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*105 The Maxim of Ex Turpi Causa and Public Policy Considerations in Running Down Actions

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Abstract

It cannot be denied that public policy considerations play an integral part in the administration of justice. Our case law is replete with it. They can solely dictate the outcome in certain instances. As a result of recent judicial activism, this article intends to explore the public policy considerations embodied in the doctrine of illegality and its role, if any in determining the outcome of running down actions, a claim founded in tort. The recent cases being that of Muhammad Noor Redzuan Misran v Muhammad Amirul Hafiz Khairulazuin (“Muhammad Noor Redzuan Misran”)[1] and Lee Chee Kuan v Yogeswaran a/l Sinniah & Anor (“Lee Chee Kuan”)[2] where public policy considerations per se resulted in the claim being dismissed and in Mohd Shahril bin Abdul Rahman v Ahmad Zulfendi bin Anuar (“Mohd Shahril bin Abdul Rahman”)[3] where liability against the claimant was enhanced (hereinafter “the recent case(s)”).

Public policy considerations and the invoking of the operation of the illegality doctrine in running down actions is certainly a new development, which, if accepted as the norm will have a profound effect on road accident victims. The said doctrine cannot be invoked without a justifiable rationale, especially in tort, as otherwise, it is bound to give rise to injustice. The basis for invoking the operation of the doctrine of illegality in the recent decisions, also begs the question, whether the intention of Parliament in enacting certain provisions in Part IV of the Road Transport Act 1987 (Act 333) (“the RTA”) to protect successful claimants of road accidents was taken into account. In that respect, this article will also explore whether the recent cases conflict with other public policy considerations contained in those provisions of the RTA and if so, how the conflict ought to be resolved in the interest of justice. Henceforth all references to a section in an Act refers to the RTA unless stated otherwise.

Introduction

Recently, in three running down actions, the claims were either dismissed or liability was reduced purely on the ground that the plaintiff did not possess a valid driving licence and/or the vehicle did not possess a valid road tax and/or third-party risk insurance (hereinafter “the relevant documents”) on public policy considerations per se, even though the absence of all or any one of the relevant documents was not the cause of the accident.

The first of the recent cases was Muhammad Noor Redzuan Misran where the plaintiff did not possess a valid driving licence at the time of the accident and based on that his Lordship Awang Armadajaya Awang Mahmud JC on appeal held that a person riding a motorcycle without a valid driving licence has no right to be on the road as it is prohibited by s 26(1) of the RTA and hence did not deserve the protection of the law and dismissed the entire claim on public policy consideration per se.

The second of the recent cases was that of Lee Chee Kuan where once again his Lordship Awang Armadajaya Awang Mahmud JC took it a step further by ruling, on the same basis as the first case, that if a pillion with knowledge that the rider did not possess a valid driving licence gets a lift from him and meets with an accident (even though not due to the fault of the rider) the pillion is not entitled to make a claim.

The last of the recent cases was that of Mohd Shahril bin Abdul Rahman where the plaintiff had no driving licence, no motor vehicle licence (road tax) and also no policy of insurance against third-party risks at the time of the accident. His Lordship Su Tiang Joo JC on appeal concluded that riding or driving a motor vehicle without a riding licence, road tax and policy of insurance against third-party

risks is an offence under the RTA and therefore tantamount to an illegal act and as such the claimant in a running down action ought not to be entitled to relief, in whole or in part on public policy considerations. However, his Lordship in this particular case enhanced the liability of the plaintiff by 30% due to the said illegal conduct.

The common thread that runs through all the recent cases is that the non-possession of the relevant documents as mandated in the RTA before one can use a motor vehicle on a public road tantamount to illegal acts which must be penalised by either the dismissal of the entire or part of the claim on public policy considerations.

Until the recent cases, the "preponderance of authority" have held that the non-possession of driving licence, at the time of the accident by the claimant per se has no bearing on the outcome of a running down action unless the absence of the same had directly contributed to the accident itself. In other words, it was a matter of proof that there was a causal link between the absence of the relevant documents (driving licence being the most likely) and the accident itself. The non-possession of a motor vehicle licence (road tax) *107 and also policy of insurance against third-party risks by the claimant has never been a factor that determined the outcome in a running down action.

Therefore, these recent cases are a paradigm shift from what has been the legal position so far. Noble as it may seem the intention to be achieved, the question that needs to be addressed is, does such judicial activism sit well within the time-tested framework of the law upon which a running down action is mounted. Since implicit in the doctrine of illegality are public policy considerations, let's look at what is public policy?

Public policy

Public policy is a phrase not easy of definition but it plays an immense role in all government decisions, legal or otherwise. Although there are various definitions, it can simply be defined as the course of government action or inaction in response to public problems. In other words, the policy is in response to an existing problem and invariably the policy is made in the public interest with an aim of achieving certain objective(s). In the legal context, the government's response to a problem will be in the form of enacting a legislation. The legislation in response to the problem can prohibit conditionally or unconditionally an unwanted act or promote the achievement of an objective in the interest of the greater good. A legislation may be prohibitive per se where the conduct is abhorred by society, like theft or corruption. Others may be prohibitive unless certain requirements are complied with, for example, the using of a motorised vehicle on a public road is prohibited unless the user has the relevant documents. There are also instances where a single legislation may contain provisions that are prohibitive and also promotive, example being the RTA where the majority of provisions in Part II (to make provision for regulation of traffic on roads) are prohibitive in nature subject to fulfilment of certain requirements whereas in Part IV (to make provision for the protection of third parties against risks arising out of the use of motor vehicles) contains protective or promotive provisions for innocent road users. Therefore, as much as public policy considerations are inherent in the doctrine of illegality so are they in legislation like the RTA.

Relevant sections of the RTA

The recent cases have centred around the violation of certain provisions in the RTA by the claimants. Before examining whether the recent cases are a move in the right direction, the relevant sections of the RTA are set out in full as follows:

26. Driving licences

The above section is clear that no one is permitted to drive a motor vehicle on a public road unless in possession of a valid licence and in subsection (2) the sentence for breach thereof is mentioned.

90. Motor vehicle users to be insured against third party risks

The aforesaid section prohibits the use of a motor vehicle on a public road unless there is in force a policy of insurance against third-party risks.

15. Motor vehicle licences

*109 23. Other offences in connection with registration and licensing of motor vehicles

Therefore, each section has its own penal sanction in the event of non-compliance.

There is no doubt that all the aforesaid sections have in them policy considerations when they were enacted. For example, s 26 of the RTA is to ensure that only a person who possesses a valid driving licence is permitted to be on the road because that person is deemed to have competency and skill in

handling a motorised vehicle as well as possessing the necessary knowledge of the road traffic rules and regulations to ensure the safety of other road users. In the case of s 90 of the RTA, it is to ensure that in the event an accident occurs resulting in serious injuries the innocent third party is assured of compensation so that he does not fall into destitution and become a burden to society.

The recent cases

Let us look at the facts of the recent cases in more detail as well as the reasoning or rationale utilised by the learned judges in arriving at their decisions, as follows.

Muhammad Noor Redzuan Misran

In this case, the plaintiff was riding a motorcycle along the EDL Highway at 1.15 a.m. The defendant was riding another motorcycle in the same direction as the plaintiff. The defendant collided with the plaintiff who was stopping to make a phone call. The defendant was about 40 metres behind the plaintiff when he realised the presence of the plaintiff in front of him. The defendant could not stop in time resulting in a collision. In the Sessions Court, the plaintiff was held 80% liable and the defendant 20% liable.

*110 When the matter came up for appeal before his Lordship Awang Armadajaya Awang Mahmud JC, despite other issues raised on appeal, his Lordship was of the view that "there is only one determining factor" and that is:

Whether a person riding a motorcycle without a valid driving/riding licence has the right to be on the road and hence the protection of the law?

After perusal of the preamble to the RTA and relying on s 26 thereof, his Lordship concluded that:

The prohibition is almost complete because no one is allowed to drive a motor vehicle on the road UNLESS he has a valid licence. Anyone who has no licence SHOULD NOT be driving a motor vehicle.

