

Neutral Citation No: [2019] NICTy 2

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*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

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2019/003159

IN THE COUNTY COURT FOR NORTHERN IRELAND

SITTING IN ARMAGH

BETWEEN:

Gemma Magill

Plaintiff

and

Emma Donnelly

Defendant

District Judge Gilpin

Introduction

[1] On Friday 16 November 2018 the Vehicle Test Certificate (“MOT Certificate”) certifying the roadworthiness and compliance with certain environmental standards on the Plaintiff’s VW Golf GT TDI expired.

[2] By Tuesday 20 November 2018 the Plaintiff’s vehicle had been left into a garage for a pre-MOT inspection check.

[3] On Wednesday 21 November 2018 the Plaintiff collected her vehicle from this garage. She then proceeded to park it temporarily at Railway Street in Poyntzpass. While the vehicle was parked there and unoccupied the Defendant reversed into it causing damage to the vehicle. Thus, when the collision occurred there was no valid MOT Certificate covering the Plaintiff’s vehicle.

[4] The Plaintiff thereafter engaged the services of an accident management company, Crash Services Limited (“Crash”), to assist her in resolving some of the issues arising out of the collision caused by the Defendant.

[5] In due course the Plaintiff had her vehicle repaired by WA Graham of Bessbrook at a cost of £1500.00. The Defendant accepts she must compensate the Plaintiff for this cost of repair.

[6] During the 15 days the Plaintiff's vehicle was being repaired at WA Grahams she was provided with a replacement vehicle to use in the form of another VW Golf. The costs of hiring this vehicle including certain miscellaneous outlays associated with the hire and temporary insurance amounted to £1,284.98 ("the disputed amount"). The Defendant objects to paying this disputed amount.

[7] At the hearing of this matter the Plaintiff gave evidence that she had mistakenly believed that once the MOT Certificate expired on Friday 16 October 2018 she had a two week period of grace to obtain a new MOT Certificate. She also gave evidence that when she collected her vehicle from the garage on Wednesday 21 November 2018 she had intended to contact the MOT Test Centre the next day to book an appointment which she believed she could get at short notice.

[8] However, Article 63 of The Road Traffic (NI) Order 1995 requires any person using certain vehicles on any road or other public place to have a valid MOT Certificate. Certain exemptions to this general requirement are provided for in the Motor Vehicle Testing Regulations (Northern Ireland) 2003 but these do not include the period of grace the Plaintiff suggested she believed she enjoyed.

[9] Furthermore, using a vehicle on a road or other public place without a valid MOT Certificate is a fixed penalty offence as provided for by the Road Traffic (Fixed Penalty) (Offences) Order (Northern Ireland) 1997.

[10] Returning to the facts of the instance case I do not accept that the Plaintiff genuinely believed that she had a period of grace to Friday 30 November 2018 to obtain a new MOT Certificate and in the interim that she was permitted to drive lawfully on a public road. In my view she knew it was unlawful to have her vehicle on the public road on Wednesday 21 November 2018 when the collision occurred. That having been said in having her vehicle subjected to a pre-MOT check I am satisfied that the Plaintiff was intending shortly thereafter to submit her vehicle for inspection with a view to obtaining a new MOT Certificate. However her use of the vehicle in the way that she did after the expiration of the previous MOT Certificate and her casual attitude to obtaining an appointment for a test are far from commendable.

The issue in the case

[11] The Defendant in this case argues that she is not responsible to pay the disputed amount because at the time the accident occurred the Plaintiff was engaged in an unlawful act namely having her vehicle on the public road without an MOT Certificate being in force.

[12] In short the Defendant invites the court to find that the defence of *ex turpi causa* ("illegality") is made out.

The Defendant's submissions

[13] Mr John Dowey Barrister at Law on behalf of the Defendant submitted that the Plaintiff cannot recover damages which are consequential on her illegality. The gist of his argument is that the illegal conduct of the Plaintiff in the instant case was of such a character to deprive her in recovering the disputed amount.

[14] In support of this argument he relied on inter alia the decisions in *Patel v Merza* [2016] UKSC 42; *Hewison v Meridian Shipping Services PTE Ltd & others* [2002] EWCA Civ 1821; *Ashmore, Benson, Pease & Co Ltd v Dawson* [1973] 1 WLR 828; *Agheampong v Allied Manufacturing (London) Ltd* [2008] and in this jurisdiction the recent decision of Burgess J in *Morgan v Bryson Recycling Limited* [2018] NIQB 12.

