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# Outlaw and Order: The Defence of Illegality in Personal Injury Cases

Cassandra Williams

22 May 2024



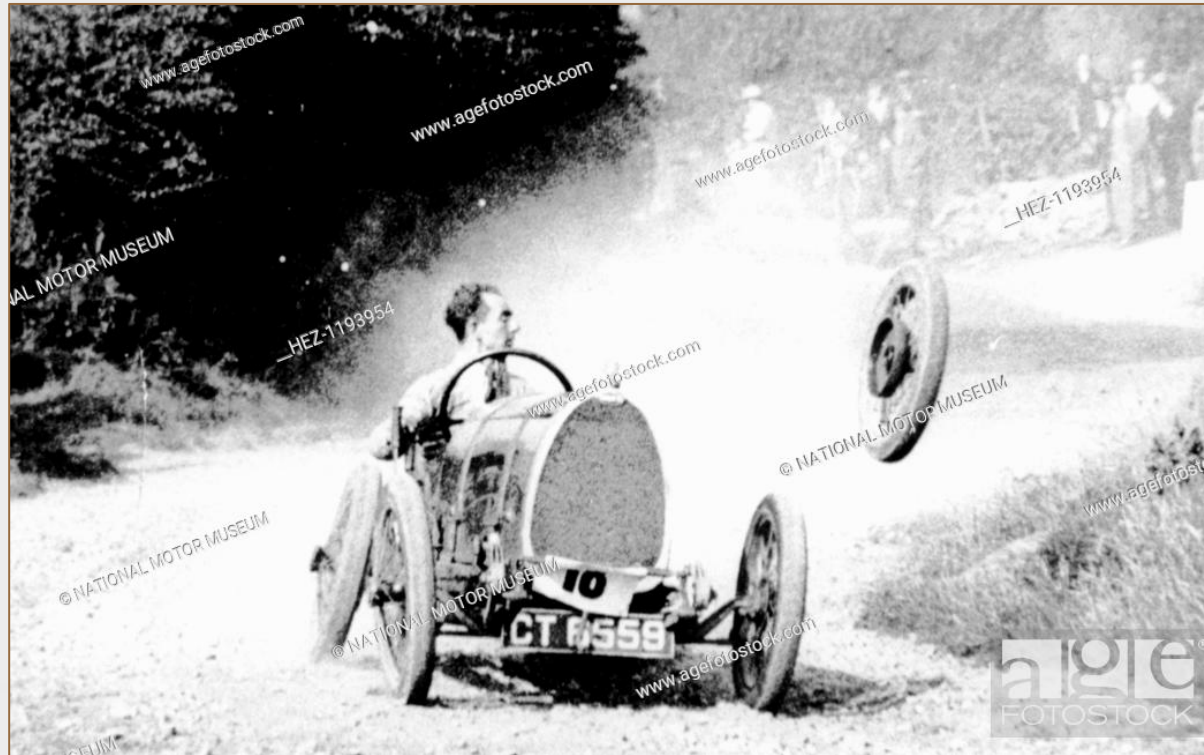
# Speaker



**Cassandra Williams**

Barrister

# 1. WHY ILLEGALITY?



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# 1. WHY ILLEGALITY?