His Lordship concluded that the consequences of breach of the said prohibition is that the act of driving or riding a motor vehicle becomes an illegal act. Pursuant to it, his Lordship considered at length the illegality defence or otherwise known by the maxim ex turpi causa non oritur actio , a Latin phrase meaning no action can arise from one's own immoral or illegal act. This defence is based on public policy consideration and this was stated so in the case of Holman v Johnson[4] and referred to by his Lordship himself:

The principle of public policy is this; ex dolo malo non oritur action ["no action action arises from deceit"]. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act.

After an exhaustive look into cases on illegality involving contracts and tortious claims arising from joint criminal enterprises his Lordship, with all due respect erroneously concluded (which I shall explain later) that the lack of a valid driving licence triggered the operation s 95(j) of the RTA resulting in a breach of s 90 of the RTA (user must be insured against third party risks) and thereby the said vehicle will also be without a policy of insurance as required under paragraph 91(1)(b) of the RTA. To quote his Lordship:

In a case where a driver is not covered by the insurance policy by virtue of the fact that he has no driving licence and hence, should not be on the road, that conduct of driving a motor vehicle without a valid licence is itself an illegal act . (Emphasis added.)

The public policy considerations of his Lordship in dismissing the plaintiff's appeal can be discerned from the following passages:

[63] To allow this appeal would tantamount to rewarding the appellant/plaintiff for not complying with the law, or worse to reward him for the violation of the very law that seeks to regulate the conduct of traffic and transportation on the road, by posing a danger both to himself and above all, to other law-abiding users of the road. I find this position untenable and totally unacceptable.

*111 [64] In short, the law cannot protect one who has no regard of the law . (Emphasis added.)

The rationale of his Lordship in invoking the doctrine of illegality was based on the view that if damages were awarded despite the breach, it would tantamount to rewarding the wrongdoer and a wrongdoer cannot be allowed to profit from his or her illegal act and dismissed the claim. As to whether this rationale justifies the invoking of the doctrine of illegality in normal running down actions will be explored later when discussing the compensatory nature of claims in running down actions.

Lee Chee Kuan

In this running down action the first and second plaintiffs/respondents were the rider and pillion respectively and the motorcycle they were travelling on collided with the appellant/defendant's motorcar at a junction controlled by traffic lights. The trial judge held the first plaintiff 50% liable and the defendant 50% liable and as per the law ruled that the second plaintiff as the pillion was entitled to claim 100% from the defendant. An appeal was filed by the defendant and a cross-appeal by the plaintiffs.

The issue that again attracted the attention of his Lordship Awang Armadajaya Awang Mahmud JC was that the first plaintiff rider did not have a valid driving licence and the motorcycle did not have an insurance policy against third party risk and that the police have summoned the plaintiff for both offences and a further summon for beating the traffic light. The second plaintiff pillion admitted that he was aware that the first plaintiff did not possess a valid driving licence.

As expected, his Lordship's first question was, can a person who does not possess a valid driving licence and is not protected by insurance be entitled to ride a motorcycle on a road? After discussing s 26(1) of the RTA and the rationale for its existence, his Lordship stated if s 26 of the RTA is allowed to be flouted then it is akin to a burglar claiming damages from his victim who in self-defence injured the burglar, and that will make a mockery of the law. His Lordship also opined that "He who comes to equity must come with clean hands" and since the first plaintiff is claiming through equity, equity follows the law. In short, his Lordship referred to his earlier case of Muhammad Noor Redzuan Misran and stated that since the first plaintiff had failed to show some exceptional circumstances that compelled him to ride a motorcycle without a licence (like escaping from a rapist) held that the first plaintiff is 100% liable.

The second question posed by his Lordship was, whether a motorcyclist who did not possess a valid driving licence is entitled to claim damages if he collides into another vehicle driven by a person who possesses a valid licence? His Lordship held that if a person does not possess a valid driving licence he is not entitled under the law to make a claim for damages in tort *112 unless he falls within the five exceptions, which I reproduce in its entirety to avoid misquoting:

[34] Prinsip pemeliharaan lima perkara terpenting iaitu nyawa, kehormatan, kepatuhan undang-undang, keturunan dan akal yang sihat tidak boleh dipanjangkan kepada perkara-perkara yang tidak termasuk di dalamnya seperti hal-hal yang santai dan berseronok-seronok. Ia prinsip yang tuntas oleh perundangan yang mantap.

His Lordship further goes on to rule that a pillion who did not know that the rider did not possess a valid driving licence at the time of the accident can only make a claim against his own rider .

The third scenario posed by his Lordship was, whether a pillion who knew that the rider did not possess a valid driving licence but still got a lift from him and met with an accident, is such a pillion entitled to make a claim for damages in tort? His Lordship deemed such a pillion to be an abettor to the crime committed by the rider under the traffic rules as defined under s 107 of the Penal Code and stated that such a pillion cannot make a claim from any third party but can only claim from the unlicensed rider .

Therefore, according to his Lordship Awang Armadajaya Awang Mahmud JC's aforesaid decisions, a rider/driver without a valid driving licence and a pillion/passenger who knowingly hitches a ride thereon are deemed to be in the position of a common criminal and/or trespasser and not deserving the protection of the law and are thereby deprived of their entitlement to make any claim in tort of negligence. Such a view unfortunately would amount to outlawry and it is an untenable position in law because:

the law does not allow even a criminal who has committed a serious offence to be deprived of all his or her rights under either the civil or criminal law.[5]

In fact, in all probability both the decisions of his Lordship could have been justified on a basis independent to that of illegality, that is liability itself.

In this case, the additional rationale that can be discerned for invoking the doctrine could be the preservation of the sanctity of the legal system since his Lordship considered that allowing the claim would make a mockery of the law.

Mohd Shahril bin Abdul Rahman

In this running down action, his Lordship Su Tiang Joo JC agreed with the trial judge's findings that the defendant was 70% liable and the plaintiff was 30% liable in contributory negligence in respect of

the accident. However, at the material time of the accident, the plaintiff did not have a valid driving *113 licence and the motorcycle had no road tax and no insurance against third party risks. In the appeal, his Lordship posed the question whether:

In a running down action, should the plaintiff who at the time of the accident had no driving licence, no motor vehicle licence (or commonly known as road tax) and no policy of insurance against third-party risks be entitled to any relief from the court?

Thereafter, his Lordship descended to consider the issue of illegality arising from the plaintiff's non-possession of the relevant documents and undertook an exhaustive analysis of case law related to the issue, not necessarily limited to running down actions, both local and foreign. Having done so, his Lordship acknowledged the prevailing sentiments of our courts in respect of the absence of the relevant documents and its effect on the outcome on running down actions and I quote:

[45] The preponderance of authorities at the High Court level held that riding or driving without a valid licence per se is not negligent and the Federal Court in Malaysia National Insurance Sdn Bhd (supra) held that an insurance policy will still indemnify the insured even if the insured does not have a valid driving licence at the time of the accident. With respect, this Court is of the considered view that the Federal Court had probably decided so in keeping with the public policy of protecting any third-party claims consonant with the Road Transport Act 1987 (Act 333) as will be seen below. (Emphasis added.)

His Lordship minded to apply the defence of illegality in the case under consideration found support for it in the recent cases decided by his Lordship Awang Armadajaya Awang Mahmud JC and also the Court of Appeal case of Lee Nyan Hon & Brothers Sdn Bhd v Metro Charm Sdn Bhd[6] where it was stated the maxim ex turpi causa non oritur actio is applicable to all causes of action including claims in tort. His Lordship then referred to the dicta by his Lordship Peh Swee Chin SCJ in Chua Kim Suan & Teoh Teik Nam (suing as Administratrix and Administrator respectively of the Estate of Teoh Tek Lee, deceased) v Government of Malaysia & Anor ("Chua Kim Suan"),[7] a tort case concerning a claim for loss of earnings tainted with illegality and concluded that it can be reconciled with the ratio formulated by Lord Toulson SCJ in Patel v Mirza[8] although it was a contract case. His Lordship then applied the three tests propounded in Patel v Mirza to the illegality arising from the lack of the relevant documents to arrive at the decision. To appreciate the examination of the public policy considerations by his Lordship, I quote from the judgment, in extenso as follows:

[55] The first consideration of the test is to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be *114 enhanced by denial of the claim . The prohibitions that the plaintiff had contravened [in] this case are: i) using a motor vehicle without having in force a policy of insurance in respect of third party risks in contravention of section 90 RTA 1987; ii) driving a motor vehicle without a driving licence authorising him to drive a motor vehicle which in his case is a motor cycle in contravention of s 26 of the RTA 1987; and iii) using a motor vehicle in respect of which there is not in force a motor vehicle licence, or what is commonly known as "road tax" in contravention of s 15 RTA 1987.

