Patel v Mirza
[2016] UKSC 42

Summary

Patel paid £620,000 to Mirza for the purpose of betting on the price of RBS shares, relying on insider information that Mirza expected to receive regarding a government announcement about RBS. In the event, no announcement was made and so Mirza was never in a position to bet on whether the RBS shares would go up or down. However, he never repaid Patel the £620,000, and Patel sued him for the value of the money.

Patel's claim was dismissed at first instance on the ground that Patel's agreement with Mirza amounted to a criminal conspiracy to commit the offence of insider trading, and that Patel could only establish a right to recover the money he paid Mirza by relying on the existence of that agreement (so as to show that the money had been paid for a consideration that had totally failed). As a result, Patel's claim must be struck out as arising *ex turpi causa* (or, in more modern language, must be struck out on the grounds of illegality).

The Court of Appeal allowed Patel's claim on the basis that although Patel had to rely on his illegal agreement with Mirza to establish a right to recover the value of the money he had paid Mirza under that agreement, his claim fell within an exception (the so-called *locus poenitentiae* exception) to the rule that *ex turpi causa non oritur actio*, which is that if an illegal agreement is not carried out, then monies paid under the agreement could be recovered.

The UKSC unanimously dismissed Mirza's appeal, ruling that Patel was entitled to recover the value of the money that he had paid Mirza without, however, having to rely on any exception to the *ex turpi causa* rule: the rule simply did not apply to Patel's claim. However, the nine members of the UKSC disagreed on how they reached that conclusion:

Lord Toulson (and four others)
Lord Toulson gave the majority judgment (with the agreement of Lady Hale, Lord Kerr, Lord Wilson, and Lord Hodge). He argued (in particular, at [87]-[92]) that the law on illegality – which was based on the idea that a claimant should not be able to rely on an illegal act in order to make a claim against a defendant – was unclear and potentially arbitrary in the way it operated, and was insufficiently flexible to achieve the policy goals that the law on illegality was designed to achieve, namely, (i) 'that a person should not be allowed to profit from his own wrongdoing'; and (ii) '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' ([99]).

Instead, Lord Toulson proposed that the courts should not approach the issue of whether a claim should be struck out on the basis of illegality 'mechanistically' but should instead consider (a) 'the underlying purpose of the prohibition that has been transgressed', (b) 'any...relevant public policies which may be rendered ineffective or less effective by denial of the claim' and (c) keep in mind 'the possibility of overkill unless the law is applied with a due sense of proportionality' ([101]). On the issue of proportionality, Lord Toulson indicated that a list supplied by Andrew Burrows of eight factors to be taken into account (set out in para [93]) was 'helpful but I would not attempt to lay down a prescriptive or definitive list because of the infinite possible variety of cases' ([107]).

Lord Toulson indicated that he was aware that the new approach to cases involving illegality that he was advocating could be criticised as making the law uncertain, but argued that (i) the current law also suffers from uncertainty and unpredictability in the way it operates, (ii) in other jurisdictions which had adopted a more flexible approach to illegality cases he 'not aware of evidence that uncertainty has been a source of serious problems', and

(iii) certainty was not such an important consideration in cases where people are 'contemplating unlawful activity' ([113]).

Turning to the case at hand (at [115]), Lord Toulson ruled that Patel should be allowed to recover the value of the money that he had paid Mirza: 'the policy underlying the rule which made the contract between Mr Patel and Mr Mirza illegal would [not] be stultified if Mr Patel's claim in unjust enrichment were allowed'; consequently, denying Patel's claim 'would not be a just and proportionate response to the illegality'.