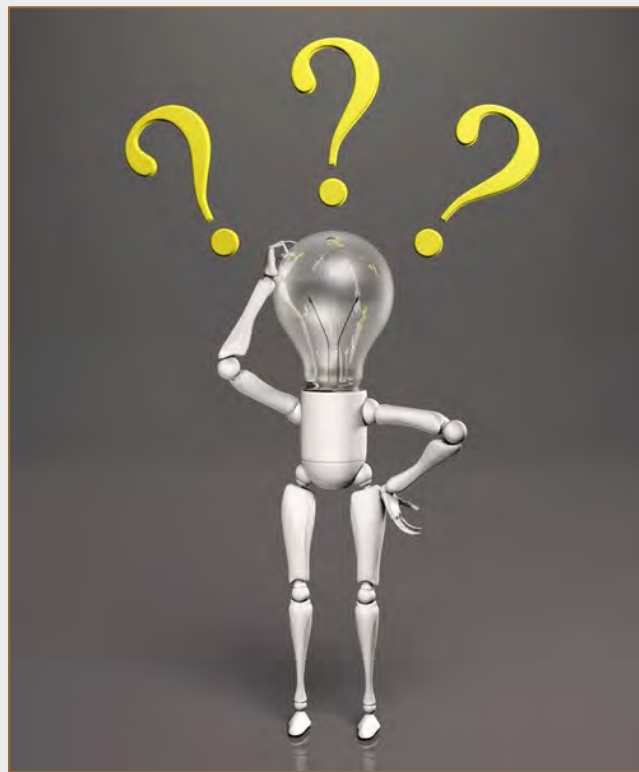


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# PLEASE NOTE:

For more on joint enterprise:

- 1) *Clark v Farley, MIB and Edmonds* [2018] EWHC 1007 (QB)
- 2) *McCracken v Smith, MIB and Bell* [2015] EWCA Civ 380
- 3) *R v Jogee* [2016] UKSC 8



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## 2. WHAT IS THE ILLEGALITY DEFENCE?

*“No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act”.*

*“If, from a plaintiff’s own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend aid to such a plaintiff”*

*Holman v Johnson* (1775) 1 Cowp 341, 343 per Lord Mansfield



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## 2. WHAT IS THE ILLEGALITY DEFENCE?

*Ex turpi causa non fit injuria:*

The action does not arise from a shameful cause



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# 3. EVOLUTION OF THE LAW OF ILLEGALITY

*“...it is one thing to deny to a plaintiff any fruits from his illegal conduct, but different and more far-reaching to deprive him even of compensation for injury which he suffers and which otherwise he is entitled to recover at law.”*

*Revill v Newbery* [1996] QB 567, 579 per Evans LJ

See *Cross v Kirkby* [2000] EWCA Civ 426



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### 3. EVOLUTION OF THE LAW OF ILLEGALITY

*“if the injury complained of was so closely interwoven in the illegal or criminal act as to be virtually a part of it or if it was a direct uninterrupted consequence of that illegal act”*

*Revill v Newbery* [1996] QB 567



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### 3. EVOLUTION OF THE LAW OF ILLEGALITY

*“in my view the principle applies when the claimant’s claim is so closely connected or inextricably bound up with his own criminal or illegal conduct that the court could not permit him to recover without appearing to condone that conduct...”*

*.the Claimant’s injury in respect of which he brought his action originated and arose (oritur) from the claimant’s own criminal conduct.”*

*Cross v Kirkby* [2000] EWCA Civ 426 [76] [78] per Beldam LJ



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### 3. EVOLUTION OF THE LAW OF ILLEGALITY

*“the facts which give rise to the claim must be inextricably linked with the criminal activity. It is not sufficient if the criminal activity merely gives occasion for the tortious conduct of the Defendant.”*

*Vellino v Chief Constable of the Greater Manchester Police* [2002] 1 WLR 218 [70] per Sir Murray Stuart-Smith



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### 3. EVOLUTION OF THE LAW OF ILLEGALITY

*“the maxim ex turpi causa expresses not so much a principle as a policy. Furthermore, that policy is not based upon a single justification but a group of reasons, which vary in different situations”.*

*Gray v Thames Trains* [2009] 1 AC 1339 [30] per Lord Hoffmann



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# 3. EVOLUTION OF THE LAW OF ILLEGALITY

*Gray v Thames Trains* [2009] UKHL 33

Public Policy Rules

Narrower Form: the need to avoid inconsistency in the law

Wider Form: you cannot recover for damage which is the consequence of your own criminal act.

