Neutral Citation Number: [2023] EWHC 2159 (KB)

Claim No: H37YJ221/
KA-2022-BHM-00004

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BIRMINGHAM DISTRICT REGISTRY
ON APPEAL FROM THE WARWICK COUNTY COURT

Birmingham Civil & Family Justice Centre
33 Bull Street, Birmingham
B46DS

Date: 29/08/2023

Before :

THE HONOURABLE MR JUSTICE MARTIN SPENCER

- -

Between :

MR MAJID ALI	**Claimant/ Appellant**
- and –	
HSF LOGISTICS POLSKA SP ZOO	**Defendant/ Respondent**

- -

Mr Benjamin Williams KC (instructed by **Bond Turner**) for the **Appellant**
Mr Gareth Cheetham (instructed by **DWF Law**) for the **Respondent**

Hearing date: 1st August 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 6th September 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Martin Spencer:

1. Pursuant to permission granted by Ritchie J, the Claimant/Appellant appeals against the judgment of Mr Recorder Charman ("the Judge") whereby, in a claim arising from a road traffic accident when the Defendant's lorry struck the Claimant's parked Volvo XC60 vehicle on 20 February 2021, he disallowed a claim for £21,588.72 in respect of credit hire charges incurred by the Claimant for a replacement vehicle whilst his Volvo was being repaired.

2. The Volvo, although used by the Claimant on an almost daily basis, did not enjoy the benefit of a valid MOT Certificate. The single issue arising on this appeal is whether the Judge was right to disallow the claim for credit hire charges, not on the basis of illegality but on the basis that the lack of an MOT Certificate together with evidence of any intention to obtain one meant that the claim failed for lack of causation. In so deciding, the Judge followed the decision of HHJ Lethem in *Agbalaya v London Ambulance Service,* a decision of 17 February 2022, although, in that case, Judge Lethem also decided that the claim failed on the ground of illegality. This appeal therefore raises the question whether the two grounds are truly independent of each other, or whether a finding of lack of illegality is fatal to a finding of lack of causation on the basis that there was no valid MOT Certificate and no intention to obtain one during the period of car hire, had the accident not happened.

Relevant Facts

3. The relevant facts, as found by the Judge, were as follows. On 20 February 2021, a lorry driven by the defendant's employee struck the claimant's parked and unattended Volvo XC60. Liability was not disputed, nor was the fact that the Volvo was undriveable after the collision. The claimant hired a replacement vehicle while his own car was repaired, something which the Judge held (subject to the issues around the MOT) was reasonable, as the claimant used the Volvo regularly. The Judge found that the hire car was a reasonable replacement, and that the overall period of hire and the hire charges themselves were reasonable. As such, the only issue as to the recoverability of the hire charges related to the absence of an MOT certificate. As to that, there was no issue that the Volvo required one, being first registered in 2013. The evidence showed that the Volvo's previous MOT had expired 4½ months before the accident. The Judge found that the claimant had no plausible excuse for failing to obtain a new MOT certificate, and that, while he could not find that the Claimant was positively aware the certificate had lapsed, he was 'careless' as to whether the Volvo was covered by a valid MOT Certificate and 'not greatly concerned' to ensure that it was. The Judge accepted, however, that there was no evidence that the Volvo had been in any way unroadworthy prior to the accident. Nor was there any evidence that the Claimant had any intention to obtain a MOT certificate in the near future. He also accepted that the absence of an MOT might have entitled the claimant's insurer to (as he put it) repudiate the policy, and that the claimant had not proved that his motor policy was not invalidated by the absence of an MOT certificate.

4. It was against this factual background that the judge had to consider whether the claimant's omission to renew his MOT, and consequential unlawful use of the Volvo in the period prior to the accident, meant that any claim relating to the loss of use of the Volvo, such as the claim for hire charges, had to be dismissed.

The Judge's Findings

5. At paragraph 11 of the defence it was pleaded:

> "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 Claimant's claim for hire charges should be dismissed."