Lord Neuberger

Lord Neuberger argued (at [146]) that Patel's case should be disposed of by reference to a rule (which he called 'the Rule') that monies paid under an illegal contract are always recoverable. The Rule is subject to 'two possible exceptions': (i) where the defendant is intended to be protected by the criminal legislation that the agreement between the defendant and claimant violates; and (ii) where the defendant was unaware 'of the facts which gave rise to the illegality' ([162]). Lord Neuberger thought that there might be 'other exceptions' to the rule ([162]), particularly in cases 'where the illegal activity has been wholly or partly put into effect' ([172]). In such cases, Lord Neuberger thought that the Rule should still apply ([167]) – so that a claimant who had received in part or in full what he had paid for under an illegal agreement might still be entitled to invoke the Rule to recover the value of the money he had paid under that agreement – unless a good case could be made for arguing that the Rule should not apply. In determining whether or not such a case could be made, Lord Neuberger thought that 'the approach suggested by Lord Toulson in para 101...provides as reliable and helpful guidance as it is possible to give in this difficult field. When faced with a claim based on a contract which involves illegal activity (whether or not the illegal activity has been wholly, partly or not at all undertaken), the court should, when deciding how to take into account the impact of illegality on the claim, bear in mind the need for integrity and consistency in the justice system, and in particular (a) the policy behind the illegality, (b) any public policy issues, and (c) the need for proportionality' ([174]).

Lords Mance, Clarke and Sumption

Lords Mance, Clarke and Sumption – giving separate judgments – rejected Lord Toulson's new approach to the issue of when a private law claim should be denied on the basis of illegality.

Lord Mance 'called for...a limited approach to the effect of illegality, focused on the need to avoid inconsistency in the law, without depriving claimants of the opportunity to obtain damages for wrongs or to put themselves in the position in which they should have been' ([192]). Lord Mance saw the *locus poenitentiae* exception to the *ex turpi causa* rule as designed to allow the parties to an illegal agreement to put themselves back in the position where they should have been by unwinding (or rescinding) their agreement and undoing their illegality ([193]). Lord Mance thought 'this principle of rescission [has] become unduly limited with time, particularly in 20th century authority, and...that it should be restored to its former significance and generalised' ([197]) – even to the extent of allowing an illegal agreement to be unwound where it had been partly performed 'making, where possible, appropriate adjustments for benefits received' ([198]) – so that 'reliance on illegality [would remain] significant as a bar to relief, but only in so far as it is reliance in order to profit from or otherwise enforce an illegal contract. Reliance in order to restore the status quo is unobjectionable' ([199]).

Lord Sumption based his decision squarely on the 'reliance test' according to which 'the court will not give effect, at the suit of a person who committed an illegal act (or someone claiming through him), to a right derived from that act' ([233]). Lord Sumption did

not think that this principle stood in the way of Patel suing Mirza: 'although Mr Patel would have to rely on the illegal character of the transaction in order to demonstrate that there was no legal basis for the payment, an order for restitution would not give effect to the illegal act or to any right derived from it' ([268]).

Lord Clarke took the view, in agreement with both Lords Mance and Sumption, that 'the application of orthodox principles of unjust enrichment, rescission and *restitutio in integrum*' ([210]) supported allowing Patel's claim against Mirza.

All three judges made scathing criticisms of the way the majority, led by Lord Toulson, would wish to see the courts dispose of cases raising issues of illegality in the future.

Lord Mance argued that the majority's 'entirely novel' approach to the defence of illegality would result in the courts being 'required to make a value judgment, by reference to a widely spread mélange of ingredients, about the overall "merits" or strengths, in a highly unspecific non-legal sense, of the respective claims of the public interest and of each of the parties' ([206]). Lord Mance did not think that the uncertainties and difficulties in the current law on illegality justified 'tearing up the existing law and starting again' and pointed out that those uncertainties and difficulties were 'problems in areas far removed from the present, and do not to my mind throw any light on the issues we have to decide on this appeal' ([208]).

Lord Clarke also thought that Lord Toulson was guilty of overkill in attempting to deal with any problems afflicting the current law: 'The correct response is not leave the problem to a case by case evaluation by the lower courts by reference to a potentially unlimited range of factors, but to address the problem by supplying a framework of principle which accommodates legitimate concerns about the present law' ([217]).