[56] I am of the opinion that a denial of the claim in whole or in part will serve the underlying purpose of ensuring that only qualified drivers who have undergone a competency test as to qualify for a licence and who have in force a policy of insurance against any third party risks before they are permitted to drive. (Emphasis added). It is not difficult to visualise the damage that can be done by a motorised vehicle in an accident which can cause very serious personal injuries, just like in the instant case or even death to other road users. In the case of personal injuries, the cost of medical care to rehabilitate the victim both physically and mentally can be very large and if the negligent party has no insurance to make good any award a court may order by way of damages, the court's order is only good as a paper judgment.

[57] Besides being guilty of an offence under s 23 RTA 1987 for using a motor vehicle without a motor vehicle licence in force, and upon conviction, the plaintiff can be liable to a fine not exceeding two thousand ringgit, the revenue has been defrauded.

[58] The second consideration of the test is to consider any other relevant public policy on which denial of the claim may have an impact. I am of the opinion a denial of such a claim, in whole or in part, would serve the public policy that there will be no free lunch. It will serve to instil a sense of responsibility to drive all to be armed with a mentality that laws are to be obeyed at all times.

[59] The third consideration of the test is 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. The answer to this consideration in this case can best be answered by postulating, what if the

roles were to be reversed i.e. that it was the motor car driver who was without any policy of insurance and is incapable of meeting any monetary award to rehabilitate the motor cyclist who had suffered serious injuries to his right leg; how would the plaintiff/motorcyclist feel? The answer is to my mind obvious, that a denial of the claim in whole or in part would be a proportionate response to the illegality to imbue into all road users with motor vehicles that they must all help and share in carrying the risk of damages that may befall any road user arising from their negligence and in the process assist to reduce the load of insurance premium.

Based on the aforesaid justifications his Lordship did not dismiss the plaintiff's claim, although he had opined that it should be dismissed but stated that although the defendant was more to blame for the accident but *115 however due to the illegality committed the plaintiff's liability was increased by another 30%. In the end, the defendant was held 40% liable and the plaintiff 60%.

His Lordship's rationale for invoking the doctrine is with a view to punishing the wrongdoer as a deterrence to others, and it can be discerned from the following and I quote:

This is to underscore the message that whilst the claimant may not care for him or herself, there is a price to be paid for ignoring the law … (Emphasis added.)

This same rationale can also be seen when his Lordship opined that the ex turpi causa principle should also be applied in determining the award for damages in such situations, as follows:

[66] It is this court's view that the ex turpi causa principle as refined by the Patel v Mirza test is to apply and, any damages , subject to proof, that is to be awarded to such a claimant ought to be premised upon the lowest scale in the compendium of personal injuries so as to judicially castigate such a claimant and to discourage such illegal acts or omissions . (Emphasis added.)

His Lordship's decision in not having dismissed the claim but apportioning liability based on illegality, also begs the question whether it can be utilised akin to how contributory negligence reduces damages.

In all the recent cases there could be the underlying rationale that the court should not assist a claimant who has been guilty of illegal conduct of which the courts should take notice.

Let us first explore whether the recent cases fit into the dynamics of a running down action which is based on common law tort of negligence and to a great extent supported by the provisions found in Part IV of the RTA?

What is a running down action in common law?

A running down action in common law is an action based on tort of negligence where the plaintiff has to prove that the duty of care owed to the plaintiff as a road user was breached by the defendant and that the breach was the cause of the injury and financial loss. In other words, as stated by his Lordship Abdul Malik Ishak J in Ramachandran a/l Muniandy v Abdul Rahman bin Ambok Laongan & Anor[9] there must be a causal link between the breach and the injury.

In running down actions, the most common defence pleaded will be contributory negligence on the part of the plaintiff. Contributory negligence *116 was explained by Bucknill LJ in Davis v Swan Motor Co (Swansea) Ltd ,[10] as follows:

… when one is considering the question of contributory negligence, it is not necessary to show that the negligence constituted breach of duty to the defendant. It is sufficient to show lack of reasonable care by the plaintiff for his own safety . This is set out clearly in the speech of Lord Atkin in Caswell v Powell Duffryn Associated Collieries Ltd[11] as follows:

"But the injury may be the result of two causes operating at the same time, a breach of duty by the defendant and the omission on the part of the plaintiff to use ordinary care for the protection of himself or the property that is used by the ordinary reasonable man in those circumstances." (Emphasis added.)

In simple language, contributory negligence can be equated with carelessness on the part of the plaintiff that also contributed to the accident.

Therefore, the common thread that runs through tort of negligence and also contributory negligence is the element of causation as stated by Lord Atkin in Caswell v Powell Duffryn Associated Collieries Ltd and this is a matter of proof. For example, in the Singapore case of Wong Ah Gan v Chan Swei Yueh & Anor[12] despite the plaintiff's failure to wear a crash helmet and having sustained severe head injuries, the court refused to consider it as contributory negligence on the ground that there was no evidence at all before the trial judge that the head injury suffered by the first plaintiff would have been

less serious if he had been wearing a crash helmet at the time of the accident. Similarly, in the case of Siti Rohani Mohd Shah & Ors v Hj Zainal Hj Saifee (" Siti Rohani Mohd Shah "),[13] his Lordship Jeffery Tan opined on the failure to wear a crash helmet as follows:

Also, the 1st appellant did not contribute to her injuries. In not wearing a safety helmet, she was not being prudent, for a reasonably prudent man would foresee that the wearing of a safety helmet might result in less harm being caused to him, whether by someone else or by himself, if he is involved in an accident or collision while riding a motorcycle. But she did not sustain any head injuries, and the wearing of a safety helmet would not have reduced her injuries. In all respects, she could not be faulted, for the collision, or for the extent of her injuries. She should not have been penalised.

Unfortunately, the cases of Muhammad Noor Redzuan Misran and Lee Chee Kuan were decided purely on the issue of illegality due to the lack of the relevant documents and no consideration was given to causation in arriving *117 at the decisions which is an integral part of the tort of negligence upon which a running down action is founded.

Based on the aforesaid dynamics involved in running down actions, therefore quite rightly the prevailing judicial mindset is that the lack of the relevant documents is not per se negligence simply because by itself it cannot be the cause of the accident. This mindset can be gleaned from the following cases[14] where the focus has been on causation.

Maimunah bte Hassan (Sebagai Wakil Harta Pusaka Rozita bte Khamis) & Satu Lagi v Marimuthu s/o Samanathan & Satu lagi

In this case, his Lordship Mohd Noor bin Ahmad J relying on the authorities of Tam Chye Choo & Ors v Chong Kew Moi ,[16] Badham v Lambs,[17] New India Assurance Co Ltd v Pang Piang Chong & Anor[18] and Che Wil Mohmood bin Ismail ,[19] held that a motorcyclist is not negligent merely because he has no valid riding licence, road tax and insurance because at the time of the accident, the plaintiff was in his lawful path when the defendant had encroached into his path.

Chu Kim Seng & Anor v Abd Razak Amin ("Chu Kim Seng")

In this case, his Lordship Abdul Malik Ishak J held that the fact that the respondent did not have a driving licence and was not wearing a crash helmet and that the motorcycle was ridden without road tax and insurance and was not fitted with a horn could not in law make him negligent. In this case, the appellant/defendant had exited from a junction when the respondent/plaintiff was on the main road. The respondent was held 100% liable. His Lordship observed the element of foreseeability required before making the plaintiff liable as follows:

It was not foreseeable for the respondent (plaintiff) to foresee harm would fall on others as to make him liable for actionable negligence by riding the motorcycle while those extraneous factors were contravened by him and neither would the respondent foresee that by riding the motorcycle with these extraneous factors being contravened by him would result in harm to himself and thereby contribute to the cause of the accident.

Tineskumar Ravindran v Nor Shahizan Ibrahim

His Lordship Abu Bakar Katar JC following Chu Kim Seng held that the fact that the plaintiff at the time of the accident did not have a valid driving licence cannot mean that he was negligent.

