in the Court of Appeal in *Saunders* v *Edwards* was of the view 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."[43] Nicholls LJ in the Court of Appeal in *Tinsley* v *Milligan* framed the issue slightly differently. He took the view that the courts have to balance "the adverse consequences of granting relief against the adverse consequences of refusing relief. The ultimate decision calls for a value judgment."[44]

It is clear that, on occasions, value judgments can lead to somewhat questionable decisions. In the 1970s, for example, there were several English cases which suggested that trespassers who were injured in the course of committing crimes would effectively be treated as outside the protection of the law.[45] The attitude of the courts in this respect could well have been influenced by the then-prevailing social problems caused by the activities of squatters and vandals. However, the apparent willingness, based on such considerations, to refuse to compensate the victims of violence who were themselves guilty only of non-violent (albeit criminal) activities, can hardly be said to have accorded with Bingham LJ's view that the courts tend to offer remedies for genuine wrongs in all but the most extreme cases. Although

[43] *Supra*, note 31, at 1134.

[44] *Supra*, note 7, at 319. For a less subjective approach, see the dictum of McLachlin J in the Supreme Court of Canada in *Hall* v *Herbert* [1993] 4 WWR 113, who observed (at 126) that: "... it is not the judge's outrage but a concern for the legal system ... which is operative." This is cited by Jones, *supra*, note 17, at 479, in his discussion of the role of judicial discretion in *ex turpi causa* situations.

[45] See, *eg*, the statements of Lord Denning in *Cummings* v *Grainger* [1977] 1 All ER 104, at 109 (that *ex turpi causa* might prevent a burglar who was bitten by a guard dog from succeeding in his claim) and *Murphy* v *Culhane* [1977] QB 94, at 98 (that a burglar shot by a householder might have his claim destroyed by *ex turpi causa* even if the householder were to be convicted of a criminal offence for the shooting).

the decision of the Court of Appeal in *Revill* v *Newbery*, in which the judgment of Rougier J in the High Court was affirmed,[46] appears to have redressed the balance in trespasser situations, it is troubling to see how the concept of *ex turpi causa* can be used in a way which reflects, rather than faces, the prejudices of society.

Of concern, too, is the fact that the public policy considerations which lead to *ex turpi causa* being invoked are, on occasions, apparently incompatible with competing public policy concerns operating in specific areas of tort law. For example, in both England and Singapore there is legislation making it compulsory for all drivers of motor vehicles to carry third party accident insurance. It is, moreover, impossible by any form of agreement to exclude liability for injury caused to third parties by the driver of a motor vehicle.[47] The legislation which embodies this rule is designed to protect, and to ensure compensation to, all victims of road accidents. Yet it was held in *Pitts* v *Hunt*[48] that, the legislation notwithstanding, *ex turpi causa* should be applied to deprive a wrongdoing accident victim of his entire award of damages. The decision was apparently based on the underlying assumption that the policy reasons for depriving the plaintiff in that case of his claim were stronger than the policy reasons for ensuring that all accident victims should be guaranteed compensation,[49] but it does create some confusion as to which policy should prevail and when.

The difficulties faced by courts in *ex turpi causa* cases when attempting to take account of public policy are perhaps most apparent in cases involving claims on behalf of persons who have committed suicide, usually while in prison or police custody. Although in England,[50] (unlike in Singapore)[51] suicide – or, more accurately, attempted suicide – is no longer a crime, the question of *ex turpi causa* applying to persons who commit or attempt suicide is still relevant there, given the traditional view that it is fundamentally wrong to take one's own life.

46 See *supra*, note 36.

47 See the English Road Traffic Act and the Singapore Motor Vehicles (Third Party Risks and Insurers) Act, Cap 189, 1985 Rev Ed.

48 *Supra*, note 5.

49 See in this respect the dictum of Beldam LJ, *ibid*, at 46-47: "The policy underlying the provisions for compulsory insurance for passengers and others injured in road accidents is clearly one intended for their benefit ... If, however, the offence, or series of offences [committed jointly by the driver and a passenger], is so serious that it would preclude the driver on grounds of public policy from claiming indemnity under a policy required to be effected under the Act for the benefit of a passenger, that public policy would in my judgment also preclude the passenger jointly guilty of that offence from claiming compensation".

