Case No: J90PE925
Neutral Citation Number: [2024] EWHC 3500 (KB)

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PETERBOROUGH DISTRICT REGISTRY
SITTING IN CAMBRIDGE COUNTY COURT

Date: 3 October 2024

Before :

HHJ KAREN WALDEN-SMITH sitting as a Judge of the High Court

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Between :

DARCIE PATRICIA FRANCES BERRESFORD	**Claimant**
- and -	
(1) SYED MASROOR HAIDER SHAH	**Defendants**
(2) CALPE INSURANCE COMPANY LIMITED	

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ANNIE MACKLEY (instructed by **SLATER & GORDON**) for the **CLAIMANT**
DANIEL TOBIN (instructed by **DWF LAW LLP**) for the **DEFENDANTS**

Hearing dates: 26 and 27 September 2024

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HHJ Karen Walden-Smith:

1. On 20 October 2019, Darcie Patricia Frances Berresford (Ms Berresford) was being conveyed with her friend, Jodie Megan Dunbar (Ms Dunbar), in a taxicab being driven by Syed Masroor Haider Shah (Mr Shah). At that time Ms Berresford was aged 17 (her date of birth being 30 December 2001) and Ms Dunbar was aged 15 (her date of birth being 23 October 2001). There was some examination of Ms Dunbar that she was celebrating her 16th birthday the day after the incident.

2. Mr Shah was a very experienced taxi driver. At the time of the incident, he had been driving cabs since 1997 and he has given evidence that he had a clean driving licence.

3. The circumstances of what happened that evening are in dispute between the parties and it is a part of Mr Shah's defence to the claim that Ms Berresford, and her friend Ms Dunbar, were engaged in criminal activity, namely fare dodging (more formally making off without payment contrary to the provisions of section 3 of the Theft Act 1978), when the accident occurred with Ms Berresford falling out of the still-moving cab causing her to hit her head and suffer personal injury. Mr Shah seeks to rely upon that alleged engagement in illegal activity as raising the defence of *ex turpi causa.*

4. This is the liability-only trial in which the court has a number of determinations to make:

   (i) The factual matrix;

   (ii) Whether Mr Shah was negligent. Was Mr Shah was acting in breach of a duty owed to Ms Berresford and, if so, whether her injury was foreseeable;

   (iii) If he were negligent, can he avail himself of the defence of *ex turpi causa* on the grounds that (a) Ms Berresford was carrying out an illegal act, and (b) that such an illegal act should be a bar to her claim;

   (iv) Whether, as a separate issue to illegality, Ms Berresford contributed to her own injury by failing to take reasonable care for her own safety.

Mr Shah's Witness Statement

5. Prior to hearing any evidence or submissions with respect to liability, I dealt with a late application made on behalf of Ms Berresford for the exclusion of the witness statement of Mr Shah. The application was not made until 23 September 2024 and was not served upon Mr Shah's representatives until after close of business on 23 September 2024, therefore less than 3 clear days before the commencement of the trial on 26 September 2024. There was no explanation for the application being so very late other than it was a point that had been noted by counsel when she was instructed for the purpose of attending trial.

6. The issue raised on behalf of the claimant was that there had been a failure on the part of the defendant to comply with the provisions of the practice direction to CPR 32, in particular paragraph 18.1 and 23.2. 32PD18.1 provides that *"The witness statement must, if practicable, be in the intended witness's own words and must in any event be drafted in their own language."* 32PD23.2 provides that "*Where a witness statement is in a foreign language – (a) the party wishing to rely on it must – (i) have it translated; and (ii) file the foreign language witness statement with the court; and (b) the translator must sign the original statement and must certify that the translation is accurate."*

7. For the reasons I set out in detail in the extempore judgment I gave on 26 September 2024 when dealing with this discrete point (which I will not repeat here and which can be referred to if necessary), the witness statement of Mr Shah is substantively defective. However, in accordance with the principles set out in *Correia v Williams* [2022] EWHC 2824, I gave permission for Mr Shah to rely upon this witness statement.