Thus, the defendant had squarely pleaded that the absence of an MOT, and its possible impact on the claimant's insurance, meant that the claim for hire charges failed pursuant to the doctrine of illegality, sometimes referred to by the Latin tag "*ex turpi causa non oritur actio*". At trial, the defendant sought to supplement its case in two ways: first, that there was an additional (but unpleaded) ground for illegality, namely that the Claimant was guilty of "insurance fronting"; secondly, a causation argument, namely that in circumstances where the claimant's pre-accident use of his own vehicle was illegal, the accident could not be said to have caused the loss of use which the claimant claimed to have mitigated by incurring hire charges.

6. As to the first point, this arose from the fact that the vehicle was not insured in the name of the Claimant but in the name of his cousin. The Claimant had previously been disqualified from driving, and the allegation – and indeed the finding by the Judge – was that the Claimant had caused or permitted his insurance to be obtained in the name of his cousin and without disclosing the previous disqualification, in order to reduce the insurance premium, an activity known as "insurance fronting". The Judge found that this ground of illegality, if it was to be relied on, should have been pleaded, which it was not. He stated:

> "In my judgment an allegation of insurance fronting is one that, if it is to be relied upon by HSF as an additional basis for a finding of ex turpi causa, should have been specifically pleaded. Simply putting Mr Ali to strict proof of having valid insurance is not sufficient to do so. The specific pleading of ex turpi causa is only made by reference to the absence of the MOT. It follows that in my judgment it is not open to HSF to rely upon insurance fronting in support of its illegality defence."

There has been no cross-appeal by the Defendant from this part of the Judge's judgment.

7. The second supplementary ground relied on by the Defendant was the "causation" argument and although, as it seems to me, this was a point which, if it was to be taken, should also have been pleaded, the Judge allowed the Defendant to run the argument and it has not been suggested on the Claimant's behalf on this appeal that he was wrong to do so. Thus, "illegality" (in its broadest terms) arising from the lack of a valid MOT certificate was relied on by the Defendant in two respects: first, for the purposes of the doctrine "*ex turpi causa"*; secondly, specifically, in relation to the claim for hire charges as founding an argument of lack of causation between the accident and the hire charges that had been incurred.

8. So far as the argument based on "*ex turpi causa"* is concerned, this was dismissed by the Judge in an impeccable application of the principles set out by Lord Toulson in *Patel v Mirza [2016] UKSC 42* at [101] which involves a consideration of whether to allow the claim, when it is "tainted by illegality", would be harmful to the integrity of the legal system. This involves a consideration of 3 matters:

   i) The underlying purpose of the prohibition which has been transgressed;

   ii) Any other relevant public policies which may be rendered ineffective or less effective by denying the claim; and

   iii) The need for a due sense of proportionality and the need to avoid overkill.

9. The Judge rejected the "*ex turpi causa"* of the Defendant by reference to the third of these matters. He stated:

> "32. I consider the first two matters identified by Lord Toulson at a high level, as described in the guidance of Lord Lloyd- Jones to which I have already referred.
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> 33. The underlying purpose of the requirement for an MOT is to ensure that cars on the public roads are roadworthy. Unroadworthy cars can cause injury and even death, as well as damage to property. The modern MOT test also includes emissions and the public purpose therefore extends to air quality, and arguably, carbon emissions and climate change. Further, 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.
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> 34. The other relevant public policy is that tortfeasors should be required to compensate those damaged by their tortious conduct. This is an important principle and a fundamental feature of civil law.
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> 35. There is, as always, a tension between these competing policies. However it is significant that the presence of Mr Ali's

vehicle involved a breach of the relevant law and the illegality is, unlike for example the case of *Delaney* [*Delaney v Pickett* [2011] EWCA Civ 1532] … one that is connected with the circumstances giving rise to the accident. The very presence of Mr Ali's vehicle on the road was the matter which gave rise to the breach of the criminal law and the breach was not merely coincidental to that presence.

36. In my judgment, allowing a claim for the consequences of a road traffic accident 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.

37. It is therefore necessary to go on to consider whether it would be proportionate to deny Mr Ali's claim, which means the whole of his claim …

41 . 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.

42. Mr Cheetham drew my attention to a number of cases post-Patel where the absence of an MOT certificate led to a defence of ex turpi causa succeeding and the court did not regard the denial of a claim in such circumstances as disproportionate. One of those cases involved a credit hire claim for about £145,000. I agree with Mr Cheetham that the sum in issue in this case, in particular in respect of the credit hire, does not of itself mean that denying the claim would be disproportionate.