Lord Sumption argued that when it came to considering the desirability of adopting Lord Toulson's favoured approach to illegality cases, the 'real issue' is whether the range of factors that Lord Toulson thought were relevant to resolving such cases should be 'regarded (i) as part of the policy rationale of a legal rule, and the various exceptions to that rule, or (ii) as matters to be taken into account by a judge deciding in each case whether to apply the legal rule at all' ([261]). Lord Sumption took the view that 'the former approach represents the law' and that 'it would be wrong to transform the policy factors which have gone into the development of the current rules, into factors influencing an essentially discretionary decision about whether these rules should be applied' ([261]). Lord Sumption took particular exception to the way in which the 'range of factors' approach favoured by Lord Toulson in resolving illegality cases 'largely devalues the principle of consistency' – which Lord Sumption saw as lying at the heart of defence of illegality ([230]) – 'by relegating it to the status of one of a number of evaluative factors, entitled to no more weight than the judge chooses to give it in the particular case' ([262](ii)) and the suggestion that whether or not a claimant's claim might be struck out on the grounds of illegality might depend on the 'degree' of illegality involved: 'If the application of the illegality principle is to depend on the court's view of how illegal the illegality was or how much it matters, there would appear to be no principle whatever to guide the evaluation other than the judge's gut instinct' ([262](iii)). Lord Sumption did not see why it was necessary to adopt the kind of 'revolutionary change in hitherto accepted legal principle' that the majority was contemplating in order 'to achieve substantial justice in the great majority of cases' ([264]).

Lord Kerr

Lord Kerr was one of the four judges who agreed with Lord Toulson's judgment. However, he gave a short separate judgment, most of which seemed targeted at rebutting the criticisms of Lords Mance, Clarke and Sumption of the majority's approach. Lord Kerr thought that 'The approach commended by Lord Toulson..., if properly applied, will promote, rather than detract from consistency in the law' ([123]). In particular, it would avoid the courts' decisions

in cases involving illegality being affected by the 'happenstance' ([142]) of whether a claimant could make out a claim against a defendant without relying on an illegal act. For example, Lord Kerr thought that in deciding the case at hand it could not 'be the correct way to deal with the impact of illegality' to allow Patel's claim on the basis that the fact that 'the formation of the contract, its purpose and its performance all involved illegality' could be 'side-stepped and ignored' because 'it [was] not necessary to rely on the terms of the agreement, other than to demonstrate that there was no legal basis for the payment of the money to Mr Mirza' ([139]). Lord Kerr also took on the point made by Lord Sumption at [261] (without acknowledging that he was doing so), arguing that 'if the *ex turpi causa* axiom [sic] is itself no more than an expression of policy, the taking into account of countervailing policy considerations, in order to decide whether to give effect to it in a particular instance, is the only logical way to proceed' ([129]).

Comments

(1) *Application to the law of tort*. *Patel* v *Mirza* is a case about the application of the law on illegality to claims in contract and in unjust enrichment, but it seems very likely that the majority judgment in *Patel* will also be taken as applying to claims in tort. Running through all of the judgments in *Patel* is an assumption that the same approach to striking out claims on the basis of illegality should be applied across the board, whatever the nature of the claim: see Lord Toulson's invocation of *Gray* v *Thames Trains Ltd* [2009] AC 1339 (a tort case) at [28], *Hall* v *Hebert* [1993] 2 SCR 159 (another tort case) at [55], *Hounga* v *Allen* [2014] 1 WLR 2889 (ditto) at [72], *Bowmakers* v *Barnet Instruments Ltd* [1945] 1 KB 65 (ditto) at [18] and [111], Lord Mance's characterisation of the defence of illegality as designed to 'avoid inconsistency in the law, without depriving claimants of the opportunity to obtain damages for wrongs' at [192], Lord Clarke's agreement with that statement in [214], and Lord Sumption's criticisms of *Cross* v *Kirkby* [2000] EWCA Civ 426 at [240]. This is despite:

(i) The Law Commission's initial 1999 recommendations for reforming the law on illegality – which have now effectively been turned into law by the judgment of Lord Toulson (Chairman of the Law Commission, 2002-2006), with heavy academic support from Andrew Burrows (Law Commissioner, 1994-1999) – were only meant to apply to the law on contracts and trusts.