8. I am mindful, however, of the defects in Mr Shah's witness statement and I place greater reliance on what was said by Mr Shah to the police at the time of the incident as a more accurate reflection of his account. The manner in which the statement was drafted fundamentally affects its reliability. That is of particular significance in a case such as this as there is substantial dispute about the factual scenario leading to Ms Berresford being injured.

The Factual Matrix

9. Ms Berresford has no recollection of the accident. She says that she has *"no clear memory of the day of the accident. I cannot recall the events leading up to the accident, the accident, or the immediate aftermath. I can remember getting into a taxi. I remember being with my friend Jodie Dunbar. My next memory is being in Bedford Hospital"*

10. The conflicting accounts of what happened are therefore those of Ms Dunbar, on behalf of Ms Berresford, and Mr Shah. It is notable that, while there has not been a falling out between Ms Berresford and Ms Dunbar, time has moved on and that, not surprisingly (as they were only aged 17 and 15 years old at the time of the incident) they are not anywhere near as close as they used to be. I am considering Ms Dunbar's evidence in light of the fact that she has no personal interest in the outcome. In addition to the evidence Ms Dunbar and Mr Shah have given to the court, I have the benefit of the reports from the emergency services who attended after the incident – namely the police and the ambulance service. The police did not take any action against either Mr Shah nor against Ms Berresford and Ms Dunbar.

11. It has been said to be one of the most difficult jobs of the judge at first instance to determine where the truth lies between two conflicting accounts. Judges are not imbued with sixth sense and have to determine what happened on the basis of the evidence available, including when the witnesses may have partial recollections and recollections which have altered over time. A witness certain in their account is not necessarily an accurate witness or correct in their recollections. That does not mean the witness is being dishonest or deliberately misleading, but it does mean care has to

be taken and contemporaneous (or near contemporaneous) evidence can often be more helpful and reliable.

12. In *Kimanthi v Foreign and Commonwealth Service* [2018] EWHC 2066, Stewart J..referred to three helpful first instance judgments setting out the proper approach to factual evidence and how to reach factual findings: *Gestmin SGPS SA v Credit Suisse (UK) Limited* [2013] EWHC 3560 per Leggatt J. (as he then was); *Lachaux v Lachaux* [2017] EWHC 385 and *Carmarthenshire County Council v Y* [2017] EWFC 36, both cases of Mostyn J. From those cases several helpful points can be extrapolated (I am not repeating all the points made in those cases referred to by Stewart J):

From *Gestmin:*

- *We believe memories to be more faithful than they are. Two common errors are to suppose (1) that the strong and more vivid the recollection, the more likely it is to be accurate; (2) the more confident another person is in their recollection, the more likely it is to be accurate;*

- *Memories are fluid and malleable, being constantly rewritten whenever they are retrieved;*

- *The process of civil litigation itself subjects the memories of witnesses to powerful biases;*

- *Considerable interference with memory is introduced in civil litigation by the procedure of preparing for trial. Statements often take a long time after relevant events and drafted by a lawyer who is conscious of the significance for the issues in the case of what the witness does or does not say;*

- *Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.*

From *Lachaux*

- *... a witness, however honest, rarely persuades a judge that his present recollection is preferable to that which was taken down in writing immediately after the incident occurred. Therefore, contemporary documents are always of the utmost importance…"*

From *Carmarthenshire County Council*

- *The general rule is that oral evidence given under cross-examination is the gold standard because it reflects the long-established common law consensus that the best way of assessing the reliability of evidence is by confronting the evidence.*

13. Ms Dunbar described in her witness statement how she had been with her friend Ms Berresford (Darcie) on 20 October 2019 and that later in the day they had decided to go to Flitwick as Ms Berresford wanted to meet with someone called Gabriel who she liked. She said that after their arrival at Flitwick Train Station at approximately 5.30pm, Darcie phoned a taxi company in order to book a cab and that when the cab

arrived it was a large car with sliding doors with a partition between the passenger seats and the area where the driver sat. She said that she was not aware that there was an opening through which money could be passed. She also described the yellow support bar in the door frame.