DISTINCTION BETWEEN *“causing something and merely providing the occasion for someone else to cause something”* [54] per Lord Hoffman



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# 4. THE TRIO OF CONSIDERATIONS

*Patel v Mirza* [2016] UKSC 42

- a) the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim
- b) any other relevant public policy on which the denial of the claim may have an impact and;
- c) 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

**[120] per Lord Toulson**



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## 4. THE TRIO OF CONSIDERATIONS

*Henderson v Dorset Healthcare University NHS Foundation*  
[2020] UKSC 43 [113]

*“does not mean that Patel represents “year zero” and that in all future illegality cases it is Patel and only Patel that is to be considered and applied. That would be to disregard the value of precedent built up in various areas of the law to address particular factual situations giving rise to the illegality defence. Those decisions remain of precedential value unless it can be shown that they are not compatible with the approach set out in Patel in the sense that they cannot stand.”*

**[77] per Lord Hamblen**



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# 4. THE TRIO OF CONSIDERATIONS

*Henderson v Dorset Healthcare University NHS Foundation*  
[2020] UKSC 43 [113]

- “*The first stage*” or “*stage (a)*” to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by the denial of the claim.
- “*The second stage*” or “*stage (b)*” to consider any other relevant public policy on which the denial of the claim may have an impact.
- “*The third stage*” or “*stage (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.



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## 4. THE TRIO OF CONSIDERATIONS

*Henderson v Dorset Healthcare University NHS Foundation*  
[2020] UKSC 43 [113]

*Stage (a) is directed at policy reasons which support denial of the claim and stage (b) is directed at policy reasons which support denial of the illegality defence... stage (b) is meant to operate “conversely” to stage (a).”*

**[116] per Lord Hamblen**

*“Stage (a) should not be interpreted as being confined to the specific purpose of the prohibition transgressed. Whilst that is of great importance, other general policy considerations that impact on the consistency of the law and integrity of the legal system also fall to be taken into account.”*

**[119] per Lord Hamblen**





# 4. THE TRIO OF CONSIDERATIONS

*Henderson v Dorset Healthcare University NHS Foundation*  
[2020] UKSC 43 [113]

Proportionality

*“the seriousness of the conduct, its centrality [to the transaction], whether it was intentional and whether there was a marked disparity in the parties’ respective culpability.”*

**[124] per Lord Hamblen citing Lord Toulson in Patel at [101]**

*When considering the circumstances relating to the illegality, whether there is a causal link between the illegality and the claim and the closeness of that causal connection, will often be important considerations”*

**[124] per Lord Hamblen**



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# 4. THE TRIO OF CONSIDERATIONS

*Grondona v Stoffel & Co* [2021] AC 540

*“...such an evaluation of policy considerations, while necessarily structured, must not be permitted to become another mechanistic process. In the application of stages (a) and (b) of this trio a court will be concerned to identify the relevant policy considerations at a relatively high level of generality before considering their application to the situation before the court...”*



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# 4. THE TRIO OF CONSIDERATIONS

*Grondona v Stoffel & Co* [2021] AC 540

*“The essential question is whether to allow the claim would damage the integrity of the legal system. The answer will depend on whether it would be inconsistent with the policies to which the legal system gives effect. The court is not concerned here to evaluate the policies in play or to carry out a policy-based evaluation of the relevant laws. It is simply seeking to identify the policies to which the law gives effect which are engaged by the question whether to allow the claim, to ascertain whether to allow it would be inconsistent with those policies or, where the policies compete, where the overall balance lies. In considering proportionality at stage (c), by contrast, it is likely that the court will have to give close scrutiny to the detail of the case in hand.”*

**[26] per Lord Lloyd-Jones**



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# 5. APPLICATION OF THE LAW

*RO v Gray and MIB* [2021] EWHC 2770 (QB)



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# 5. APPLICATION OF THE LAW

*RO v Gray and MIB* [2021] EWHC 2770 (QB)