[15] In *Morgan v Bryson Recycling Limited* the Plaintiff's vehicle had been damaged in a road traffic collision for which the Defendant accepted liability. The Plaintiff sought to recover the costs of damage to his vehicle, certain vehicle storage costs and the costs of hire of a replacement vehicle he used while his own was being repaired. The Defendant disputed the storage and hire elements of the claim on the basis that the Plaintiff had been using his vehicle for four months without it having a valid MOT Certificate and further in the absence of an MOT Certificate the vehicle also had no valid insurance cover. The Defendant relying on the doctrine of illegality disputed that the Plaintiff was entitled to recover the cost of hire and storage since when he was using his car at the time of the accident he was committing two criminal offences: driving without a valid MOT Certificate and driving without insurance. The Plaintiff however contended that the defence of illegality did not apply as liability for the accident had been conceded.

[16] Burgess J held that the Plaintiff had or should have been aware of his obligations regarding an MOT Certificate. In addition he found that the Plaintiff should also have been aware of the lack of insurance cover in the absence of such an MOT Certificate being in force. Burgess J held that while the two offences that therefore arose were not the most serious they were not insignificant and thus found the defence of illegality to be made out and dismissed the Plaintiff's claim for both storage and hire.

[17] Mr Dowey suggests that the facts of the instance case are similar to those in *Morgan* and this court should arrive at the same conclusion as Burgess J did.

The Plaintiff's submissions

[18] Mr Michael Ward, Barrister at Law, on behalf of the Plaintiff submitted that the Defendant has failed to make out the defence of illegality and thus the Plaintiff should be entitled to recover the disputed amount. He argued that the unlawful conduct of the Plaintiff lacked the necessary character to engage the illegality defence.

[19] Mr Ward placed reliance on the recent decision of the Supreme Court of the United Kingdom in *Patel v Mirza* [2016] UKSC 42 in which the court had the opportunity to revisit the defence of illegality with the majority adopting a new 'range of factors' test to decide if the defence in any particular case is made out.

[20] He also relied on the judgment of Sir Murray Stuart-Smith in *Vellino v Chief Constable of the Greater Manchester Police* [2002] 1 WLR 218 in which the judge suggested that the authorities supported a proposition that for illegality to apply the facts situation which gives rise to the claim must be "inextricably linked" with the criminal activity. Furthermore, Mr Ward drew support from Sir Murray's distillation of the case law that the "criminal conduct has to be sufficiently serious to merit the application" of the defence of illegality.

[21] Mr Ward invited me not to follow the decision of Burgess J in *Morgan* as he submitted it had been "wrongly decided" claiming it was in conflict with the decision of the Supreme Court in *Patel* and certain decisions of the Court of Appeal in England & Wales. Furthermore, he argued that *Morgan* could be distinguished on its facts from the instant case in that in *Morgan* as well as the lack of a valid MOT Certificate the Plaintiff's car was not insured at the date of the collision. In the instant case he argued, correctly, that no evidence has been adduced by the Defendant that the Plaintiff's insurer had voided her policy of insurance thus resulting in the Plaintiff committing a further illegal act namely of driving her vehicle without a valid policy of insurance being in force.

Discussion

[22] While the Defendant accepts her liability to pay the costs of repair of the Plaintiff's vehicle in respect of the costs of hiring and insuring the replacement vehicle they seek to rely on the defence of illegality.

[23] This long-established defence that no action should be founded on an illegal act is considered to be a special rule of important public policy.

[24] An expression of the early form of this defence can be found in *Holman v Johnson* [1775] 1 Cowp 341 where Lord Mansfield said:

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

[25] Today the common law does not require that a Plaintiff will never recover in a tortious claim where there is a backdrop of criminality. As time has passed the illegality defence has become somewhat diluted with the courts showing some willingness to engage in an apportionment of responsibility.

[26] Bingham LJ explained in *Saunders v Edwards* [1987] 1 WLR 1116, 1134 why the courts are now willing to take such an approach when he said:

“... it is unacceptable that the court should, on the first indication of unlawfulness 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 conduct.”

[27] In *Vellino v Chief Constable of Greater Manchester Police* [2002] 1 WLR 218 para 48 Sedley LJ noted that:

“In road traffic accident cases, for example, it is common enough to find that the injured claimant has contributed to the accident by speeding or driving with faulty brakes; but I know of no decision that such a claimant cannot sue another driver who has negligently caused his injuries. Nor can I see any justice in so deciding when the criminal law is there to deal with his criminality and the power to apportion damages will deal with his own contribution to his injuries.”

[28] Therefore, the courts now have a balance to strike between not lending their aid to a Plaintiff who is pursuing a claim which has as a backdrop of criminality and creating a class of Plaintiffs barred from seeking justice.