43. Had it been open to HSF to contend that the illegality in this case extended to insurance fronting, then denying the claim would in my judgment clearly not have been disproportionate. However, I cannot and do not take that into account; to do otherwise would be circumvent the requirement that HSF be restricted to its pleaded case.

44. As I have already noted, Mr Ali has not discharged the burden of proving that in the absence of valid MOT, his insurance remained valid. It is a real possibility that the absence of MOT meant that he was uninsured. 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. The ex turpi causa defence therefore fails."

10. Having thus rejected the argument based on *ex turpi causa*, the only remaining bar to the Claimant's recovery of his credit hire charges was the new "causation" argument. The argument for the Defendant was that, because it was not possible at the time of the accident for Mr Ali lawfully to drive his car on the public highway, it was therefore not a reasonable act of mitigation of his loss to hire a replacement vehicle. It was argued that, in substance, he had no loss of use claim because he did not have a vehicle which he could lawfully use on the roads: he 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 own car on the road at the time of the accident. Nor was there any evidence that Mr Ali was about to obtain or would have obtained a valid MOT, nor whether the vehicle would in fact have passed an MOT test.

11. For the Claimant, it was argued that the causation defence was in substance the illegality defence in another form. It was submitted that on-going illegality beyond the time of the accident is irrelevant and that once a claimant has been deprived of his car it matters not what use he would have made of it.

12. The Judge accepted the Defendant's argument. He stated:

> "50. …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.
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> 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 Mr Ali does.
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> 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."

Having referred to the Judgment of HHJ Lethem in *Agbalaya's case* which the Judge said he found persuasive, he continued:

> "55. A claimant may be able to show that even if they had a vehicle without a valid certificate, on the balance of probabilities they had a vehicle which they could, and they in fact would, have had the vehicle tested and obtained a valid MOT certificate at or shortly after the time of the accident, or at least during the actual period of the hire. If they so establish, then they would show a loss of use for at least part of the repair period and the question of whether hire was reasonable mitigation would arise.
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> 56. As establishing that is an essential element of the causation of their hire claim, that is a matter which it is for the claimant to prove, before the question of whether the defendant can show that they have failed to mitigate their loss can arise.
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> 57. I have already found that Mr Ali was careless as to whether his car had valid MOT and that there is no evidence either way as to whether the car was in fact roadworthy. It follows from those findings that Mr Ali has not established on the balance of probabilities that he could and would have obtained a valid MOT for his car during the hire period if the accident had not occurred.
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> 58. In my judgment, Mr Ali's credit hire claim fails because he has 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 occurred hire charges to avoid or mitigate such a claim."

The claim for credit hire charges was accordingly dismissed.

The Arguments on Appeal

13. On behalf of the Appellant/Claimant, Mr Williams KC, who did not appear below, submitted that, on the facts as found, the Claimant was in fact using the vehicle prior to the accident, and he had therefore proved a loss of user which, on ordinary tort principles, he was entitled to mitigate against by hiring a replacement vehicle. The only reason it was found he could not recover was because he had been using the vehicle illegally, that is, without a valid MOT certificate. However, to import into the recoverability of damages the concept of illegality is to reintroduce the illegality argument which the Judge had already rejected: the Judge has lost sight, he submitted, of the fact that he had already found that it would be disproportionate to disallow the claim on the basis of what Mr Williams portrayed as a "relatively trivial offence of not having an MOT certificate". Referring to paragraph 58 of the judgment (see above), he submitted that this "nakedly exposed" the true position: the Claimant was not entitled

to recover the credit hire charges because for him to have used the vehicle would have been a criminal offence, not because there was no loss of user. What is being applied is, in reality, the illegality defence which he had earlier rejected. It is no less an illegality defence because it is a periodic illegality: being periodic does not transform it into a causation defence. Mr Williams referred to paragraph 37 of the judgment of Judge Lethem in *Agbalaya* (see paragraph 15 below) and submitted that it is incoherent to say that a claim is not defeated by reason of illegality on the grounds of proportionality, but then to say that it is in fact proportionate to defeat the claim for illegality because it would have been illegal for a particular period. Mr Williams' argument is encapsulated in the skeleton argument which he submitted for the purposes of obtaining permission to appeal where he said:

> "The judge was right to reject the ex turpi causa defence, However, despite his insistence to the contrary, the judge's alternative 'causation' analysis was just ex turpi causa wearing a different dress. It is obvious that the loss of use of the claimant's own car was caused by the accident: he drove it notwithstanding the lack of an MOT to the point that it was damaged, and but for the accident he would clearly have gone on driving it. His hire of a replacement car was clearly a result of the accident depriving him of the vehicle that he had previously used. The judge dismissed the claim for hire charges not because it was causally disconnected from the accident, but because he found that to award the hire charges would be to compensate the claimant for the loss of the illegal (ie un-MOT'd) use of his car. Despite his disavowal, the judge thereby applied the ex turpi causa principle: that the claimant could not be compensated for the loss of an unlawful use of his car, because that would offend public policy. As such, it was flat-out contradictory for the judge rightly to reject the ex turpi causa defence, but then to dismiss the claim for hire charges on indistinguishable illegality grounds."

14. For the Defendant, Mr Cheetham effectively adopted the reasoning of the Judge, including his reliance on the judgment of Judge Lethem in *Agbalaya*. He submitted that, at the time of the accident, it was not possible for the Claimant to drive his vehicle lawfully on the highway because there was no valid MOT certificate, and therefore it was not a reasonable act of mitigation to hire a vehicle: the Claimant had no loss of use because he didn't have a vehicle which he could lawfully use on the road.

15. Mr Cheetham referred to the judgment of Judge Lethem in *Agbalaya* where, having referred to the argument of Mr Shannon Eastwood, counsel for the Claimant, that the Defendant's argument was simply "the illegality argument in alternative clothing" (the argument echoed by Mr Williams KC in the present case), he said:

> "36. In my judgment Mr. Eastwood's argument fails to acknowledge an important distinction between a car that can be driven ('a driveable car') and a car that can be lawfully used on the highway ('a useable car'). As Mr. McGrath reminded me the authorities require the Defendant to recompense the Claimant for loss of use of the car. This is an important distinction because,

> while the car could plainly be driven, it could not be used on the road because it had no MoT. Mr. McGrath made an important concession that demonstrated the difference between a causation argument and an illegality argument. He conceded that if the car was rendered roadworthy with a MoT then the causation argument ceased at that point. Of course had this been an illegality argument in disguise then it would be of no consequence that the car was later rendered legal, the illegality argument would defeat the entire credit hire claim.
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> 37. The fact of the matter is that the Claimant had a car that was driveable but, to all intents and purposes unusable for the purpose that she needed, namely to drive on the public road. Mr Eastwood suggested that because the vehicle was driveable it could still be used, for example off road or on an estate. That is very true and if there was evidence that this Claimant would have put the vehicle to that use then she would be entitled to damages within that context. However the entire case was advanced on the basis that this Claimant wanted to use her vehicle on the road, particularly to travel to work. Accordingly she is not entitled to recover credit hire until such time as she could have used the car on the road.
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> 39. … The question I have to ask is "when, on the evidence do I find on balance of probability the vehicle would have been rendered legal to drive on the road, so I [can] properly compensate for loss of that use?" At this point the clear evidence from the financial disclosure and the Claimant's oral evidence provide the answer. It is plain from the approach taken by the Claimant to a replacement vehicle that these sums were beyond her means and that she has to endure a tortuous journey to get to work. There is no evidence that the Claimant would ever have been able to render the car useable on the road and accordingly I have come to the conclusion that the causation argument succeeds and thus I award nothing for the credit hire element because there is nothing for the Defendant to compensate."

