# *Ex Turpi Causa*: Negligence and Dangerous Drivers

**Ray Ryan**
**LL.B. (Dub)., LL.M. (Dub)., Barrister at Law.**

The principle of *ex turpi causa non oritur actio*, famously enunciated by Lord Mansfield as long ago as in the case of *Holman v Johnson* (1775) 1 Cowp 341 is one which seldom arises in negligence cases. As Lord Asquith put it over 50 years ago, "[c]ases where an action in tort have been defeated by the maxim are exceedingly rare" (*National Coal Board v England* [1954] AC 403, 428). Conceptual confusion has characterised the (admittedly scanty) judicial approaches to the maxim, particularly as regards its overlap with the defences of contributory negligence and voluntary assumption of risk provided for in s 34 of the Civil Liability Act 1961. In an important and welcome judgment in the case of *Anderson v Cooke* [2005] IEHC 221 (High Court, unreported, June 29, 2005) Finnegan P recently afforded consideration to a plea of *ex turpi causa* in a negligence action arising from a motor accident. The judgment provides a valuable insight into, *inter alia*, current thinking on the nature of the *ex turpi* plea, the rationale for its existence, and its interplay with the related defences of contributory negligence and voluntary assumption of risk.

## BACKGROUND

The factual background to the *Anderson* case is compelling, and is reminiscent of the facts in the famous Supreme Court case of *McComiskey v McDermott* [1974] IR 75. The facts of *Anderson*, as accepted by Finnegan P, may be summarised as follows. Prior to the date of the accident (November 18, 2001), the plaintiff and defendant had known each other for a number of months. They had originally met in a car park where motor enthusiasts meet and discuss cars. In the months leading up to the accident, both parties were users of a website called *maxed.ie.net* and both had usernames and passwords for that site. In addition to communicating with each other via this website, the parties had met at car parks on several occasions and had exchanged phone numbers. On the day of the accident, the plaintiff telephoned the defendant and they agreed to meet. The plaintiff suggested that they take the defendant's car in order to see how fast it would go. The vehicle model was a Toyota Corolla Twin Cam GTI, which has a far more powerful engine than a standard 1.6 Corolla and is used for motor sport purposes. The object of the expedition was to take a photograph of the speedometer which could then be posted on the internet site. The defendant agreed to the proposed scheme. On the night of November 18, 2001, the Port Road in Waterford was practically deserted. The parties met as they had earlier arranged. The plaintiff prepared his camera and the defendant then set off at high speed with a view to reaching the highest possible speed in the car. On the first run, the plaintiff removed his seatbelt so that he could lean over and take a photograph of the speedometer. On that first run, the car travelled in excess of 125 mph. They then made a second run starting down the Port Road but did not achieve the same speed. As they were coming to the end of the Port Road the defendant was slowing down when the accident happened. As the plaintiff did not take any photographs on this second run, there was no indication of the speed reached. The accident occurred when the back of the car spun out to the left, causing the car to go out of control onto the right hand side of the road and collide with a pole. The defendant estimated that his speed at the time at which the car went out of control was 110 mph.

## THE ISSUES IN THE HIGH COURT

In response to the plaintiff's negligence claim, the defendant mounted three specific defences. First, he alleged that the plaintiff had voluntarily assumed the risk and had thereby agreed to waive his legal rights within the meaning of s 34(1)(b) of the Civil Liability Act 1961. Second, a plea of *ex turpi causa non oritur actio* was raised. Since the parties were at all material times engaged in a common or joint criminal enterprise, namely driving at maximum speed and in excess of the speed limit, the defendant argued that the plaintiff was thus precluded from pursuing his claim under the principle of *ex turpi causa*. Third, the defendant pleaded contributory negligence on the part of the plaintiff.

## VOLENTI NON FIT INJURIA

The first limb of the defence mounted involved a plea of *volenti non fit injuria* or, more accurately, the attenuated form of *volenti* embodied in s 34(1)(b) of the Civil Liability Act 1961. This provides as follows:

> "This subsection shall not operate to defeat any defence arising under a contract or the defence that the plaintiff before the act complained of agreed to waive his legal rights in respect of it, whether or not for value; but, subject as aforesaid, the provisions of this subsection shall apply notwithstanding that the defendant might, apart from this subsection, have the defence of voluntary assumption of risk".