[29] This balance has been something of a struggle for the courts to achieve. As Ward LJ put it succinctly in *Delaney v Pickett* [2011] EWCA at para 34 it is difficult:

“to find a coherent path of principle or policy which will lead to the right outcome in the particular case.”

[30] The difficulties the courts have experienced seems to arise from the fact the public policy lying behind the defence of illegality is not based upon a single justification but on a group of reasons which vary in different circumstances.

[31] In recent times the Supreme Court of the United Kingdom had the opportunity to revisit the defence of illegality in *Patel v Mirza* [2016] UKSC 42.

[32] In *Patel* the claimant advanced funds to the respondent for him to invest in a bank of which the claimant had insider knowledge. The respondent did not however invest the funds. The defendant however did not return the sums advanced, saying he need not return it because the contract was for an illegal purpose. In *Patel* the Supreme Court sought to resolve what it suggested was “an incoherent mass of inconsistent authority” by adopting a new ‘Range of Factors’ test.

[33] In advancing a new “range of factors” approach Lord Toulson said:

“.... I would not attempt to lay down a prescriptive or definitive list because of the infinite possible variety of cases.”

Potentially relevant factors include the seriousness of the conduct, its centrality to the contract, whether it was intentional and whether there was marked disparity in the parties' respective culpability."

[34] As can be seen from this passage the Supreme Court did not lay down an exhaustive list that is to be mechanistically applied to the facts of each case. What seems to now be required is that the court must now take into account the broad circumstances of the case rather than simply a question of whether the Plaintiff is relying upon their own wrongdoing.

[35] While Lord Toulson appears to have found helpful the range of factors that Professor Burrows set out in his Restatement of the English Law of Contract (OUP 2016) in *Patel* the Supreme Court did not lay down firm guidelines as to which factors a court ought to apply in a given case. However, what Lord Toulson did say was:

"Potentially relevant factors include the seriousness of the conduct, its centrality to the contract, whether it was intentional and whether there was a marked disparity in the parties' respective culpability." [Para 107]

[36] In the context of the instant case it seems to me important to keep in mind as Sir Murray Stuart-Smith said in *Vellino*:

"Generally speaking a crime punishable with imprisonment could be expected to qualify. If the offence is criminal but relatively trivial, it is in any event difficult to see how it could be integral to the claim." [Para 70(3)]

Furthermore, as Clarke LJ said in *Hewison* a:

"..... court should not deprive the claimant of part of the damages to which he would otherwise be entitled because of the defendant's negligence or breach of duty by reason only of some collateral illegality or unlawful act." [Para 43]

And, finally in *Joyce v O'Brien & Anor* [2013] EWCA Civ 546 Elias LJ said of illegality:

"The doctrine will not apply, for example, to minor traffic offences." [Para 51]

[37] In relation to the judgment of Burgess J in *Morgan* which the Defendant urges me to slavishly follow I accept that decisions of a higher court are ordinarily binding on a lower one. As the County Court sits beneath the High Court in the judicial hierarchy I am thus ordinarily bound by the decision of the High Court. While in

Morgan Burgess J was sitting in an appellate capacity I accept I am bound by the decision of the High Court even if it were sitting at first instance. *Howard de Walden Estates Ltd v Aggio, Earl Cadogan v 26 Cadogan Square Ltd* [2007] EWCA Civ 499. However, given the law as it currently stands requires the court to take into account a broad view of the circumstances of each case it seems to me necessary to conduct a case specific inquiry in each case. The circumstances of the instant case differ from those in *Morgan*. I note in particular that in *Morgan*, Burgess J was dealing with two unlawful acts of the Plaintiff while in the instant case there is just one. Furthermore, in *Morgan* several months had passed since the MOT Certificate had expired before the collision occurred in the instant case it was but a few days.

[38] In the instant case regrettable as the conduct of the Plaintiff was it is not of a sufficient character to allow the Defendant to avail of the defence of illegality. The failure to have a valid MOT Certificate at the time of the collision was a minor road traffic offence. While the Plaintiff had a casual attitude to the requirement to maintain at all times a valid MOT Certificate by the time of the collision she had gone to the effort of having her vehicle subjected to a pre-MOT inspection and seemingly intended shortly thereafter to submit her vehicle for examination. Her conduct was not of such a nature that this court should deprive her of recovering the disputed amount to which she would otherwise be entitled because of the defendant's negligence. To deny the Plaintiff's claim would be a disproportionate response to her illegality. She is thus entitled to recover the disputed amount.