Mr Cheetham, adopting Judge Lethem's distinction between a "driveable" and a "useable" car, conceded that if one works from the premise that there is no such distinction, then the Claimant would probably be correct in his argument. However, he submitted that there is such a difference, which goes to the quality of the item, the use of which the Claimant has been deprived. With no valid MOT, the quality of the vehicle is so diminished that the item is qualitatively different: for the purposes of causation, it is the difference between a vehicle which is useable, and which is <u>lawfully</u> useable. Referring to paragraph 39 of Judge's Lethem's judgment, Mr Cheetham accepted that if, in the present case, the Claimant could have shown that he would have ameliorated the situation by getting an MOT certificate at some time in the future, then he would have had a valid claim for credit hire charges from that date. This is the contrast with an *ex turpi causa* argument which is all or nothing and is founded on policy grounds:

the usual examples are a loss or injury incurred in the course of drug-dealing or burglary. Judge Lethem's acceptance that if an MOT had been booked (and the vehicle would have passed), that would affect the causation argument illustrates the difference between this defence, and the *ex turpi causa* defence.

Discussion

16. Whilst I have found this a difficult issue to resolve, and was certainly attracted at one stage by Mr Williams' powerful argument that there is no scope in law to allow in, through the back door of causation as it were, an illegality argument which has been refused admission through the front door of the doctrine *ex turpi causa*, I have in the end concluded that Judge Lethem in *Agbalaya* and, following him, the Judge in the present case, were correct. The answer, as it seems to me, is that what is being considered are, in reality, two different forms of illegality. The first form is the one represented by the tag "*ex turpi causa"*: this is an all-encompassing defence which deprives a Claimant of any form of redress. It is a form of punishment, perhaps, derived from the circumstances in which the claim was born. What the law is saying is that, for reasons of public policy and in order to protect the integrity of our legal system, the courts will not entertain a claim for damages made in certain circumstances and I refer again to common examples: where the Claimant was engaging in drug-dealing or burglary at the relevant time. It is an extreme defence, which is why it involves a consideration of proportionality, balancing the all-encompassing effect of the defence against the loss of which the Claimant is being deprived and, indeed, how heinous is the illegality in question. One can well understand that if a Claimant, perhaps the owner of a 4-year-old Jaguar which is otherwise in perfect condition, had inadvertently allowed his MOT to expire for a few days - which I surmise may not be uncommon where no MOT reminder is automatically sent out to vehicle owners and the alert comes when, for example, the vehicle needs to be taxed or insured – it would be regarded as disproportionate to disallow all claims, including for recovery, repair and hire costs, which would potentially run into many thousands of pounds, on the grounds of "*ex turpi causa".* Indeed, some motorists might regard it as bringing the law into disrepute for the courts to disallow the claim in its entirety on that ground. There is a world of difference between that example and a motorist in the circumstances found by Judge Lethem in the *Agbalaya* case where the vehicle was unroadworthy, the owner could not afford the repairs necessary to remedy the position and thereby enable the vehicle to pass the MOT, and therefore decided to use the vehicle illegally (and potentially dangerously) with no intention to obtain an MOT in the foreseeable future.

17. What has been decided in this case, however, is that even if there is not this all-embracing form of illegality which deprives the Claimant of all claims arising from the accident, there is a second, more targeted, form of illegality which can be directed towards a particular aspect of the claim being made. This form of illegality does not involve considerations of public policy or proportionality because, by its nature, it allows the courts to distinguish between the "meritorious" Claimant – the Jaguar owner in my example in the preceding paragraph – and the "unmeritorious" Claimant who has no intention to obtain an MOT in the near future, or at any rate during the period of hire of an alternative vehicle. Thus, the court can do two things: first, it can look at the claim that is being made and ask whether that claim is affected at all by the fact that the car's MOT had expired and could not lawfully be driven on the road. If the claim is

not affected by this consideration, then the lack of a valid MOT is irrelevant and the Claimant will recover in full - for example, for the recovery and repair costs. Secondly, in respect of a claim which is affected by the lack of a valid MOT, and this 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 the 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. This then delimits the period of compensation and distinguishes between the meritorious Claimant (perhaps deprived of only a few days of car hire charges) and the unmeritorious Claimant (who fails to recover his credit hire charges at all). This alternative form of illegality is thus flexible and enables justice to be done by balancing the interests of the Claimant in receiving compensation for a loss reasonably incurred and the interests of the Defendant in not being required to compensate a driver for the period of use of a vehicle which was or would have been (but for the accident) unlawful, and it does this through the well-rehearsed application of the doctrine of causation. In my judgment, this is not *ex turpi causa* in disguise, but a different entity altogether.