Siti Rohani Mohd Shah

His Lordship Jeffrey Tan J having held that the first appellant/plaintiff's version was more probable held the second respondent/defendant 100% liable for encroachment. As regards the first appellant who was only 12 years old at the time of the accident and not possessing a valid licence (contravened s 26 of the RTA) and underaged (contravened s 39 of the RTA) his Lordship opined as follows:

It is very clear; riding or driving without a valid licence per se is not negligent . Perhaps some other violations of the Highway Code, such as failure to give way to through traffic, may enter, depending on the facts, into the cause of an accident. But riding or driving without a valid licence per se would not enter into the cause of an accident . Rather, it is the manner of the riding or driving and/or conduct on or in relation to the road that enter into the cause of a motor accident or collision . In the present case, the fact that the 1st appellant was riding the motorcycle without a valid driving licence, without a safety helmet and even with a pillion rider, could not and did not enter into the cause of the collision. The fact of the matter was that on the balance of probabilities, the 1st appellant did not cause or contribute to the cause of the accident.

Now to answer Miss Lai, the law of course does not sanction a person without a valid licence to be

riding or driving a vehicle on the road. But that person is not, as would seem to have been suggested by Miss Lai, fair game, with no rights. He is still entitled to the same duty of care expected of to be accorded to all on and adjacent to the road . For it is an underlying principle of the law of the highway that all must show mutual respect and forbearance (see Searle v Wallbank [1947] AC 341, 361). The only remedy, or penalty if you like, is that prescribed in the RTA. The remedy is not an actionable wrong. (Emphasis added.)

Mohd Hafizul Mokhtar & Anor v Mohd Zaki Kamarudin

In an appeal from the Sessions Court, where the plaintiff did not have a driving licence for the motorcycle that he was riding and he led no evidence that he knew the Highway Code or that he had the experience and skill to ride a motorcycle, his Lordship Mohtarudin Baki J (now JCA) held that this per se is not negligence.

Abdul Wahab b Jam v Abdul Wahab b Abdullah & Anor

In this case, the second respondent/plaintiff who was riding a motorcycle did not have a valid driving licence and collided into the left rear side of the appellant/defendant's motor van. After trial the defendant was held 100% liable resulting in the appeal. On appeal, his Lordship Mohamed Apandi Ali J held that not having a valid driving licence in itself does not mean that the driver is negligent and found the driver to be 80% liable for the accident on the basis that she had admitted guilty to negligent driving under rule 10 of the Road Traffic Rules.

Abdul Azim bin Abdul Halim v Vinod Kannan a/l Sivajothi & Anor

In this case, the plaintiff had failed to use a dedicated motorcycle lane because of fear for his own safety as it was dark and raining heavily and he suspected that the motorcycle lane was not safe due to the presence of cones ahead on the motorcycle lane which was there primarily to warn and hinder motorcyclists from using the lane. His Lordship Azmi Abdullah JC relying on the case of Siti Rohani Mohd Shah held that:

The mere fact a traffic rule is not being adhered to is not the sole consideration in determining an accident and the court needs to seek the cause of the accident in the totality of the prevailing evidence. (Emphasis added.)

Yoon Fong Yin, Sebagai Wakil Diri Harta Pesaka Yong Gun Ham (si mati) v Fazree bin Syed Majid

In this case, the magistrate had found the appellant/defendant and the respondent/plaintiff equally liable for the accident although at the material time the plaintiff did not possess a driving licence and road tax. Her Ladyship Hadhariah Syed Ismail J held that the magistrate had erred in his approach as regards of the plaintiff not possessing a licence and road tax and opined as follows:

Upon accepting the fact that the absence of a licence was not a factor in determining the plaintiff's liability , the magistrate had made a baseless assumption that the plaintiff was a serious traffic offender and his evidence was completely unreliable. The magistrate failed to distinguish between "proof of negligence" and "traffic offender". In a case of a road accident, the plaintiff only needs to prove the defendant's negligence. In the instant case, the plaintiff has proved the defendant's negligence in that the defendant had encroached onto the plaintiff's rightful lane. A traffic offender is a person who has committed a traffic offence that is punishable if charged. A traffic offender cannot be equated with a negligent person . Traffic offenders can be easily identified. However, to prove one's negligence in a case of a road *120 traffic accident requires evidence and not assumption. There was no evidence before the magistrate that because the plaintiff did not possess a licence, he did not know how to ride a motorcycle or was not credible . Thus, the magistrate erred in deciding that as a traffic offender, the plaintiff's evidence was not entirely credible. … In the instant case, the magistrate had accepted the plaintiff's version. Therefore, on the issue of liability, the magistrate should have determined the defendant to be 100% liable instead of distributing liability evenly. (Emphasis added.)

Therefore, in all the above authorities the focus was correctly on what caused the accident rather than on alleged illegal conducts based on the absence of the relevant documents. To ignore the former at the expense of the latter will be to ignore the time-tested elements in the tort of negligence as applied in running down actions.

Public policy considerations in Part IV of the RTA

All the recent decisions were decided by invoking the operation of the maxim ex turpi causa non oritur actio or otherwise known as the doctrine or defence of illegality on the basis that there are public policy considerations with underlying purposes intended to be achieved by compliance with ss 26, 90, 15 and 23 of the RTA. The public policy considerations or the underlying purpose intended to be

achieved in all the aforesaid sections as elaborated by both their Lordships in the recent decisions cannot be disputed. However, in running down actions there is also in play ss 91, 94, 95 and 96 in Part IV of the RTA with their own public policy considerations and underlying purpose intended to be achieved.

Before venturing to look into the public policy considerations found in ss 91, 94, 95 and 96 it is essential to understand certain terminologies relevant to motor insurance policies. Motor vehicle insurance is taken by the owner of the vehicle (the insured) from an authorised insurance company (the insurer) for the protection of innocent road users. The innocent road users not being a party to the aforesaid insurance contract are called third parties and therefore the risk being covered is called third party risk.

Section 91(1)(b) basically sets out the scope of compulsory third-party risks insurance coverage. In a nutshell, the subsection mandates that the insurance policy must cover "in respect of the death of or bodily injury to any person (third party) caused by or arising out of the use of the motor vehicle or land implement drawn thereby on a road" with exceptions as stated in proviso (aa) to (cc).

Once such a policy comes into existence and if none of the vitiating factors set out in s 96(2) or (3) exists then the insurer is duty bound under s 96(1) to satisfy the judgment sum. It is this statutory right under s 96(1) that enables the third party to sue the insurer directly even though there is no privity of contract. Therefore, the public policy consideration or the underlying purpose intended to be achieved by the legislature is that victims of road *121 accidents who succeed in their running down actions must be assured of compensation by the insurer concerned. The need for such protectionism arose because of the upsurge in accidents with increase in motor vehicles usage. If victims of road accidents who sustain serious injuries are not compensated via compulsory insurance, they will then become a burden to society at large.

To ensure that the objective of s 96(1) was achieved, the legislature also enacted ss 94 and 95 to prevent the insurer from repudiating liability on the grounds that the insured had breached some policy conditions before or after the accident.

Section 94 states, "Certain conditions in policies or securities to be of no effect" reads as follows:

Any condition in a policy or security issued or given for the purposes of this Part providing that no liability shall arise under the policy or security or that any liability so arising shall cease in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy or security shall be of no effect in connection with such claims as are mentioned in paragraph 91(1)(b).

This section prohibits the insurer from repudiating liability to pay the third party in respect of something the insured should or should not have done after the accident which would amount to a breach of policy condition. For example, there will be policy conditions that the insured must notify the insurer immediately after an accident and that the insured should not admit liability for the accident, failing which the insurer will repudiate liability. But, let's say the insured did not comply with both the policy conditions. Such a breach would normally entitle the insurer to repudiate liability under the policy and not pay the plaintiff. However, repudiation by the insurer on such grounds is prohibited under s 94 to ensure that the successful claimant in a running down action will be assured of payment from the insurer concerned .

The heading to s 95 reads, "Avoidance of restrictions on scope of third party risks policies" and the section itself reads:

Where a certificate of insurance has been delivered under subsection 91(4) to the person by whom a policy has been effected, so much of the policy as purports to restrict the insurance of the persons insured by reference to any of the following matters:

shall, as respects such liabilities as are required to be covered by a policy under paragraph 91(1)(b), be of no effect.