(ii) No one has been able to establish that the law on illegality as it applied to claims in tort, and as it was restated by Lord Hoffmann in *Gray* v *Thames Trains Ltd* was working unsatisfactorily. Lord Hoffmann's restatement distinguished between two forms of the illegality defence in tort – the narrow form, which worked to prevent a claimant in tort suing for damages when doing so would mitigate the effect of the claimant's being criminally punished for committing a criminal offence; and the wide form, which Lord Hoffmann saw as giving effect to the idea that 'you cannot recover for damage which is the consequence of your own criminal act' (*Gray*, at [54]) but which has before and since been more narrowly characterised as only applying where there was a *very close connection* between the claimant's committing a criminal act and the loss he was suing for in tort. These two forms of the defence of illegality in tort seemed to work perfectly satisfactorily, but it looks like they have now been thrown under the bus to satisfy five members of the UKSC's desire to change the law on illegality as it applies to contracts and claims in unjust enrichment.

(iii) Whatever the constitutional impropriety involved in unelected judges (and just five of them at that) changing the law to implement Law Commission recommendations that were heavily criticised when they were made, and which the Law Commission did not give

Parliament a chance to express its views on – and in a case that could have been decided on much narrower grounds, as it was by Lords Mance, Clarke and Sumption – that impropriety is surely multiplied when it comes to changing the law on illegality in tort, where public concern about allowing criminals to bring claims for damages is much greater and where Parliament has already legislated (in the form of s 329 of the Criminal Justice Act 2003) to reflect that concern. It might be said by some 'Well, if Parliament doesn't like it, it can always change the law back'. But it is likely that Parliament will have much graver things on its mind in the next few years – even assuming that any MPs can be bothered to plough through the 270 paragraphs of judgments in *Patel* v *Mirza* to see what the UKSC has done while they weren't looking.

(2) *Rationale of the illegality defence*. One thing on which all of the members of the UKSC seemed to be able to agree on was that the defence of illegality in private law exists for public policy reasons – the phrase 'public policy' is repeated 76 times in the case, 'public interest' 25 times. We should be suspicious of such a consensus – it is precisely when you stop thinking, and start parroting what other people are saying, that you are most likely to fall into error. Is there a case to be made for thinking that the defence of illegality is not concerned with the public interest or public policy, but exists for some other reason?

Only Lord Sumption was willing to acknowledge that 'There was a time when the courts approached the application of the illegality principle on the footing that a court should not be required to sully its hands by dealing with criminal ventures' ([228]) but was sniffily dismissive of the idea, observing that 'it has rarely risen above the level of indignant judicial asides' ([228]) and that it 'has not for many years been regarded as a reputable foundation for the law of illegality' ([268]). But is there more to be said in favour of this idea? Millett LJ observed in *Tribe* v *Tribe* [1996] Ch 107, 135 that 'Justice is not a reward for merit', and Lord Sumption agreed with this at [252]. But a different view is possible.

Justice is the virtue of distributing things properly (see McBride and Steel, *Great Debates in Jurisprudence* (Macmillan, 2014), 184-90), but justice itself is a good that may need to be distributed, and that we have to be just about distributing. The common law of obligations has its roots in this point: the king's justice could not be given to everybody, to sort out every dispute between neighbours, and so choices has to be made about what sort of cases would be heard by the royal courts and what sort of cases would be left for local courts to sort out – and those choices had to be seen to be just. So claims that a plaintiff had been the victim of a *wrong* committed by the defendant gradually gained priority over claims that the plaintiff was entitled to something from the defendant, as wrongs seem more pressingly worthy of redress than claims of right. And claims that the plaintiff had been the victim of a wrong where the plaintiff could colourably argue that the defendant had used violence, in breach of the king's peace, seemed the most pressing of all to deal with – at least until changes in social conditions meant that it became hugely important for the royal courts to provide a mechanism for providing redress in cases where the plaintiff was aggrieved that the defendant had *failed* to do something for him.