18. In so deciding, I do not lose sight of the position of motor insurers who agree to provide their policy-holders who are the innocent victims of a road accident which is entirely the fault of the other driver with a replacement hire car, in the expectation of being able to recover those hire charges from the insurer of the driver at fault. It seems to me that those insurers can easily protect themselves by making it a term of the policy that the right to a replacement hire car is conditional on the damaged car having a valid MOT certificate at the date of the accident. Whilst I doubt (without having had the point argued) that a clause would be valid which invalidates the policy of insurance altogether in the event of the car needing, but not having, a valid MOT certificate, I can see no objection to a clause depriving the policy-holder of a right to a hire car in those circumstances. Indeed, this would be an additional incentive to motorists to ensure that they have a valid MOT at all times and that their use of the vehicle is entirely lawful.

19. Mr Williams KC, having seen a draft of the above judgment, rightly and properly drew to my attention the case of *Hewison v Meridian Shipping* [2002] EWCA Civ 1821, [2003] ICR 766. That case was referred to in Mr Williams' skeleton argument, but I was not taken to it in argument. Conscious of the principle that, having received a draft of the judgment, the invitation to make corrections is not an opportunity to re-argue the case, Mr Williams considered – rightly in my view – that he should draw this case to my attention so that it could not be said that my decision was reached *per incuriam*. In *Hewison's case,* the claimant was deprived of his full loss of earnings claim (but was allowed a more modest one) because he had illegally concealed his epilepsy so as to work at sea as a crane operator in particularly lucrative employment. Mr Williams' point is that my analysis at paragraph 17 above is arguably irreconcilable with *Hewison* because there, even where the issue only went to an aspect of the claim (loss of earnings), that issue was analysed by reference to the principles of *ex turpi causa* with the answer lying in considerations of public policy.

20. In my judgment, the decision of the Court of Appeal in *Hewison* in fact supports my analysis at paragraph 17 and the analysis of the Judge in the court below and that of Judge Lethem in *Agbalaya*. *Hewison* was subjected to detailed analysis by HHJ Dean QC in the case of *Ageampong v Allied Manufacturing (London) Limited* (unreported), an analysis which I adopt and which it is unnecessary to repeat in full for present

purposes. The leading judgment in *Hewison* was delivered by Clarke LJ who, having referred to the decision of the Court of Appeal in *Clunis v Camden and Islington Health Authority* [1998] QB 978, continued:

> "26. As can be seen from those passages, the courts have not adopted the suggestion that, at any rate in a case where the maxim ex turpi causa non oritur actio applies, the correct approach is to identify whether the public conscience would be affronted. We have been shown no case in which the courts have adopted such an approach to a case of this kind. In these circumstances I, for my part, do not think that it is appropriate to adopt it.
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> 27. The correct principle seems to me to be substantially the same as that identified by Beldam LJ as being applicable to cases in which the maxim ex turpi causa non oritur actio applies. It is common ground that that maxim does not itself apply here because it is correctly agreed that there is no principle of public policy which prevents the appellant from pursuing his cause of action for damages for negligence or breach of duty against the respondents. The question is not whether he can recover at all but whether he is debarred from recovering part of his alleged loss.
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> 28. However, as I see it, the principle is closely related. It is common ground that there are cases in which public policy will prevent a claimant from recovering the whole of the damages which, but for the rule of public policy, he would otherwise have recovered. The principle can perhaps be stated as a variation of the maxim so that it reads ex turpi causa non oritur damnum , where the damnum is the loss which would have been recovered but for the relevant illegal or immoral act. A classic example is the principle that a person who makes his living from burglary cannot have damages assessed on the basis of what he would have earned from burglary but for the defendant's negligence.
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> 29. To my mind the authorities support that approach. They seem to me to support the proposition that where a claimant has to rely upon his or her own unlawful act in order to establish the whole or part of his or her claim the claim will fail either wholly or in part. In the present context the principle can be seen from the decision of this court in *Hunter v Butler* [1996] RTR 396."

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.

21. For the above reasons, the appeal is dismissed. It would be remiss of me, before ending this judgment, not to pay tribute to the careful, well-reasoned and insightful judgment of Mr Recorder Charman in the court below.