The above restrictions will invariably be conditions in third party risk insurance policies. What happens if any one of the restrictions is breached by the insured at the time of the accident, such as paragraph (j), that is the insured did not possess a valid driving licence, which was inter alia the basis upon which their Lordships invoked the defence of illegality in the recent cases against the claimants. Can the insurer rely on that breach by his insured and repudiate liability under the policy so as to not pay the plaintiff? Unfortunately, the insurer cannot do so because according to s 95 such restrictions shall "be of no effect" when it applies to "liabilities as are required to be covered by a policy under paragraph 91(1)(b)." In short, s 95 ensures that even if there is a breach of policy conditions by the

insured by reference to any of the restrictions mentioned therein the insurer must still honour the judgment obtained by the plaintiff.

The rationale for s 95 was explained by Goddard LJ in Zurich General Accident and Liability Insurance Co Ltd v Morrison ("Zurich General Accident and Liability Insurance Co Ltd ")[26] as follows:

Insurance was left in the hands of companies and underwriters who could impose what terms and conditions they chose. Nor was there any standard form of policy, and any company, who could fulfil the not very onerous *123 financial requirements which were necessary for the acceptance as an approved insurer, could hedge the policies with so many warranties and conditions that no one advising an injured person could say with certainty whether, if damages were recovered against the driver of the car, there was a prospect of recovering damages against the insurers … It is not surprising, therefore, that by 1934 Parliament interfered, and by s 10 of the Act of that year they took steps towards remedying the provision … Generally speaking, s 10 was designed to prevent conditions in policies from defeating the rights of third parties . (Emphasis added.)

Therefore, with all due respect, the view taken by his Lordship at paragraphs [40] to [44] in the case of Muhammad Noor Redzuan Misran that s 95 determines "Who is covered by a valid insurance policy?" and restriction (j) means that if the tortfeasor did not have a valid licence it also means that automatically there is no insurance cover or even if there is cover it does not cover the third party, is not right. The scope of coverage under compulsory third-party risk insurance is actually spelt out in s 91(1)(b) and not s 95.

In fact, ss 94 and 95 are classic examples where the legislature on public policy considerations had intervened in the realm of insurance law and set aside the normal consequences of breach of policy conditions which incidentally are also transgressions of the law to ensure that innocent road users were compensated. Sections 94 and 95 exists to ensure the underlying purpose of s 96(1) is achieved. In fact, in the Federal Court case of Malayan National Insurance Sdn Bhd v Abdul Aziz bin Mohamed Daud ,[27] his Lordship Raja Azlan Shah FJ held that although the accident occurred at a time the driver's licence was not renewed, it was not against public policy for the insurance policy to indemnify the loss arising from the accident because "Road traffic cases e.g. manslaughter on the road by gross negligence, negligent driving and the like are not wilful and culpable crimes which makes them contrary to public policy." (Emphasis added.)

Since the issue under consideration is the impact of illegality on running down actions, it is pertinent to note that the restrictions found in s 95(a) to (k) are in fact conducts expressly prohibited under Part II of the RTA, such as cannot drive under the influence of intoxicating liquor or drugs, without a valid driving licence or in breach of conditions imposed in the road tax, etc. Despite such breaches being illegal under the RTA the legislature mandates that the insurer ignores such illegality committed by the insured in the context of running down actions and still indemnify the plaintiff. This shows the clear intention or underlying purpose of Parliament in enacting in s 96(1), that is, innocent road users must be compensated even though the provisions in RTA have been breached by the insured. That clear intention of Parliament can only be achieved if the same latitude is given to a plaintiff in a claim for damages in a running down action . As the saying goes what is good for the goose is good for the gander .

*124 Because of the aforesaid policy considerations behind s 96(1), in the case of Balamoney Asoriah v MMIP Services Sdn Bhd ,[28] the Court of Appeal after referring to Zurich General Accident and Liability Insurance Co Ltd affirmed that the RTA (Act 333) is a "piece of social legislation" which I quote:

[17] The above decision [Zurich] was adopted by the Supreme Court in the case of Malaysia National Insurance Sdn Bhd v Lim Tiok [1997] 2 AMR 1489; [1997] 2 MLJ 16; [1997] 2 CLJ 351, 378; [1997] 1 MLRA 43 when delivering inter alia the approach the courts should take when interpreting the relevant provisions of Act 333, which the Supreme Court regarded as a " piece of social legislation ":

"… It is important to fit these three elements — the common law principle, the contribution legislation, and the compulsory third party insurance legislation — in such a manner as to ensure that they work in harmony without occasioning injustice ." (Emphasis added.)

Therefore, to give total preference to the public policy considerations in ss 26, 90, 23 and 15 as done in Muhammad Noor Redzuan Misran and Lee Chee Kuan or the enhancement of liability as done in Mohd Shahril bin Abdul Rahman without due regard to the legislative intent and greater public policy consideration in ss 91(1)(b), 94, 95 and 96 will produce undesirable outcomes bearing in mind that

those sections are intended to protect the poorer segment of our society who are more often than not users of motorcycles and form the bulk of accident victims.

The statutory context

In fact, it is not uncommon for the courts to limit the effect of illegality in tortious claims by reference to the legislative intent as I have discussed above. This is evident in the following cases.

National Coal Board v England

The House of Lords ruled that a claim by the injured plaintiff should succeed notwithstanding the fact that he and a fellow employee, acting in concert, had knowingly broken regulations under the Coal Mines Act 1911 designed to protect workmen coupling up explosives. The House of Lords examined the legislative intention and found that the policy behind the statute did not preclude recovery in tort by the plaintiff.

Cakebread v Hopping Brothers (Whetstone) Ltd

The plaintiff employee claimed for injuries suffered as a result of the employer's breach of the Woodworking Machinery Regulations 1922 and the Factories Act 1937. The employer raised the illegality defence, claiming that *125 the plaintiff had aided and abetted the illegality. Even if that contention was correct, the defence failed because:

[t]he policy of the Factories Act makes it plain that such a defence as that put forward here would be inconsistent with the intention of Parliament. (per Cohen LJ ibid , at p 654).

Revill v Newbery

A case in which an allotment holder shot and wounded a would-be burglar. The defendant was found liable because in discharging the shotgun in the direction of the burglar he had used greater violence than was justified by the use of reasonable force in lawful self-defence. His Lordship Neil LJ in the Court of Appeal held that the claim should not be barred on the ground of illegality based on the effect of the Occupier's Liability Act 1984 as follows:

It seems to me to be clear that, by enacting section 1 of the Act of 1984, Parliament has decided that an occupier cannot treat a burglar as an outlaw and has defined the scope of the duty owed to him. As I have already indicated, a person other than an occupier owes a similar duty to an intruder such as the plaintiff … I am satisfied that the liability of someone in the position of the defendant is to be determined by applying a test similar to that set out in section 1(4) of the Act of 1984. There is in my view no room for a two-stage determination whereby the court considers first whether there has been a breach of duty and then considers whether notwithstanding a breach the plaintiff is barred from recovering by reason of the fact that he was engaged in crime.

When the principles from the aforesaid cases are applied to the legislative intent embodied in ss 91(1)(b), 94, 95 and 96, as amply explained under the preceding heading, the maxim ex turpi causa should be not invoked in purely negligence-based running down actions.

The doctrine of illegality and running down action

Before venturing into the doctrine, the timely reminder of the need for pragmatism by the courts when applying the defence as stated by his Lordship Bingham LJ in Saunder v Edwards[32] must be borne in mind, and I quote:

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 nor how disproportionate his loss to the unlawfulness of his *126 conduct …. [O]n the whole the courts have tended to adopt a pragmatic approach to these problems, seeking where possible to see that genuine wrongs are righted so long as the court does not thereby promote or countenance a nefarious object or bargain which it is bound to condemn. Where the plaintiff's action in truth arises directly ex turpi causa , he is likely to fail … [w]here the plaintiff has suffered a genuine wrong, to which the allegedly unlawful conduct is incidental, he is likely to succeed … (Emphasis added.)

In Euro-Diam Ltd v Bathurst ,[33] his Lordship Kerr LJ said that:

[T]he ex turpi causa defence must be approached pragmatically and with caution.