50 See section 1 of the Suicide Act 1961, 12 Halsbury's Statutes (4th ed).

51 See section 309 of the Penal Code (Cap 224, 1985 Rev Ed).

In *Kirkham's case*,[52] the plaintiff's husband, who was an alcoholic with suicidal tendencies, killed himself while in a remand centre. The police into whose care he was initially placed were aware that he had recently attempted suicide, and he was ordered to be kept in custody for his own protection. However, when they transferred him to the relevant remand centre, the police failed to inform the prison authorities that he was at exceptional risk of attempting suicide. He was therefore left alone and unsupervised in a cell, where he was able to hang himself. The plaintiff sued the police, whom she argued had owed a duty of care to her husband to prevent him from killing himself, which duty they had breached. The trial judge held the police liable, and rejected their argument that the defences of *volenti non fit injuria* and *ex turpi causa* should apply.

The Court of Appeal upheld the findings of the trial judge. The court held that the defence of *volenti* was unavailable because the deceased's freedom to make a rational choice about whether or not to take his own life had been impaired by his clinical depression[53] and (*per* Farquharson LJ) because "the act of the deceased relied on is the very act which the duty cast upon the defendant required him to prevent."[54] Where *ex turpi causa* was concerned, all three judges effectively applied the public conscience test and concluded that, in a society in which suicide was no longer a crime, it would not, in the words of Lloyd LJ, "affront the public conscience, or shock the ordinary citizen" to allow a claim based on suicide, at least where the deceased was "not in full possession of his mind".[55] In such a situation, therefore, the defence of *ex turpi causa* would fail. However, the court specifically left open the position with respect to a person who might kill himself even when he *was* in full possession of his mind.

Recently, the Court of Appeal in *Reeves'* case[56] had to consider just such a situation. The deceased had been held in a cell by police who knew (as a result of incidents which had occurred on previous occasions while he was in police custody) that he might try to commit suicide. In spite of the known risk, the police officers in charge left him unattended, and he hanged himself by tying his shirt through the spy hole on the outside of his cell door. It was established that the defendant was of sound mind when he killed himself. The trial judge held that the defences of *volenti* and *ex turpi causa* were available to defeat the claim. The question before the Court

[52] *Supra*, note 7.
[53] *Ibid, per* Lloyd LJ at 290-291, Farquharson LJ at 294-295 and Sir Denys Buckley at 296.
[54] *Ibid*, at 295.
[55] *Ibid*, at 291.
[56] *Supra*, note 2.

of Appeal was whether the decision in *Kirkham's* case, which was apparently based on the fact that the deceased was of unsound mind, was distinguishable, or whether it could be applied to a case in which the deceased was sane when he took his life.

The court held that the decision in *Kirkham's* case was applicable. Where *volenti* was concerned, the majority adopted the reasoning of Farquharson LJ – that the defence could not apply because the deceased's suicide was the very act against which the defendants had been required to guard.[57] And all three judges held that the defence of *ex turpi causa* was unavailable. Buxton LJ (whose views on the questionable nature of *ex turpi causa* when applied to tort law were referred to at the beginning of this article) referred in his judgment to the argument by counsel for the police that the decision in *Kirkham's* case ought not to be extended to situations where the person who committed suicide was sane. In response to the suggestion that it would be socially objectionable to allow a claim with respect to the suicide of someone who was *not* mentally ill, he observed:

> When a judge is asked to hold that a particular outcome would affront the public conscience or shock the ordinary citizen it behoves him to proceed with caution ... No evidence will be available to him on which to base such conclusions, and therefore the exercise must be one of speculation, albeit one would hope intelligent speculation.[58]

He went on to hold that, for reasons of logic and legal principle, it was not necessary to take such a subjective approach in this case. The defence of *ex turpi causa* must fail for several practical reasons. First, as with the defence of *volenti*, the deceased's suicide was the very thing which the defendants had owed a duty to prevent. It would therefore be illogical to allow them to avoid liability for breaching that duty by applying the defence of *ex turpi causa*. Second, in a situation such as this one, there would be no danger of assisting or encouraging either the person who committed suicide or anyone else to participate in the wrongful act in the sense envisaged by Kerr LJ in his test in the *Euro-Diam* case.[59] Finally – and in this respect

[57] *Ibid*, *per* Buxton LJ at 407 and *per* Lord Bingham of Cornhill CJ at 425. Morritt LJ (adopting at 421-422 the reasoning of the trial judge in the case) considered that the defence of *volenti* should have been allowed, because, *inter alia*, "[a]cceptance by a claimant of the consequences of his own intentional act is a stronger reason for excluding liability than acceptance of the risk created by negligence of the defendant."