14. The taxi was a Peugeot Evo E7, which is a purpose-built taxi, based upon the Peugeot Expert Tepee – a van based multi-purpose vehicle (MPV). As is described in the expert report of Mr Durnford of Burgoynes (the Defendant's instructed expert), the vehicle has eight seats – two in the front, being the driver and nearside front passenger, and six rear seats. Three of those are front facing and three are fold down seats facing backwards. Mr Durnford agrees that the doors are sliding and that there is a clear partition between the driver and the rear passengers. Helpfully he attaches a copy of the E7 brochure and there is no dispute that this was the type of vehicle being driven by Mr Shah.

15. Ms Dunbar said that the taxi driver did not say anything to them when he picked them up, save for Ms Berresford telling him that they wanted to go to Oliver Steet, near Willow Way, that he was "not the friendliest" and that until he spoke about the money, they did not communicate. In her statement Ms Dunbar set out that she had showed Mr Shah through the rear-view mirror that she had a £5 note, but in her oral evidence she said that the conversation about the money did not happen until towards the end of the journey when she said that they discussed being short on the fare. She said that Ms Berresford had thought that the fare would be about £7, but it was in fact £10 and they only had £5. Ms Dunbar says that they discussed paying the £5 with Mr Shah and that Ms Berresford would go off to get the balance, with Ms Dunbar waiting in the cab for her to return. Mr Shah does not accept that exchange took place.

16. Mr Shah says that he picked up Ms Berresford and Ms Dunbar from the Avenue in Flitwick. He said that this was a job that he had been given by his cab company and it appears that he was anxious from the outset as he notes in his statement that he did not have a pickup address and he asked for more details from his controller and was told that he would be picking them up in the street. He said that when he picked up the two young women he asked where they wanted to go and that they told him Willow Way in Ampthill. It does not appear that there was any further discussion.

17. I accept that there was no discussion about how much the fare would be or how they would pay Mr Shah before the journey started or, indeed, much before the end. I also accept that they had thought that the fare would be about £7 but they only had £5 on them. While the difference between an expected £7 fare and an actual £10 fare might not seem so great, it would be a great sum for these two young women aged 15 and 17 years.

18. I am satisfied that Ms Berresford and Ms Dunbar did have a £5 note and that they intended to pay Mr Shah for the cab journey. Ms Dunbar says that when they approached Willow Way, where they had asked to be taken, they discussed the shortage on the fare. She said that the cab had stopped and she had got out in order to pay the £5 and that Ms Berresford was still in the cab. Ms Dunbar said that she was going to get back into the cab (effectively as collateral for the balance of the fare) and that Ms Berresford was then going to go off to meet with Gabriel to get the money for the balance of the fare.

19. Mr Shah said that when he got to Willow Way he asked for £10 as that was what was on the meter. He said that he usually asks for the fare before he stops as his intention is that the passenger pays before the vehicle stops. I do not accept that to be the case. While he might say what the fare is before he stops, I do not believe that he expects to be paid before he stops, and by saying that he has reconstructed the truth. It would be highly dangerous for a driver to be dealing with the collection of a fare, which would often include the giving back of change, while still driving. I do not accept that a driver of Mr Shah's experience would continue to drive while taking the fare even if it was "rolling at about 2 or 3 mph" as he suggested. I am certain that the vehicle had stopped and that the exchange about the fare and how that would be paid occurred when the vehicle was stationary. That is consistent with the view of the police officer (Kevin Sloan) who attended the scene and who records in the collision report *"the two females have been travelling in the vehicle to Ampthill, upon arrival the vehicle has come to a stop and the driver has asked for payment ..."* In the statement made at the roadside between 18:19 and 18:42, Mr Shah describes how *"the female that got injured [Ms Berresford] told me to stay here and she would bring me the money"* . It makes no sense that the vehicle was still moving if she said "stay here". In my judgment, Mr Shah then told the police that the vehicle was moving and he had said "DON'T OPEN THE DOOR" as he was aware that if the vehicle had stopped and then he had set off again then he could be liable for the injuries sustained by Ms Berresford. The "Driver and Vehicle Details" report records that Mr Shah said*"they refused to provide house number as I said I would take them back as I've drove off the[y] have jumped out the vehicle and tried to run."*