In Standard Chartered Bank v Pakistan National Shipping Corporation and others (No. 2) ,[34] his Lordship Evans LJ stated:

[T]he authorities support the "pragmatic approach" described by Lord Justice Bingham in Saunders v Edwards [1987] 1 WLR 1116.

His Lordship Mance LJ stated in Hall v Woolston Hall Leisure Ltd :[35]

[i]n practice, as is evident, it requires quite extreme circumstances before the test will exclude a tort claim.

The usual main policy rationales or the justifications for invoking the defence of illegality can be surmised as follows: (1) the need to preserve the dignity and reputation of the courts and legal system; (2) the need to deter unlawful or immoral conduct; (3) the need to prevent a claimant from profiting or benefitting from his or her own wrong doing; and (4) as a punishment. The defence must be seen in a pragmatic manner with due consideration to the policy rationale intended to be promoted as against the cause of action the claim is founded, the remedy sought and the factual matrix of the case itself.

The need for the above considerations is essential because the said defence is not only confined to tortious claims but also applicable to claims in contract and trust. Each of these causes of action will entitle the claimant to seek different types of remedies and each remedy has an inherent purpose. For instance, the purpose of awarding the damages could be as a mere compensation for the loss suffered or as a punishment for the wrong doer (aggravated damages) or as an example so that others will be deterred (exemplary damages) or as a restitution (recompense for a loss or injury). Obviously one of the factors that should dictate the application or otherwise of the said defence should be the purpose of awarding the remedy in law.

The nature of damages awarded in running down actions

That brings us to the compensatory nature of damages in running down actions. As such, caution must be exercised when applying the defence of illegality as expounded in contract and trust cases as well as certain tortious claims, such as tort of deceit or misrepresentation because they may involve consideration of the wrongdoer profiting from his wrongdoing or illegal conduct as compared to running down actions where damages awarded are as compensation and they cannot in any manner whatsoever be equated with profit or reward. This was explained by his Lordship Syed Agil Barakbah FJ, in Ong Ah Long v Dr S Underwood[36] as follows:

Damages for personal injuries are not punitive and still less a reward. They are simply compensation that will give the injured party reparation for the wrongful act, so far as money can be compensation.

That is why his Lordship Evan LJ in Revill v Newbery had reservation as regards the applicability of the defence of illegality to personal injury claims in tort when he stated as follows:

[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.

Therefore, when viewed from the perspective that damages are compensatory in nature and not a reward or profit, one of the main rationales for the application of the illegality defence in trust or contract vanishes when applied to running down actions. That is probably why the Court of Appeal in Tay Lye Seng & Anor v Nazori bin Teh & Anor (" Tay Lye Seng "),[37] an appeal involving a running down action, referred to the Supreme Court case of Chua Kim Suan and held that the maxim of ex turpi causa non oritur actio has a limited action in tort.

The personal injury cases of Pitts v Hunt and Ashton v Turner

Of course, reference have been made to cases like Pitts v Hunts[38] and Ashton v Turner[39] where compensatory claims for personal injury in tort were denied, inter alia on the basis of illegality. However, the said cases are easily distinguishable from the run of the mill running down actions, such as in the recent cases on the basis that the injuries in those cases were sustained while undertaking a joint criminal enterprise .

In the case of Pitts v Hunts after an evening of outing Hunt gave Pitts a lift on the back of his trial motorbike which was a Suzuki 250cc. He had no licence to ride the bike on the road, indeed the engine capacity limit for a 16-year-old *128 to ride legally would be 50cc. He also had no road tax or insurance. The pair consumed alcohol at their destination and Mr Hunt was twice over the legal limit for driving. Nevertheless, the pair embarked on their journey home on the motorcycle. Witnesses

gave evidence that the two were obviously very drunk and Hunt was driving recklessly and erratically. He was zig-zagging down the centre of the road at great speed, with both the parties shouting and jeering. Mr Pitts was jeering Mr Hunt on and encouraging the dangerous driving. At one time, Mr Hunt drove dangerously close to a witness in order to scare them. Unfortunately, Mr Hunt hit an oncoming car when he was travelling at speed on the wrong side of the road. Mr Hunt was killed and the claimant was left permanently partially disabled. He brought an action for the injuries sustained against the personal representatives of Mr Hunt. The claim was not only dismissed on the grounds of illegality but also probably on the basis that no duty of care was owed in such situations.

Similarly, in Ashton v Turner two drunken men committed a burglary. While trying to escape, the first defendant, driving the second defendant's car with his permission, caused an accident severely injuring the plaintiff, who was a passenger in the car. His claims were dismissed. His Lordship Ewbank J considered that as a matter of public policy the defendants owed him no duty of care.

Therefore, the cases of Pitts v Hunts and Ashton v Turner cannot be flag bearers for application of the defence of illegality in purely negligence-based running down actions.

When seen in the light of cases like Pitts v Hunts and Ashton v Turner and even tortious claim based on deceit or misrepresentation, his Lordship Abdul Malik Ishak JCA's view in Lee Nyan Hon & Brothers Sdn Bhd v Metro Charm Sdn Bhd[40] that ex turpi causa is a principle that is applicable to all causes of action including claims in tort is also justified.

The case of Patel v Mirza

The aforesaid case, which had a dominant role in the recent cases dealt with the scope of the illegality principle relating to an insider trading contract which is a criminal offence. The inherent danger of importing the illegality defence as applied in other causes of action into running down actions have already been discussed in the preceding paragraphs. In any event what were the facts in Patel v Mirza and how did it alter the applicability of the illegality defence?

In the said case, Patel had paid £620,000 to Mirza pursuant to an agreement under which Mirza would bet on the price of some shares, on the basis of insider information. Using advance insider information to profit from trading in securities is an offence under s 52 of the Criminal Justice Act 1993. *129 The scheme did not come to fruition as the expected insider information was mistaken. Thereafter, Patel brought a claim based on contract and unjust enrichment for the return of £620,000. Mirza argued that no such obligation could be enforced because the whole contract was illegal, and any claim would be precluded by the principle of ex turpi causa non oritur actio based on the case of Tinsley v Milligan ("Tinsley").[41]

The ratio in Tinsley was that illegality would bar the plaintiff from making the claim if the plaintiff has to rely upon the illegal element to make out the claim (usually referred to as "the reliance test"). Further, the harshness of the illegality defence was that it did not allow the exercise of any discretion by the court in favour of one party or the other.

The central consideration in the mind of the judges would have been, by denying the claim based on Tinsley , Mirza would be profiting from his illegal act notwithstanding that Patel is also a co-conspirator. Therefore, the Supreme Court held that the case of Tinsley no longer represented the law and found in favour of Patel by considering whether the public interest would be harmed by the enforcement of the illegal agreement, taking into account:

(i)

the purpose of the prohibition which has been transgressed, and whether the purpose would be enhanced by the denial of the claim;

(ii)

any other relevant public policy on which the denial of the claim may have an impact; and

(iii)

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.

The above three questions mitigated the harshness of the illegality defence and gave an element of structured discretion to the court to ensure justice is done, if so merited.

Notwithstanding the suitability of applying the test formulated in Patel v Mirza to negligence-based running down actions, as they are different causes of action, let's explore how the three questions could have been answered in the context of running down actions bearing in mind that the defence should be circumscribed by the legislative intent found in the RTA (the statutory context).

The question would be taking into account the three factors, whether the public interest would be harmed by the awarding of compensation despite the use of a motor vehicle in contravention of the provisions of the RTA which gives rise to the illegal conduct. When viewed from the first factor no doubt the denial of the accident claim will enhance the purpose intended to be *130 achieved by the provisions in the RTA which were breached. However, when viewed from the second factor whether "any other relevant public policy which the denial of the claim may impact" it would definitely impact the public policy considerations in s 91(1)(b) read with s 96, namely the intent that innocent road users must be assured of compensation. The third factor , the proportionality test when viewed in the light of the RTA being "a piece of social legislation" the denial of the claim would definitely not be a proportionate response to the illegalities in question and is best left to the criminal courts to mete out the punishment as provided for in the RTA itself. It will be noted in due course that the illegality defence in running down actions will in all likelihood fail at the proportionality test (third consideration) level.

Unfortunately, both their Lordships did not consider the public policy considerations contained in ss 91(1)(b), 94, 95 and 96 (1)(b) when applying the Patel v Mirza test in arriving at their decisions bearing in mind that the Supreme Court as well the Court of Appeal have categorised the RTA as "a piece of social legislation" in respect of running down actions.