So 'justice for all' has never been something that English law has aspired to provide – and it still does not provide it today, when many people with solid legal grievances find themselves unable to afford to take those grievances to court. Whether this is just or not is a matter for debate, but many people would legitimately think it *unjust* for the courts to use judicial time and resources on hearing cases like *Patel* v *Mirza* and would think it *just* for the courts to take the attitude, 'If you want to enter into deals like this, that's fine by us (though the police will want to have a word) – but if they go wrong, you are on your own. We are not going to waste our time on helping you out if one of you rips the other off. This is nothing to do with public policy, or what is in the public interest – this is about having the right

priorities in terms of what cases we spend time and money on dealing with and what cases we don't bother with. And in terms of those priorities, you come last.'

(3) *The danger of Lord Toulson's approach*. While I am far from being hostile to judges taking into account considerations of public policy in deciding private law cases, it has to be admitted that one problem with their doing this is that they just aren't very good at it. This was, after all, the root cause of the downfall of the *Anns* test for determining when one person would owe another a duty of care – once it was established that the claimant had suffered some foreseeable loss as result of the defendant's action or inaction, the onus was then on the defendant and the courts to establish whether or not finding that the claimant owed the defendant a duty of care would be contrary to the public interest. And the courts (and defendants) did not have sufficient imagination to see all the public policy implications that might be raised by their finding that a duty of care was owed. The same problem afflicts *Patel* v *Mirza* – the very first case to apply Lord Toulson's 'range of factors' approach to determine whether or not a claim should be struck out on the basis of illegality.

All of the UKSC Justices agreed that it would *not* be contrary to the public interest to find that Mirza had to repay the value of the money he had received from Patel. They were strengthened in this view by Lord Mansfield's judgment in *Smith* v *Bromley* (1760) 2 Doug KB 696n, 99 ER 441 (cited by Lord Toulson at [96], Lord Neuberger at [147], Lord Mance at [194], and Lord Sumption at [251]). In that case (the facts of which are not very well explained in *Patel*), the plaintiff's brother declared himself bankrupt, and the defendant – who was the brother's largest creditor – took out a 'commission' against the brother, basically asking the authorities to seize the brother's goods and sell them and pay what they could of the defendant's debt out of the sale. However, it became clear that the brother had nothing worth selling. At this stage, the defendant should have signed a certificate discharging the brother from his bankruptcy. But the defendant refused to do this, and could only be persuaded to do this by being paid £40 by the plaintiff, via a friend of the defendant's. Paying the defendant £40 to get him to sign the certificate was unlawful – he was legally required to do it for nothing, and not use the hold he had over the brother's status as a bankrupt to make money off other people. Once the certificate was signed, the plaintiff sought to recover the money she had paid the defendant. Lord Mansfield allowed the claim, clearly on the basis (though you would never guess it from the judgments in *Patel*) that the money had been extorted by duress. At one point in his decision (at 698 (Doug KB), 444 (ER)) he said:

> 'Upon the whole, I am persuaded it is necessary, for the better support and maintenance of the law, to allow this action; for no man will venture to take, if he is liable to refund. Where there is no temptation to the contrary, men will always act right.'

All of the judges in *Patel* who cited *Smith* v *Bromley* cited with approval the first sentence in the above quote. So the idea is that allowing recovery in cases like *Smith* v *Bromley* or *Patel* v *Mirza* discourages people from entering into unlawful agreements – for who will be willing to perform such an agreement, knowing that any payment he receives for that performance can be recovered at any time?

But, again, a different view is possible – and was not considered by any of the UKSC Justices in *Patel*. It could be argued that a rule which makes payments like those in *Patel* irrecoverable would do far more to destabilise and discourage the making of illegal agreements like that in *Patel* than the rule adopted by the UKSC in *Patel* does. Consider: suppose that Patel knew that the money he paid Mirza to invest using insider information could not be recovered if Mirza did not go through with the deal; and Mirza knew that he could keep Patel's money without having to do anything for it; and Patel knew that Mirza