20. Ms Dunbar's account to the police at the time of the incident was that she had got her money out and had come to the front [of the cab] to pay *"Darcie [Ms Berresford] got out and it started moving causing Darcie to slip and bang her head."* I do not accept Ms Dunbar's account that she was half in and half out of the cab when it started moving. That is also a reconstruction of what actually happened. The East of England Ambulance Service report on 20 October 2019 records Ms Berresford's account as follows: *"... reports getting out of the taxi when it suddenly sped off. She fell backwards hitting the back of her head on the road. She denies being KOP but PCs reports Pts eyes rolling and noisy breathing for approx. 10 seconds…"* The ambulance service report entered at 17:25:47 (so as close to the incident as is possible) states *"ptn has fallen out of a taxi that has tried driving off as… did not think ptn was going to pay so started driving off as ptn was half out- ptn has fallen and hit the back of her heads(sic.)"* The clinical record from Bedford Hospital dated 21 October 2019 confirms that the fall was from a moving taxi, although that record does not assist as to whether the taxi was constantly moving. More significantly is the paediatric assessment at 19.00 on 20 October 2019 which records *"went to step out of taxi. It drove on + fell out of door hit head on Rd."*

21. I am satisfied upon all the evidence I have heard, including the way in which it was presented by Ms Dunbar and Mr Shah to the court, and by paying careful attention to the contemporaneous (or near contemporaneous) evidence of the police and the ambulance service, that what happened is as follows. Ms Dunbar and Ms Berresford decided to get a cab in order to get to the address of Ms Berresford's friend, Gabriel. It is possible, although not something that was explored in the evidence before me, that they did not even have his actual address. They had £5 on them to pay for the cab knowing it would cost about £7. When they arrived at Willow Way, Mr Shah asked

for £10, which was the fare on the meter. He had gone a longer way round to the destination. He had stopped the cab and I am satisfied that Ms Dunbar had got out of the cab in order to pay him the £5 that they had.

22. I am satisfied that Mr Shah was convinced that Ms Dunbar and Ms Berresford were not going to pay him the fare. He had been suspicious at the outset, and I am satisfied that he (and other cab drivers) had considerable experience of non-payers. I am also satisfied that he was going to show them that they could not take a cab and not pay for the fare by returning them from where they had come. That was effectively taking matters into his own hands in order to teach them a lesson. It is understandably very frustrating for cab drivers to have to deal with fare dodgers but Mr Shah's behaviour on this day was dictated by his experience which he described as follows: *"many times customers have run off without paying. I was very concerned this would happen again. Experience many times say pay and then go and never pay."* When asked about his views of the two girls he said *"No – never possible I was wrong that they were not going to pay."*

23. I am satisfied that Mr Shah had asked them to give the address of where they were going to get the money from and that they had not told him, possibly because they were unable to do so. I do not accept that he asked for the mobile phone to be left behind, it is not something he mentioned when speaking to the police and quite clearly Ms Berresford had a mobile telephone as she had used it to book the cab in the first place. I am satisfied that Ms Dunbar and Ms Berresford intended to pay him what they had, the £5. I am not satisfied (on the civil standard) that Ms Dunbar and Ms Berresford intended not to pay the balance. Unfortunately, Mr Shah had started from a position of great suspicion and then interpreted everything that happened to fit his pre-conceived view. The most clear example of why Mr Shah's account cannot be relied upon is how he describes Ms Berresford coming out of the vehicle, losing her footing and hitting the edge of the car but then getting up and walking behind the taxi and sitting on the grass verge. That does not accord with any of the other evidence available, including that from the emergency services. Ms Berresford hit her head, she lost consciousness and was described as having heavy, snoring-like, breathing with her eyes rolling in her head.