English cases pre and post Patel v Mirza on the application of defence of illegality case in running down actions

The English cases herein preferred to look at running down actions based on causation and contributory negligence rather than applying the maxim of ex turpi causa to reduce or deny a claim even though the claimants were engaged in criminal conducts which had directly contributed to the accident unlike the recent cases where the non-existence of the relevant documents was not at all instrumental in causing the accident.

John McHugh (Administrator of the Estate of Christine McHugh (Deceased) v Ophelia Okai-Koi & Anor ("McHugh")

In this case, in the summer of 2013, Mrs Okai-Koi parked her car in the car park of the Lord Kitchener pub in New Barnet to visit a Sainsbury's supermarket across the road. When she came back, she was met by a very angry Mr and Mrs McHugh who were upset with Mrs Okai-Koi for illegally parking in the pub car park. She also said that Mrs Okai-Koi had parked so close that Mrs McHugh became extremely verbally aggressive towards Mrs Okai-Koi, and started to kick her car. Miss Okai-Koi then drove off, stopped at the exit to the car park to call the police. Mrs McHugh, who had been drinking heavily, thought that she was deliberately blocking their exit from the car park and jumped onto the bonnet of Mrs Okai-Koi's car. Mrs Okai-Koi panicked and drove off throwing Mrs McHugh from the bonnet of the car where she struck her head and died from the injuries. Mrs Okai-Koi was found guilty of causing death by careless driving. Mrs Okai-Koi's counsel argued that the maxim ex turpi causa applied in this case because *131 Mrs McHugh's conduct amounted to a number criminal offences and relied on the case of Patel v Mirza to dismiss the claim. His Lordship applied the considerations to the facts of the case and in particular, as regards the third consideration, held that, despite the obvious criminal nature of the conduct and its direct bearing on the outcome, the denial of the claim would not be proportionate in the circumstances and I quote,

I do not consider that the denial of the claim would be proportionate in the circumstances where Mrs Okai-Koi has been convicted of causing death by careless driving and where Mrs McHugh's actions were not the sole cause of the accident . (Emphasis added.)

His Lordship when answering the first consideration in Patel v Mirza found the analysis on causation in the judgment of his Lordship Richards LJ in McCracken v Smith[43] more appropriate and stated that in his views there were two causes of Mrs McHugh's accident — hers and her husband's criminal conduct and Mrs Okai-Koi's decision to move off with Mrs McHugh on the car's bonnet. Preferring to view it from the perspective of causation rather than the maxim of ex turpi causa , his Lordship apportioned responsibility 75/25 in favour of Mrs Okai-Koi based on contributory negligence after taking into account the "blameworthiness of the parties and the causative potency of their acts".

McCracken v Smith

Notwithstanding that McCracken v Smith was decided prior to Patel v Mirza it merits consideration here because the judgment of his Lordship Richards LJ in McCracken v Smith was the basis of the decision in McHugh . In McCracken v Smith , the rider of the trials bike was Damian and the pillion was Daniel, both 16 years old. Damian had no driving licence and no insurance and both were not wearing helmets and the bike was not built to carry a pillion. The bike was ridden too fast and in a

dangerous fashion (doing a wheelie) on a path reserved for cyclist and when the bike reached the entrance to a Community Centre at Weekton Road, Carlisle it collided with a minibus driven by Mr Bell which was turning right. Daniel sustained severe head injuries and sued Damian and Motor Insurers' Bureau ("MIB") (as the bike had no insurance) and Mr Bell. To cut to the chase, the Court of Appeal opined that the claim of Daniel against Damian and MIB should have been dismissed (although allowed at the High Court and not under appeal) on the ground that ex turpi causa applied because they were involved in a joint criminal enterprise to ride a bike dangerously (similar to Pitts v Hunt). However, when it came to the liability of Mr Bell to Daniel the court found that it would be wrong to use the "but for test" as there were two causes for the accident — Daniel's own criminal conduct and Mr Bell's negligence. The court held that the fact that criminal conduct was one of the causes was not a sufficient basis for the ex turpi causa defence to succeed . The right approach *132 was to give effect to both the causes by allowing Daniel to claim in negligence against Mr Bell but, if negligence was established, by reducing any recoverable damages in accordance with the principles of contributory negligence. Daniel was held 65% liable in contributory negligence (50% based on the degree of blameworthiness and 15% for failing to wear a helmet).

The judge in McCracken v Smith stated that the public interest would be best served by approaching the case between Daniel and Mr Bell on the basis of causation rather than ex turpi causa and found support for that in the statement of Lord Sumption in Les Laboratoires Servier v Apotex Inc[44] and I quote:

Lord Sumption has spelled out in Les Laboratoires Servier that the ex turpi causa defence is rooted in the public interest. The public interest is served by the approach I have indicated. It takes into account both the negligent driving for which Mr Bell is responsible and the dangerous driving for which Daniel is responsible. It enables damages to be recovered for the negligence of Mr Bell but not for Daniel's own criminal conduct. I see no reason why the court should instead apply a "rule of judicial abstention" (Lord Sumption in Les Laboratoires Servier , paragraph 23) and withhold a remedy altogether. (Emphasis added.)

Therefore, to withhold or reduce the damages in running down actions merely based on illegality in the recent cases due to the lack of relevant documents seem to run counter to the application of the same defence in England and Wales where illegal conducts are viewed from causative potency and blameworthiness. Such a view would serve the public interest.

The UK Law Commission Consultation Paper No. 160 on Illegality in Tort

The UK Law Commission in Consultation Paper No. 154 looked into the "Effect of Illegality on Contracts and Trusts" and proposed that the current law should be reformed legislatively rather than judicially, by the introduction of a statutory discretion, structured around a number of factors and the likeness of it can be seen in Patel v Mirza .

However, the UK Law Commission was not inclined to address the question of illegality as it operated in tort in Paper No. 154 as they were of the view that it involved different considerations. This in fact supports my earlier view that caution must be exercised when applying the defence of illegality as expounded in contract, trust or for that matter tort of deceit or misrepresentation because they involve different considerations, primary one being whether the wrongdoer might be profiting from his wrongdoing as compared to running down actions where the objective of awarding damages is to compensate.

*133 Paper No. 160 was devoted to reviewing the doctrine of illegality as it currently affects claims in tort in England and Wales and to comparatively look at how the doctrine has operated in a number of other jurisdictions and to reappraise the policies that lie behind the doctrine both in tort and more generally and finally to consider whether reform is necessary. Certain excerpts relevant to the topic in hand will therefore be highlighted from the Paper.

The UK Law Commission although was of the view that:

where the claimant is seeking damages as compensation for the direct consequences of his or her illegal acts …, [it] will generally continue to be barred by the courts.

However, it had reservation in respect of:

several situations in which … although there is an element of illegality involved in the circumstances surrounding the claim , and dicta in recent cases that the defence may be available, barring the claim cannot reasonably be justified on the policy rationales that underlie the doctrine of illegality . In such cases we find it difficult to argue that the claimant should still be denied what would be his or her " normal" rights under the civil law. Barring a claim where it cannot be justified on grounds other than

"criminals shouldn't have rights" or on an unreasoned, "gut-feeling" basis would be potentially disproportionate and wrong. (Emphasis added.)

The UK Law Commission stated:

… that the decision to bar a claimant from recovering damages in tort is a very serious one. It may mean that a claimant who has been barred from recovering damages for serious personal injury following a negligently caused accident will lose a substantial sum of money. He or she may have to fall back onto State benefits in respect of, for example, an inability to work as a result of the injury. In such a case this would involve both a substantial reduction in the sums available and a transfer of the financial responsibility from the defendant tortfeasor (or his or her insurers) to the public purse, the Criminal Injuries Compensation Authority, or possibly the Motor Insurers' Bureau. … Given these points, we have serious doubts as to the appropriateness of the illegality doctrine operating in the context of personal injury cases . This is a theme we develop during the course of this consultation paper.