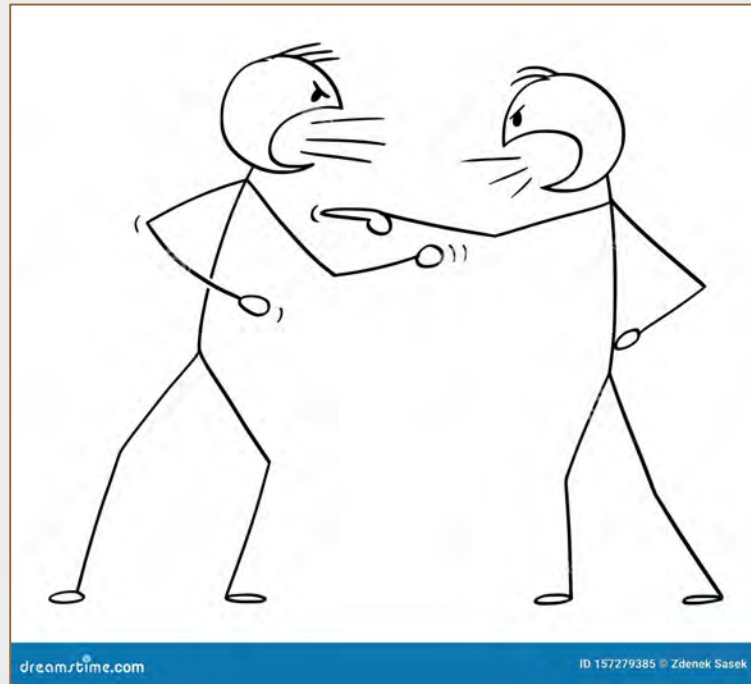


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# 5. APPLICATION OF THE LAW

*RO v Gray and MIB* [2021] EWHC 2770 (QB)

“*The first stage*” or “*stage (a)*” to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by the denial of the claim.

Narrower and wider form of public policy rule – *Gray v Thames Trains*



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# 5. APPLICATION OF THE LAW

*RO v Gray and MIB* [2021] EWHC 2770 (QB)

*“The first stage”* or *“stage (a)”* to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by the denial of the claim.

Narrower public policy rule: it was difficult to see where any disharmony in the law might arise [168]



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# 5. APPLICATION OF THE LAW

*RO v Gray and MIB* [2021] EWHC 2770 (QB)

The “*first stage*” or “*stage (a)*” to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by the denial of the claim.

Wider public policy rule: D’s conduct was the immediate cause of C’s loss.



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# 5. APPLICATION OF THE LAW

*RO v Gray and MIB* [2021] EWHC 2770 (QB)

The “*second stage*” or “*stage (b)*” to consider any other relevant public policy on which the denial of the claim may have an impact.

Impact on the public purse



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# 5. APPLICATION OF THE LAW

*RO v Gray and MIB* [2021] EWHC 2770 (QB)

“*The third stage*” or “*stage (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.

(a) The seriousness of the conduct: lower end of the scale of criminality



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# 5. APPLICATION OF THE LAW

*RO v Gray and MIB* [2021] EWHC 2770 (QB)

“*The third stage*” or “*stage (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.

(b) its centrality [to the transaction] C’s conduct was peripheral not central

(c) whether it was intentional: C’s conduct was deliberate





# 5. APPLICATION OF THE LAW

*RO v Gray and MIB* [2021] EWHC 2770 (QB)

*The third stage*” or “*stage (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.

(d) whether there was a marked disparity in the parties’ respective wrongdoing: significant disparity



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# 5. APPLICATION OF THE LAW

*RO v Gray and MIB* [2021] EWHC 2770 (QB)

*“It is difficult to imagine (ignoring joint enterprise cases) that the integrity of the law could ever be damaged by the courts coming to the aid of a seriously injured claimant if his injuries were caused by the negligence of the defendant. In such a case the integrity of the law is far more likely to be damaged by a refusal to assist”*

**[179] per HHJ Bird**



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# 6. WOULD THE DEFENCE BE MADE OUT IN MY CASE?