knew that. It is very hard to see, in such case, how Patel could think it would be a good idea to hand over his money to Mirza. He would have to have a huge amount of trust in Mirza to go ahead with the deal – and how much trust could he place in someone who is proposing to engage in insider dealing? So a rule that made payments like Patel's irrecoverable would kill deals like Patel and Mirza's stone dead, so long as everyone knew of the existence of the rule and knew that everyone else knew about it. Such a rule would do *far more* to discourage unlawful agreements like that than a rule which allowed Patel to recover his money from Mirza whether or not Mirza performed his side of the bargain. Under such a rule, it would be Mirza who would now have to be on his guard, as Lord Mansfield pointed out – Mirza would have to worry that any money he was paid by Patel could be sued for by Patel. But how much of a worry would that be to someone like Mirza? If things didn't work out and he didn't perform, he could always pay Patel back and they could go back to square one. And if things did work out, and he did perform, it is true that under the approach adopted by Lords Neuberger, Mance, Clarke and Sumption he could still be sued by Patel for the money that Patel paid him, with the result that all of Mirza's efforts at insider trading would be for nothing. But how likely is it that Patel would sue Mirza for his money back assuming that the deal had gone through and Mirza had invested Patel's money in the way Patel intended? In such case, Patel would have to be insane to sue Mirza, given the criminal liability that he would incur were he to draw any attention to his deal with Mirza. (I still find it hard to understand – and looking at first instance judgment does not help with this – why Patel sued Mirza in the actual case of *Patel* v *Mirza* given that by doing so he was effectively confessing to committing a criminal offence. Are the punishments so light for insider trading that it is worth £620,000 (plus interest!) to incur them?) So the rule unanimously adopted by the UKSC in *Patel* v *Mirza* could be expected to do very little to discourage people like Patel and Mirza from entering into future legal agreements.

When one thinks about it, the public policy arguments in favour of allowing recovery in *Patel* v *Mirza* are astonishingly weak, and the public policy arguments in favour of refusing recovery are extremely strong. But the UKSC failed to see this and thought the truth was completely the opposite. Consider the case of *Parkinson* v *College of Ambulance Ltd* [1925] KB 1, where the plaintiff sought to recovery money that he had paid on a promise that he would get a knighthood in return, which knighthood never materialised. Under the approach adopted by the UKSC in *Patel* v *Mirza*, the money paid in *Parkinson* would be recoverable, and Lush J got it wrong in holding that the money could not be recovered. Lord Toulson observed (at [118]): 'Bribes of all kinds are odious and corrupting, but it does not follow that it is in the public interest to prevent their repayment... If today it transpired that a bribe had been paid to a political party...it might be regarded as more repugnant to the public interest that the recipient should keep it than it should be returned.' He could not be more wrong: the only way to kill dead bribe-giving and bribe-taking is to assure the briber and bribee that the bribe can never be recovered by the briber, under any circumstances. (Recovery by a third party under the law on holding fiduciaries to account for gains made as a result of their position as a fiduciary is another matter entirely.) As I said, judges simply aren't very good when it comes to issues of public policy.

(4) *Application to specific tort cases.* Let's finish up by considering how the common law (that is, the law outside any specific statutory provisions) on illegality as laid down in *Patel* v *Mirza* might apply in various concrete tort cases, as compared with how the common law on illegality in tort as laid down in *Gray* v *Thames Trains Ltd* would have applied:

(a) *Jekyll-Hyde I.* *Thug* beats up *Jekyll* and *Jekyll* suffers a severe head injury as a result. This injury causes *Jekyll*'s personality to change for the worse, with the result that he starts to

suffer violent obsessions about other women. *Jekyll* goes on to sexually assault a woman and is sentenced to 5 years' imprisonment. Under the old law, *Jekyll* would not be able to sue *Thug* for compensation for the fact that he has been imprisoned (Woolf J's eccentric judgment in *Meah* v *McCreamer* [1985] 1 All ER 367 notwithstanding), and it seems clear that the same result would be achieved under Lord Toulson's approach to the defence of illegality, especially given the second policy goal (coherence in the law) that he identified at para [99] of his judgment.