[58] *Ibid*, at 414.

[59] See *supra*, note 6.

Buxton LJ diverged from the observations made in *Kirkham's* case – the distinction between persons who were suffering from a defined mental illness and those who were not was irrelevant. The claim related not to the mental state of the deceased but to the fact that, as a person known to be at risk of committing suicide (whether because he was mentally ill or for any other reason), he had not been accorded the appropriate degree of care by those responsible for his safety.

It is, however, noteworthy that, having stated that he regarded *ex turpi causa* as inapplicable for these practical reasons, Buxton LJ then conceded that he would have reached the same decision had he been obliged to analyse the question from a 'public conscience' standpoint:

> ... if I were forced to do so, I would hold that, the burden of establishing this defence being on the commissioner [of police], it is quite impossible for him to show ... that the grant of relief to the plaintiff would so shock the public conscience that that relief, otherwise available, should be withheld ... I am quite unpersuaded that shock or affront (both of which are very strong reactions indeed) would be the reaction of a citizen ... in respect of the suicide of a man known to be a suicide risk while he was involuntarily in police custody.[60]

Buxton LJ's judgment shows just how closely legal arguments and policy concerns are connected in *ex turpi causa* cases, and how difficult it is to separate the various factors involved in deciding whether a plea of *ex turpi causa* should, or should not, succeed.

The public policy analysis in suicide cases might, of course, be quite different in jurisdictions such as Singapore, where attempted suicide is still a criminal offence. On the other hand, since the question in *ex turpi causa* situations is not simply whether the plaintiff's actions are illegal or immoral, but whether public policy demands that the nature of those actions should deprive the plaintiff of a remedy, it is not certain that the courts here would decide differently from the courts in England. If the police were to have in their custody a person who was known to be at risk of killing himself, then a court might plausibly hold them to owe him a duty of care. The fact that the duty was to protect that person from the danger of his own criminal self-destruction would not necessarily be regarded by the court as destroying his claim. The key question would be whether as a matter of public policy the court considered it to be unacceptable to award

[60] *Supra*, note 2 at 415. See, too, the judgments of Morritt LJ (at 423-424) and Lord Bingham of Cornhill CJ (at 425-426).

compensation with respect to the death. It is impossible to guess how a court might answer such a question, but its answer would not be determined solely by the criminality of the deceased's act. Moreover, if the Chief Justice's reference in *Ooi Han Sun's* case[61] to *ex turpi causa* applying only in respect of injuries which are incurred "in the course of the commission of a crime" does indeed mean the commission of a crime *jointly* with the defendant,[62] then the maxim could be inapplicable in Singapore in situations of this nature anyway.

Cases such as *Kirkham's case* and, to a lesser extent, *Reeves' case* – which focus on questions of what would or would not constitute a moral affront to society – illustrate the uncertainty and subjectivity inherent in basing *ex turpi causa* decisions on the public conscience. As Buxton LJ pointed out in *Reeves'* case,[63] the judge who purports to apply standards of public outrage is really just indulging in guesswork. He is attempting to gauge what the public's reaction might be, not what it actually is. So, inevitably, and with the best will in the world, his decision is likely to be influenced by whether or not *he* would be outraged if the plaintiff's action were to succeed.[64] The conclusions reached when applying the public conscience test are therefore likely to vary from judge to judge. This will mean that decisions based on the test will not only lack any deterrent effect – something which is probably nothing more than a 'pious aspiration' where tort law is concerned anyway – but also, and, more importantly, will run the risk of failing accurately to reflect the 'public conscience' on which the test turns.

It is for these reasons that some judges reject the public conscience test, favouring the "known rule and its stern application" approach advocated by Ralph Gibson LJ in the Court of Appeal in *Tinsley* v *Milligan*.[65] In the House of Lords decision in the same case, for example, Lord Goff of Chieveley observed that: "... it is by no means self-evident that the public conscience test is preferable to the present strict rules."[66] And in the recent decision of the English Court of Appeal in *Clunis's case*,[67] Beldam LJ appeared to reject the public conscience test in favour of the Ralph Gibson LJ's approach.