As is well known, the effect of this provision was considered at length in the Supreme Court judgment in *O'Hanlon v ESB* [1969] IR 75 where the court held that *volenti non fit injuria* was no longer a defence in Irish law unless it could be established that there existed agreement between the parties. The relevant passage of the judgment of Walsh J in that case, to which Finnegan P referred in *Anderson*, reads as follows:

> "Under the terms of the Act of 1961 the Defendants must establish that the Plaintiff agreed to waive his legal rights in respect of the act complained of and that such agreement was made before the act .... In my opinion, the use of the word 'agreed' in the Act of 1961 necessarily contemplates some sort of intercourse or communication between the Plaintiff and the Defendants from which it could be reasonably inferred that the Plaintiff had assured the Defendants that he waived any right of action that he might have in respect of the negligence of the Defendants. A one sided secret determination on the part of the Plaintiff to give up his right of action for negligence would not amount to an agreement to do so. Such a determination or consent may be regarded as 'voluntary assumption of risk' in the terms of the Act but, by virtue of the provisions of the Act and for the purposes of the Act, this would be contributory negligence and not the absolute defence mentioned in the first part of subs (1)(b) of s 34".

Unsurprisingly, applying this approach to the instant case, Finnegan P was satisfied that the evidence has not established any such contract or agreement between the parties; the plea of *volenti non fit injuria* thus failed. Of course, as the final portion of the above passage from Walsh J's judgment indicates, there remained open to the defendant the option of pleading contributory negligence in relation to the same conduct of the plaintiff. As we shall see presently, this line of argument was to prove unnecessary. Having disposed of the *volenti* point, Finnegan P then proceeded to provide more comprehensive treatment of the status of the plea of *ex turpi causa* in Irish law. It is this aspect of the judgment that we now consider.

## EX TURPI CAUSA

Section 57(1) of the Civil Liability Act 1961 provides that it "shall not be a defence in an action of tort merely to show that the plaintiff is in breach of the civil or criminal law". According to Finnegan P, the effect of s 57(1) was "to modify but not to abolish the defence of *ex turpi causa*". Noting that there had for some time existed uncertainty as to whether the maxim applied to actions based on contract only, Finnegan P regarded it as "now well settled" that the maxim is equally applicable to tort actions, but noted that it had in recent yeas been refined so that it is "not every crime committed by the [p]laintiff which would cause his claim to be non suited". Finnegan P referred, *inter alia*, to the seminal English House of Lords' decision in *National Coal Board v England* [1954] AC 403 and noted that in that case Lord Porter had expressly located the *ex turpi causa* maxim in a public policy rationale. Thus, wrongdoing on the part of the plaintiff would not necessarily preclude him from bringing a claim where the court could be satisfied that to provide redress for the plaintiff would not offend against policy.

Finnegan P recognised, however, that the *ex turpi* maxim is more likely to have application in circumstances of joint illegal activity. Finnegan P also referred to a number of Australian cases on point (the most important of which is *Gala v Preston* (1991) 100 ALR 29)) and following a consideration of this jurisprudence set out his conclusions on s 57(1) of the 1961 Act as follows:

> "1. When confronted with a plaintiff who has engaged in illegal conduct leading to loss to the plaintiff, the role of the court is, *inter alia*, to examine the policy of the statute or common law under which the plaintiff's illegality arises and to then determine if a duty of care exists.
>
> 2. Under the 1961 Act, even in cases of a criminal act in which both parties are jointly engaged, the court is required to enquire on the basis of proximity whether a duty of care arose on the part of the defendant to the plaintiff in the circumstances of the particular case. In the event that the court is unable to determine whether a duty of care arose, the plaintiff's claim will fail".

It should be noted that Finnegan P took the view that, as the operation of the *ex turpi* causa maxim was "historically ... policy based", he considered it:

> "appropriate that the Court may itself raise the issue even if the Defendant does not: there are cases in which the Court has regarded it as contrary to policy to lend assistance to a Plaintiff involved in joint illegal activity even though the defence of *ex turpi causa* is not raised by the Defendant by way of defence".

This passage is interesting, for it touches upon the debate about the precise status of the operation of the *ex turpi* principle and, in particular, whether it is accurate to speak of it as constituting a *defence*. In light of the above statement of Finnegan P, it seems otiose to speak of *ex turpi* as a defence to a claim if, as Finnegan P suggests, it is open to the court itself to dismiss a case on this ground even where the defendant does not

plead same. It thus appears preferable to consider *ex turpi* as preventing the coming into being of a valid claim in the first place, rather than merely operating so as to defeat an otherwise sustainable cause of action. It is true enough that the distinction may not be of practical consequence. Nevertheless, the tendency of the courts to house the *ex turpi* principle in the rationale of public policy is afforded greater credibility when *ex turpi* is itself recognised as an inherent power of the court to dismiss unmeritorious claims. In so doing, the public policy rationale is strengthened through a refusal to recognise the validity of the claim *in the first place*. Conversely, by instead accepting that the plaintiff has made out a good cause of action, only to be defeated at the eleventh hour through the invocation of a defence, the law would appear to be undermining the very public policy criteria it seeks to associate with *ex turpi*. As such, we consider that the better view is to regard *ex turpi* not as a defence but rather as a barrier to a claim, and that this position, though not expressly reached by Finnegan P, is a logical conclusion from his reasoning in this part of the judgment in *Anderson*.