In running down actions where the claimant does not have the relevant documents, it should fall, if at all, under class of cases "where there is an element of illegality involved in the circumstances surrounding the claim" but the illegality itself is only incidental to and not closely connected to the claim and therefore there should not be a basis for barring it. This need for a *134 close link between the claimant's act and the loss suffered was well stated by his Lordship Bingham LJ in Saunder v Edwards as follows:

Where the plaintiff's action in truth arises directly ex turpi causa , he is likely to fail … [w]here the plaintiff has suffered a genuine wrong, to which the allegedly unlawful conduct is incidental, he is likely to succeed ….

In running down actions based on the lack or relevant documents, there is no close link between the illegal conducts and claim and if at all it is only incidental. Therefore, in the recent cases, there was no reliance by the claimants on the illegal element in maintaining their claims and therefore the justification or rationale for invoking the defence definitely does not exist.

Also, the UK Law Commission was not convinced that deterrence was an important rationale for invoking the operation of the doctrine in tort because:

If the deterrent effect of the criminal sanctions that go along with those offences is not sufficient to prevent the commission of similar offences by others, then we find it difficult to say that preventing any civil claim that subsequently arises will add to that deterrent effect or be a more effective one.

A similar comment was made by his Lordship Diplock LJ in Hardy v Motor Insurers' Bureau :[46]

It seems to me to be slightly unrealistic to suggest that a person who is not deterred by the risk of a possible sentence of life imprisonment from using a vehicle with intent to commit grievous bodily harm would be deterred by the fear that his civil liability to his victim would not be discharged by his insurers.

Lastly, as stated by the UK Law Commission that barring or reducing the claim in running down actions purely on the basis of illegality due to lack of the relevant documents will have an adverse impact on society at large as the claimant will have to fall back on benefits provided by the State, as stated earlier.

The issue of double punishment

One of the rationales for the doctrine of illegality is that denial of the claim serves as a form of punishment and this was very evident as a rationale in the recent cases. The basic proposition of law is that punishment for an offence is a matter for the State and not for the individual so that the function of criminal and civil law is not blurred. Denial or reduction of a claim particularly in the case of normal running down actions on the basis of illegality, however incidental to the claim in question is, would undoubtedly *135 tantamount to punishment. Since those road traffic offence provisions have their own inbuilt punishments, revisiting them in the guise of illegality in civil claims would definitely tantamount to double punishment and would be double jeopardy.

In fact, in Paper No. 160 the UK Law Commission was of the view that punishment does not provide a sufficient rationale for the existence of the doctrine of illegality in tort, and that therefore the court should only allow the illegality defence where it can be justified on policy rationales other than punishment.

Apportionment of liability based on illegality

In Mohd Shahril bin Abdul Rahman , liability was enhanced by 30% due to the illegality arising from the lack of the relevant documents. Normally, if illegality is founded it will be a complete bar to the claim but can the claim be apportioned on the same ground to reflect the impact of the illegal conduct on the claim? This was considered in Paper No. 160 and the UK Law Commission was of the view that apportionment did not properly reflect the rationales behind the illegality doctrine and stated that the doctrine should only be used "for extreme cases" and to "allow the court to treat it in much the same way as contributory negligence would, we feel, risk it developing into a doctrine of more frequent usage". Also, because of the numerous ways in which transgression of traffic rules can happen to allow apportionment based on illegality will give rise to arbitrary outcomes not in tandem with the actual cause of the accident.

Practical consideration

When the courts depart from established law (similar to when new law is enacted or amended) the new decision must be capable of practical application to produce a fair and just result when applied in all factual situations. Let's see what happens if the decisions in the recent cases are applied to the defendant tortfeasor in the following factual scenarios: say a motorcar on the main road is collided into by a motorcycle negligently exiting a junction. Assuming the motorcyclist possesses all the relevant documents while the driver of the motorcar has valid insurance and road tax but no driving licence. If based on the decisions in Muhammad Noor Redzuan Misran and Lee Chee Kuan that " the law cannot protect one who has no regard of the law" than notwithstanding that the negligence as understood in common law is on the motorcyclist for failing to stop and give way to vehicles on the major road the court will have to hold the driver of the motorcar 100% liable. This is based on the question asked by his Lordship "if he is NOT on the road because he is unlicensed or without road tax, would there be any vehicle in front of the respondent to knock into?"

*136 Or in the same scenario based on the decision in Mohd Shahril bin Abdul Rahman can the motorcyclist argue that per se he is entitled to 30% of the claim based on the fact that the driver of the motorcar did not have a licence without proof of negligence against the driver of the motorcar.

Let's look at another factual scenario. What would be the outcome if a motorcyclist travelling on the main road with two pillions, namely his wife and child, a common sight in Malaysia, but in possession of all the relevant documents and is collided into negligently while exiting a junction by the driver of a motorcar with all the valid documents and the rider and the pillions are seriously injured. As it is an offence to carry more than one pillion, based on the decision in Lee Chee Kuan all three claims would be tainted by illegality and fail despite the absence of negligence. Or in the same scenario how will the illegality be apportioned among the various claimants as all are aiding and abetting the commission of the offence in a manner of speaking. Will the illegality visit the child also? Apportionment without proper basis and limits can give rise to arbitrary or capricious outcome.

There are so many scenarios that can be envisaged as regards transgressions of traffic rules and regulations other than lack of the relevant documents which can fall within the realm of illegal conduct and if the defence of illegality is allowed to flourish without clear rationale it will result in manifest injustice. That is why the UK Law Commission in Paper No. 160 was of the view that the doctrine of illegality has very limited application in personal injury claims and more so in running down actions. This is also in tandem with the views expressed by the Court of Appeal in Tay Lye Seng and the Supreme Court in the case of Chua Kim Suan .

Conclusion

The use of a motorised vehicle on a road without complying with the requirements in ss 15, 23, 26 and 90 cannot be condoned as the concerns expressed by their Lordships in the recent cases are undoubtedly justified. At the same time, the invocation of the doctrine of illegality without justifiable rationale can produce undesirable results. Such fear is more evident in tort, especially in negligence-based personal injury claims than in trust or contract cases. The conundrum is, does the non-compliance merit the invocation of the doctrine of illegality to deny or reduce a lawful claim for compensation in running down actions. The preponderance view supported by authorities, both local and foreign as discussed above and the view of the UK Law Commission is that the maxim ex turpi causa has only a limited role to play in tort and should not in the case of negligence-based personal injury claims such as running down actions, as the denial of the claim is seldom proportionate to the transgressions in question. Further and more importantly, such denial or reduction undermines the policy consideration found in s 91(1)(b) read with s 96(1). The rationale if at all for invocation of the said doctrine as a form of punishment and deterrence would be better achieved if, the punishments for the offences in ss 15, 23, 26 and 90 are best *137 left to the Public Prosecutor to prosecute such offences as stated in the recent Court of Appeal case of Ahmad Zulfendi bin Anuar v Mohd Shahril bin

Abdul Rahman[47] rather than the dismissal or reduction of the civil claim.

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2. [[2019] AMEJ 1818; [2019] 1 LNS 2310, HC.]

3. [[2021] 5 AMR 915, HC.]

4. [[1775] 1 Cowp 341.]

5. [The Law Commission Consultation Paper No. 160 — The Illegality Defence in Tort; para 1.25.]

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9. [[1997] 4 MLJ 237.]

10. [[1949] 2 KB 291.]

11. [[1940] AC 152 at 164.]

12. [[1970] 2 MLJ 25; [1970] 1 MLRA 63; CA.]

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19. [[1982] 2 MLJ 354, HC.]

26. [[1942] 1 All ER 529; [1942] 2 KB 53.]

27. [[1979] 2 MLJ 29.]

28. [[2020] 2 AMR 211; [2019] MLRAU 418, CA.]

32. [1987] 1 WLR 1116.]

33. [[1990] 1 QB 1 at 35.]

34. [[2000] 1 Lloyd's Rep 218 at 227.]

35. [[2001] 1 WLR 225 at 248.]

36. [[1983] 2 MLJ 324.]

37. [[1998] 3 AMR 3145; [1998] 3 CLJ 466, CA.]

38. [[1991] 1 QB 24.]

39. [[1981] 1 QB 137.]

40. [[2010] 1 AMR 501; [2009] 6 MLJ 450; [2009] 6 CLJ 626, CA.]

41. [[1992] Ch 310.]

43. [[2015] EWCA Civ 380.]

44. [[2014] UKSC 55; [2014] 3 WLR 1257.]

46. [[1964] 2 QB 745 at 770.]

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