61 *Supra*, note 3.
62 See discussion *supra*, text at note 22 *et seq*.
63 See *supra*, notes 2 and 58.
64 Although see in this respect the statement by McLaughlin J in *Hall* v *Herbert, supra*, note 44, at 126.
65 See *supra*, note 7, Court of Appeal decision, at 344.
66 *Ibid*, House of Lords decision, at 363. Lord Browne-Wilkinson expressed similar doubts at 369.
67 *Supra*, note 21.

Clunis's case involved a plaintiff with a history of mental disorder, who was detained under the Mental Health Act 1983 and then released into the after-care of the defendant local authority. The plaintiff failed to attend several appointments which the defendant made for one of its doctors to examine him, and he was never in fact seen by anyone from the defendant's offices. His behaviour became increasingly erratic and violent, and he eventually killed a man in an unprovoked attack at an underground train station. He was charged with murder, but his plea of manslaughter due to diminished responsibility was accepted, and he was detained in a mental hospital for the criminally disturbed. He subsequently sued the defendant for negligently failing to provide proper after-care, with the result that he had committed a crime for which he now faced prolonged detention. The trial judge refused to strike out the action, and held that the plaintiff's criminal act did not preclude him from recovering damages. On appeal to the Court of Appeal the defendant argued (*inter alia*) that the plaintiff's action should fail by reason of the fact that it was based on his own illegal act.

In the Court of Appeal, Beldam LJ (giving the judgment of the court) rejected the argument made by counsel for the plaintiff that the defence of *ex turpi causa* could not apply to actions founded in tort, and he held that it could apply in both contract and tort, as long as the plaintiff was relying on his illegal act to found his claim.[68] He then went on to consider whether the claim in this case ought to be refused for reasons of public policy, and, more specifically, whether the public conscience test ought to be invoked. Counsel for the plaintiff argued that (even if *ex turpi causa* could apply in tort law) not all criminal acts would preclude a claim, and that manslaughter was an offence which varied greatly in blameworthiness, especially where diminished responsibility was involved. He then argued that, if the public conscience test were to be applied to this case, the diminished responsibility of the defendant would mean that the court need not refuse the claim. Beldam LJ, however, cited with approval the views of Ralph Gibson LJ in the Court of Appeal and Lords Goff of Chieveley and Lord Browne-Wilkinson in the House of Lords in *Tinsley* v *Milligan*[69] – all of whom advocated a strict blanket policy where *ex turpi causa* was concerned, rather than a case by case evaluation. He stated:

> In the present case the plaintiff has been convicted of a serious criminal offence. In such a case public policy would in our judgment preclude the court from entertaining the plaintiff's claim unless it could be said

[68] *Ibid*, at 908.
[69] *Supra*, note 7.

> that he did not know the nature and quality of his act or that what he was doing was wrong. The offence of murder was reduced to one of manslaughter by reason of the plaintiff's mental disorder but his mental state did not justify a verdict of not guilty by reason of insanity. Consequently, though his responsibility ... is diminished, he must be taken to have known what he was doing and that it was wrong.[70]

Based on the fact that the only relevant considerations were the nature of the crime and the plaintiff's knowledge that he was doing wrong when he committed that crime, Beldam LJ held that the defence of *ex turpi causa* must succeed.

It is, of course, quite likely that the same result could have been reached in *Clunis's case* even if the public conscience test had been applied. Beldam LJ referred in his judgment to the fact that the plaintiff was: "unlikely to regain his liberty for many years because of the considerable public interest and publicity which attended his conviction",[71] and even a court invoking the public conscience test could well have regarded it as an affront to society to have allowed his claim. But there *will* be cases in which the adoption of the strict across-the-board public policy approach rather than the more generous *ad hoc* application of the public conscience test will affect the question of whether or not claims should succeed. And there will never be consistency or predictability where *ex turpi causa* is concerned while these two competing approaches to its application are at work.