## EFFECT OF DANGEROUS ACTIVITY ON ADJUDICATING UPON EXISTENCE OF DUTY OF CARE

Finnegan P concluded that, in the circumstances, it was not possible to determine the duty of care which the defendant owed to the plaintiff having regard to the illegal enterprise upon which they were both engaged. Finnegan P explained that if the joint enterprise had been that the car should be driven at 70 mph where the speed limit was set was at 60 mph, then "the court might well be in a position to establish the standard of care owed by the driver to the passenger". However, in the present case the learned judge could not establish the duty of care, if any, which was owed by the defendant to the plaintiff in order to determine if there was a breach of the same. He explained that the denial of relief was "related not to the illegal character of the activity but rather to the character and incidents of the enterprise upon which the plaintiff and the defendant are engaged and to the hazards which are necessarily inherent in its execution". In view of the fact that Finnegan P was unable in the circumstances to determine the duty which was owed by the defendant to the plaintiff and accordingly to determine whether or not there was a breach of that duty, the plaintiff's claim failed. (For this reason, the defendant's third ground of defence, *volenti non fit injuria* as going towards contributory negligence, did not require consideration). In our view, the decision arrived at by the learned President is eminently sensible. It surely ought to be a rare case indeed that when an adult consents to participate in an activity as irregular and fraught with risk as in the instant case that he should subsequently be able to sustain a negligence action against his fellow participant. That said, however, a caveat must entered. In our view, it would be preferable to dismiss a claim in a case such as this by holding that the duty of care was not breached, as opposed to holding that no duty existed in the first place. With respect, a duty of care *does* exist. Are not the courts frequently called upon to pronounce on the standard of care applicable to unusual activities in which real risks inhere? One need think only of cases involving injuries sustained in the course of sporting activities, upon which reasonableness standards cannot be smoothly superimposed. So, in the important case of *Caldwell v Maguire* [2001] EWCA Civ 1054; [2002] PIQR P6 the English Court of Appeal dismissed the plaintiff's action in negligence against two fellow jockeys, after he had sustained a fall in a horse race due to their careless riding of racehorses. Crucially, however, at no stage was it suggested that plaintiff's claim was unsustainable because no duty of care arose. Manifestly, such a duty existed, but the careless jockeys were relieved of liability because in all the circumstances (racehorses galloping side by side at a furious pace) the jockeys had not breached the (highly particularised) duty which they owed to the plaintiff as a fellow jockey. That is to say, in these cases the threshold of liability will naturally be high, but it is unsatisfactory to deny the existence of a duty of care merely because the assessment of the standard of care presents unusual difficulties. The whole essence of the individuated duty of care is that it is distinct from the normal reasonableness standard precisely because the unusual circumstances prevailing are ones in which the risk of injury inheres. If the courts are to refuse to recognise the existence of the duty of care in cases where there was an inherent risk of injury, that would allow defendants who had acted in blatant disregard of the safety of a "neighbour" to evade liability simply by highlighting that risks inhered in the activity in which the parties were participating. The desired response in these difficult cases, in our view, is for the courts to inquire whether, in all the circumstances of the case, the defendant's behaviour falls short of what would have been done by the reasonable man who found himself in those circumstances.

## CONCLUSION

It has been observed that "the ritual incantation of the maxim *ex turpi causa non oritur actio* is more likely to confuse than to illuminate"(*per* Balcombe LJ in the English Court of Appeal case of *Pitts v Hunt* [1991] 1 QB 24, 49). This recent judgment of Finnegan P is therefore most welcome. While Finnegan P has provided detailed comparative analysis of the operation of the *ex turpi* principle, its precise ambit and rationale do, however, remain somewhat elusive. Moreover, the approach taken in *Anderson* towards the difficulty of determining a duty of care in the circumstances of the case arguably represents an over-cautious approach to cases of this nature where the inherent dangers of the venture obscure an assessment of the duty question. Obscurity, after all, is not the same as opacity, and it is submitted that a greater willingness to determine a duty in such cases is to be preferred over an approach which falls shy of engaging with an individuated approach to the duty of care.