24. It all happened very quickly. Mr Shah, having been suspicious before he even picked up Ms Dunbar and Ms Beresford, was convinced that they were not going to pay him. I am satisfied that he had stopped the cab, that Ms Dunbar had exited the rear of the vehicle in order to pay him £5, and that Mr Shah had started off again when it was clear there was an issue with the fare of £10. I am satisfied that Ms Berresford fell out of the rear of the cab because Mr Shah started driving off with the rear door open and when she had got up to exit the vehicle herself. I do not accept his account that the vehicle was stopped when Ms Berresford fell out. It had been stopped when Ms Dunbar exited the vehicle and he then drove off. I also do not accept the account now given by Ms Dunbar that she was fearful of Ms Berresford's safety as she was being taken off by an unknown male and that she had tried to pull Ms Berresford from the cab as there was a potential kidnap. While it would be a potential kidnap as Ms Berresford did not give permission to Mr Shah to convey her to another place, and while Ms Berresford was a vulnerable young woman of 17, the real threat of a kidnap and what could happen is (in my judgment) something that has been thought about

subsequent to the event. It was not an attempt to mislead the court, but a genuine concern that arose later.

25. Ms Dunbar and Ms Berresford should not have been able to exit the rear of the vehicle had Mr Shah had his cab properly maintained. Mr Shah should have had control of the lock from his foot pedals and could have prevented them from leaving before paying. It is clear from the reports of both Mr Simon Lane of TRL Limited on behalf of the Claimant and Mr Richard Durnford on behalf of Burgoynes on behalf of the Defendant, and their joint report dated 18 April 2024, that the rear nearside door locking was inoperative and that the lock did not engage when the central locking was operated or when the motion activated locking operated so that it was unlocked at all times. Mr Shah's view was that the lock on the door was not necessary as *"it was only for safety – to stop them from running"* and that they had only opened the door because they were trying to run. In that exchange in cross examination, Mr Shah said that when she opened the door the vehicle was stopped. Mr Shah informed me that the lock had not worked for all the time he owned that taxi cab and that he has now sold it on to another taxi driver working in Luton. He ought to have had the locking system fixed.

Negligence

26. I am satisfied that Mr Shah was negligent. A taxi driver owes to his passengers a duty of care (see, for example, *Hicks v* Young [2015] EWHC 1144. The issue is whether, on the facts of any particular case, that duty has been breached.

27. In this case I am satisfied that the duty of care has been breached. That would be so even if I had been satisfied with Mr Shah's account of what had happened.

28. In *Hicks v Young* the taxi driver had decided to drive the claimant passenger back to the taxi rank after he had formed the view that the passenger was not going to pay.:

> "The claim in negligence is not straightforward. There is no doubt that at all times the Defendant owed a duty to drive his vehicle with reasonable care for the safety of the Claimant. I have little difficulty in finding that driving away while the Claimant was standing up in the rear of the taxi with the sliding side door open was a breach of that duty. However, this action caused the Claimant to sit down and engage in a brief conversation with the Defendant. It did not cause him any injury. The injury occurred a minute or so later and ¾ mile away. At that time there is no evidence that the Defendant was driving in an unsafe manner. He was certainly driving within the speed limit. The case in negligence must therefore be put on the basis that it was negligent to drive the vehicle at all with a person detained in it who may attempt to escape because the driver knows that he wants to get out. The possibility of escape would be particularly clear because the doors were not capable of being locked. It was foreseeable that he would attempt to escape and any such attempt would involve some level of risk of injury to the Claimant. The Particulars of Claim do not refer to the absence of working locks, but there is no

> dispute about that fact, indeed it is based on the evidence given by the Defendant. That apart, they do contain allegations which enable the case to be advanced on the basis which I have just described.
>
> Once the duty is described in that way it becomes clear that the Defendant was in breach of his duty to drive his car with reasonable care for the safety of the Claimant. The taxi was simply not suitable for conveying prisoners safely. It would be unsafe whether the detention of the passenger was lawful or not. The presence or absence of working locks is not decisive of the issue, but should have operated as a particular warning on the facts of this case to the Defendant of the risk that his prisoner may try to escape. The reason for the detention is not relevant to the negligence claim, at least on primary liability… [paras 31 and 32]."