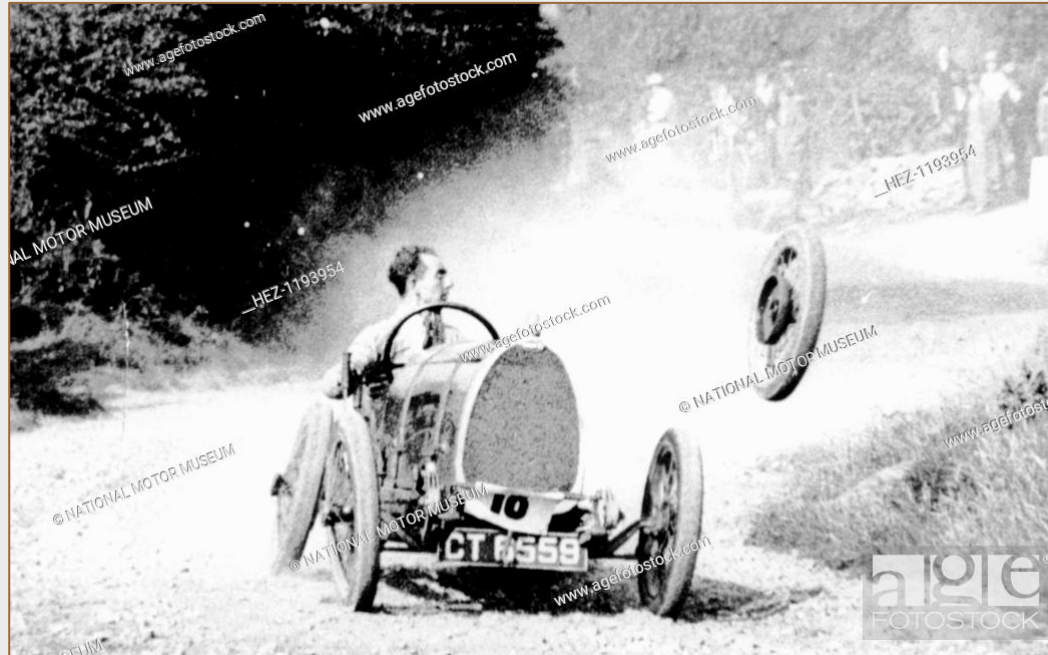


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# 6. WOULD THE DEFENCE BE MADE OUT IN MY CASE?

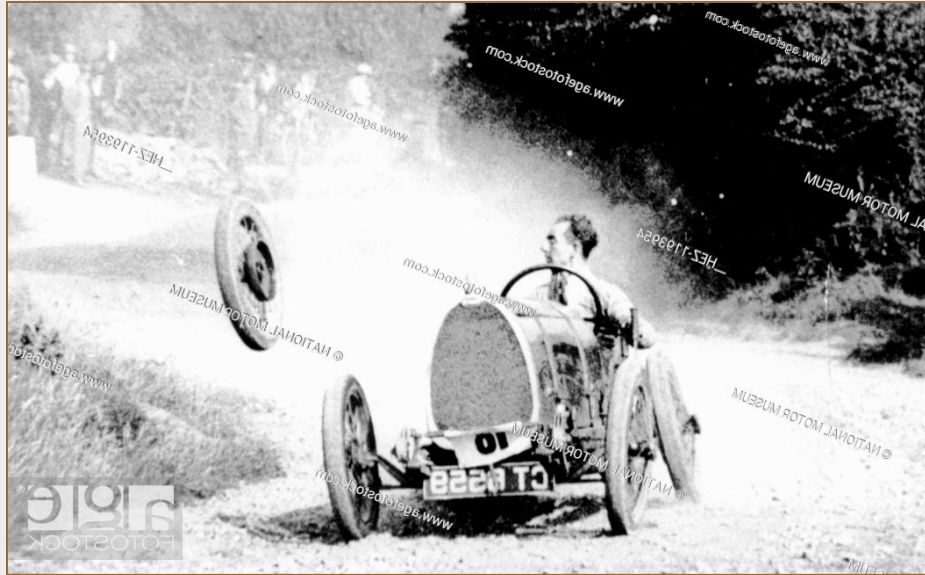


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**Stage (a)** No criminal conviction and no close connection between illegality and injury

**Stage (b)** effect on public public

**Stage (c)** Lower end of scale of criminality, deliberate but peripheral, negligent repair potentially serious consequences for motorist





# 7. CLOSING REMARKS

The Defence of illegality will rarely succeed in cases involving personal injury!



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# Break



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# Q & A



# Speaker



**Cassandra Williams**

[cassandrawilliams@ropewalk.co.uk](mailto:cassandrawilliams@ropewalk.co.uk)

# Thank You

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24 The Ropewalk, Nottingham, NG1 5EF

**Tel:** +44 (0) 115 947 2581

**Email:** [clerks@ropewalk.co.uk](mailto:clerks@ropewalk.co.uk)

**Web:** [www.ropewalk.co.uk/knowledge-sharing](http://www.ropewalk.co.uk/knowledge-sharing)



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