Of the two approaches, this writer would argue that the more flexible public conscience test is to be preferred, primarily because the rigidity of the alternative 'known rule' approach is more likely to mean that there will be cases in which its application will lead to injustice.There is, however, an argument that *both* approaches highlight the Achilles' heel of *ex turpi causa* – the fact that it must inevitably focus so strongly on public policy in the first place. For policy – whether approached from the flexible 'public conscience' or the firm 'known rule' standpoint – requires value judgments. And in an era in which society is having to become increasingly tolerant of widely differing moral and ethical principles, the whole idea of legislating judicially for what is and is not acceptable behaviour is becoming less and less palatable. Moreover, given that an *ex turpi causa* argument is an all or nothing one, the policy factor which ultimately sways the court will represent the difference between a claim being wholly successful and it being wholly unsuccessful, which, as will be suggested below, can only add to the distastefulness of the process.

[70] *Supra*, note 21, at 910-911.
[71] *Ibid*, at 906.

VI. Conclusion

The essential problem with *ex turpi causa* is that it almost always comes into play in situations which are morally questionable. In *ex turpi causa* cases, one wrongdoer is going to benefit whatever happens. If the *ex turpi causa* argument fails, the person who has suffered harm in the course of acting in a blameworthy manner will be compensated in full, with no reduction in damages to reflect his wrongdoing. If it succeeds, the person who has caused the harm in the course of committing a tort will escape liability altogether, making the law appear to condone his wrongful behaviour.[72] There is no half-way house. When one adds to this scenario the fact that the role of *ex turpi causa* in tort law is ill-defined, that there is little consensus about how or when it should be applied, and that it frequently involves policy judgments of the most subjective kind, then one is left with a concept which is far from satisfactory.

Whatever one's views as to whether *ex turpi causa* ought to have found its way into the field of tort law in the first place, it is now rather late in the day to argue that it should be confined to the realms of contract. Whether under the label of *ex turpi causa* or the more pedestrian tag of illegality, the concept has been used too frequently for there to be any point in arguing that it should have no role in tort law at all. And there will be some occasions when its application will lead to a just result which could not otherwise have been achieved. In the majority of cases, however, it will remain a shady and rather unpopular notion, applied somewhat reluctantly by judges who give the impression that they would really rather steer clear of its pitfalls.

One possible way to revive and improve the usefulness of *ex turpi causa* in tort law would be to make it a partial bar to compensation – reducing, rather than totally extinguishing, claims. To adopt a solution of that kind would at least help to overcome the all or nothing effect which is probably the biggest drawback of *ex turpi causa* at present. The plaintiff's wrong could be measured against the wrong of the defendant – whether those wrongs were part of a joint illegal enterprise or not – and the damages could be apportioned accordingly. Policy considerations would still be relevant, but they could be used to help assess the relative strengths of the two parties'

[72] See in this respect the dictum of Mason J in *Jackson* v *Harrison, supra*, note 5, at 140. Speaking of the application of *ex turpi causa* to situations involving joint participants in crimes, he stated: "The elimination of civil liability between the participants in a joint criminal enterprise cannot be sustained on the ground that it is a deterrent against criminal activity; it might with equal force be put forward as an inducement to such activity."

arguments, rather than, as at present, serving to tip the scales in favour of one party or the other.

It is submitted that the best way to achieve this end would be to make *ex turpi causa* a partial defence in its own right. However, it would also be possible to achieve the same end by incorporating it into the exisiting defence of contributory negligence, under which evidence of conduct of an *ex turpi causa* nature could be equated with contributory negligence on the part of the plaintiff. Either solution would, naturally, mean abandoning all approaches under which *ex turpi causa* might be treated as anything other than a defence, but, as has been suggested above, that would arguably be a good thing anyway.[73] Using the maxim to offer a partial, rather than an absolute, bar to recovery would also have the merit of giving judges far more flexibility to do justice in each case than they have at present.

Such a revolutionary change would, of course, almost certainly have to be initiated by statute, and no such move has been suggested in any jurisdiction. And given the small number of cases involving pleas of *ex turpi causa* in Singapore, it is unlikely that there would be sufficient interest here either to introduce legislation resembling the Contributory Negligence and Personal Injuries Act[74] or to amend that Act specifically to include *ex turpi causa* situations. Without some major revision, however, the concept of *ex turpi causa* in tort law will remain arbitrary and unclear and it will be open to the criticism that it is a part of the puzzle which does not quite fit.

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[73] See *supra*, text at note 27 *et seq*.

[74] Cap 54, 1989 Rev Ed.

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