29. In *Beaumont v Fraser* [2016] EWCA Civ 768, the facts were that six young men in Salford who had decided to "jump" a taxi without paying the fare. Three had succeed but two others could not get out of the taxi at the same time and when they did they sadly sustained very serious injuries. The sixth passenger was a young boy of 11 who was sitting in the front passenger seat. The taxi driver in that case had been subjected to a violent assault in his cab the year before, when he had been stabbed by youths who had taken him to a cul de sac to rob him, and he was concerned that he might be subjected to a similar attack on this occasion. As a consequence, he had driven off with the youths in the back of the car. The Court of Appeal found that the taxi driver's counsel was correct to accept that the driver was in breach of his duty of care to his passengers. *"His choice was either to let the remaining three of his passengers out of his vehicle or to drive them to the nearest police station. Although it is entirely understandable that he did not want to lose his comparatively modest fare of £10, that was not an excuse for driving off with an open door when the claimants were not wearing their seat belts… the judge was, with respect, wrong to say that it was not reasonably foreseeable that [one of the claimants] would position himself with a view to jumping the taxi; it was regrettably all too foreseeable once the first three youths had put their part of the criminal enterprise into effect."* Per Longmore LJ [para 18].

30. The risk of personal injury was clearly foreseeable in the circumstances of this matter. As was found by Edis J (as he then was) in *Hicks v Young,* there is no break in the chain of causation even if the claimant jumps out of the moving taxi. As Edis J. found in the circumstances of that case *"... it was certainly foreseeable that the Claimant would try to leave the taxi and that it may be moving when he did so."*

31. On the facts of this case, even if Mr Shah's account were correct, Mr Shah only stopped once Ms Dunbar had left the vehicle. If that were the case then it was too little, too late. He knew that the locks on the nearside sliding door were broken. I find that Mr Shah did not stop but decided to move away when he believed that Ms Dunbar had already "escaped" from the back of the cab when it had been stopped, and it was reasonably foreseeable that Ms Berresford would endeavour to follow her friend. That was a breach of the duty of care and it was reasonably foreseeable that she would suffer injury. On the basis of the facts, as I find them, Mr Shah moved

away from a stationary position with a young woman in the back of his cab with an unlocked and open door. That was a breach of the duty, and it was plainly foreseeable that she would be caused injury as she would not want to remain the back of the cab to be taken back to where she had been picked up and with her friend outside the cab. In my judgment, he moved his cab in order that she could not get out of it and that was plainly negligent.

Illegality

32. The burden of proof to establish illegality lies upon the defendant *(Reeves v Commissioner of Police of the Metropolis* [1999] QB 169) and in order to establish illegality it is for Mr Shah to establish that, on the balance of probabilities, Ms Berresford was committing the offence of making off without payment contrary to section 3 of the Theft Act 1978, either on the basis that was her intention or that she was in a joint enterprise with Ms Dunbar.

33. Section 3 of the Theft Act 1978 provides that:

> "A person who, knowing that payment on the spot for any goods supplied or service done is required or expected from him, dishonestly makes off without having paid as required or expected and with intent to avoid payment of the amount due shall be guilty of an offence."

34. I am not satisfied, on the balance of probabilities, that Ms Berresford was engaged in an illegal activity as I am not satisfied that she intended not to make payment for the taxi ride. While not conclusive, it is to be noted that the police took no action and did not carry out any further investigation. The value of the dispute was modest but, if the police had thought that Mr Shah's suspicions were well-founded , then the police might wish to investigate in order to stop any future behaviour of the same type

35. Even if I were wrong about that, I am not satisfied that the illegality that would have been involved is such that would bar recover of damages. The governing authority on illegality (or the defence of *ex turpi causa*) is *Patel v Mirza* [2016] UKSC 42. In that case the Supreme Court carried out a comprehensive review of the authorities dealing with illegality, including the House of Lords decision in *Tinsley v Milligan* [1994] 1 AC 340, and the Law Commission's view. Lord Toulson pithily set out the policy reasons for the common law doctrine of illegality as a defence to a claim:

> "*Looking behind the maxims, there are two broadly discernible policy reasons for the common law doctrine of illegality as a defence to a civil claim. One is that a person should not be allowed to profit from his own wrongdoing. The other, linked, consideration is that the law should be coherent and not self-defeating, condoning illegality by giving with the left hand what it takes with the right hand.*
>
> *Lord Goff observed in the Spycatcher case, Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 *that the "statement that a man shall not be allowed to profit from his own wrong is in very general terms, and does not of itself*

> *provide any sure guidance to the solution of a problem in any particular case.""* [paras 99 and 100]

36. Having worked through the rationale of the defence of illegality, Lord Toulson summarised the law as follows:

> "*The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system (or, possibly, certain aspects of public morality, the boundaries of which have never been made entirely clear, and which do not arise for consideration in this case). In assessing whether the public interest would be harmed in that way, it is necessary a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, b) to consider any other relevant public policy on which the denial of the claim may have an impact and c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts. Within that framework, various factors may be relevant, but it would be a mistake to suggest that the court is free to decide a case in an undisciplined way. The public interest is best served by a principled and transparent assessment of the considerations identified, rather than by the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate.*" [para 120]

37. In considering proportionality, Lord Toulson referred to potentially relevant factors including the seriousness of the conduct and whether there was a marked disparity in the parties' respective culpability. Professor Burrows created a list which included matters such as how seriously illegal or contrary to public policy the conduct was; how serious a sanction the denial of enforcement would be for the party seeking enforcement; whether denying enforcement will act as a deterrent to conduct that is illegal or contrary to public policy. While Lord Toulson concluded that such a list, while helpful, might be too prescriptive, it is of assistance in this case.

38. If I were wrong in my primary finding that the defendant has failed to establish illegality, and if Ms Berresford was endeavouring to escape the cab driven by Mr Shah in order to avoid payment of the full fare, then following *Patel v Mirza*, the defendant could not rely upon the defence of illegality. Mr Shah places reliance upon the finding of Longmore LJ in *Beaumont v Ferrer* that *"even if it could be said that the claimants' injuries would not have happened but for the tortious conduct of Mr Ferrer, they were in reality caused by the claimants' own criminal acts of making off without payment and that, therefore, there should be no recovery"* but that decision, on the facts of that case, predates the careful analysis of the Supreme Court Justices in *Patel v Mirza.*

39. Even if Mr Shah could make out his suspicions that Ms Berresford and Ms Dunbar intended not to pay the fare to him, the denial of damages would not amount to a deterrent to people who might otherwise think of dodging a fare. Further, the denial

of damages in these circumstances would act against public policy in that it would potentially remove a restraint on dangerous or careless driving by those who are carrying out driving for others as licensed taxi drivers. Finally, the impact of the denial of damages to someone seriously injured in the course of seeking to "dodge" a cab fare would be entirely out of proportion to the illegal act. Following the Supreme Court decision in *Patel v Mirza,* as set out in the speech of Lord Toulson, the defence of illegality would not succeed, even on a different factual basis.

Contributory Negligence

40. Mr Shah contends that there should be a significant reduction in the amount of damages awarded to Ms Berresford on the basis that she contributed to her own personal injury. Section 1(1) of the Law Reform (Contributory Negligence) Act 1945 provides that

> "Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage."

41. In my judgment, the actions of Ms Berresford in seeking to escape the moving cab were not prudent and she partially contributed to her own injuries by deciding to exit rather than remain in the vehicle. However, it would none the less have been a frightening experience for Ms Berresford. She is unable to give evidence of how she was feeling or what she thought was happening but we know from the evidence available that Ms Dunbar was out of the vehicle and that the intention of Mr Shah was to drive her back to where he had picked her up (a £10 taxi ride away). I accept that this was a fast-moving event and Ms Berresford would have been reacting quickly to what was happening. Nonetheless she must share a limited responsibility for her injuries. In the circumstances, therefore, there should be a reduction but a small one and I limit her contribution to 10%.

Conclusion

42. The claim in liability is consequently made out and damages, once assessed or agreed, will be reduced by 10% to take into account contributory negligence.