(b) *Bank Robber*. *Drunk* carelessly runs down a man in the street, who suffers crippling injuries as a result of being run over. The victim of *Drunk*'s careless driving turns out to be a bank robber who wishes to sue *Drunk* for damages in respect of all the money he would have made from robbing banks and he not been permanently disabled as a result of being run over. Again, under the old law on illegality in tort, the bank robber would not have been able to sue *Drunk* in tort in respect of his loss of 'earnings', and it seems again obvious that the same result would be achieved under the new law on illegality, especially given the first policy goal for the law (not allowing people to profit from their wrongdoing) that Lord Toulson identified at [99].

(c) *Jekyll-Hyde II*. The same facts as (a), except that when *Jekyll* carried out his sexual assault, his victim – using reasonable force in self-defence – inflicted some serious and permanent injuries on *Jekyll*. *Jekyll* now wishes to sue *Thug* for compensation for the fact that he has suffered those injuries. Now things start to get tricky. Under the old law on illegality, it is very clear that *Jekyll* would not have been allowed to sue for compensation for the injuries suffered by him in carrying out his sexual assault – the link between his suffering those injuries and the crime he committed would have been too close to allow him to sue. However, under Lord Toulson's approach, refusing to allow *Jekyll* to sue *Thug* in respect of his injuries would not seem to further either the policy goal of preventing people profiting from their wrongdoing (unlike in (b), *Jekyll* is not seeking to be compensated for losing the fruits of a life of crime, but to be compensated for some of the inevitable costs incurred in such a life), of ensuring that the law is coherent across its various divisions. So it is hard to see how, consistently with the majority's approach to illegality in *Patel* v *Mirza*, a defence of illegality could be raised to defeat *Jekyll*'s claim in this case.

(d) *Prostitute*. *Lonely* tries to have sex with *Bella*, a prostitute. Unfortunately, he is unable to perform. Feeling humiliated and miserable, he starts slapping *Bella*'s face, shouting, 'You're so useless, you're so worthless!' He is talking about himself, but *Bella* thinks he is talking about her. *Bella* reaches for a heavy glass beside the bed, and smashes it against *Lonely*'s head. The impact causes *Lonely* to suffer severe brain damage. *Bella* is tried for causing grievous bodily harm with intent contrary to s 18 of the Offences Against the Person Act 1861 and is convicted; her claim that she acted in reasonable self-defence is rejected as it is held she used excessive force in seeking to protect herself from being hit by *Lonely*. *Lonely* now wants to sue *Bella* for compensation for the loss of earnings and loss of amenity that he has suffered as a result of her battery. Again, under the old law it seems that *Lonely* would not be allowed to sue *Bella*. While *Bella* may have used excessive force against *Lonely*, the force was not so excessive as to allow us to say that there was not still a close link between *Lonely*'s hitting *Bella* and what *Bella* did to *Lonely*: see *Cross* v *Kirkby* [2000] EWCA Civ 426 (distinguished from *Revill* v *Newbery* [1996] QB 567 on the basis that the force in that case (shooting at the claimant) was so out of proportion to the claimant's illegal act in trying to break into the defendant's allotment shed that there was not close enough a link between the claimant's illegality and the loss suffered by the claimant to give rise to a defence of

illegality). However, it seems pretty clear that under the new law, things would go the other way and *Bella* would not be able to raise a defence of illegality to *Lonely*'s claim. Allowing *Bella* such a defence would not further either of the goals identified by Lord Toulson as underlying the defence of illegality at [99]. Lord Sumption – who favoured the 'narrowest' form of the illegality defence in the form of the reliance test ([262](iv)) – was also critical of allowing a defence of illegality in a case like *Bella*'s, criticising (at [240]) the Court of Appeal in *Cross* v *Kirkby* for ruling that had a farmer been found to have used excessive force in defending himself against a hunt saboteur who was threatening the farmer with a baseball bat, the farmer would still have been able to raise a defence of illegality to the saboteur's claim for compensation so long as the force used by him was not grossly excessive. In his judgment Lord Sumption called this aspect of the Court of Appeal's decision 'unprincipled' ([140]); in an earlier 2012 Chancery Bar Association lecture on illegality – 'Reflexions [sic] on the Law of Illegality' – Lord Sumption took the view that the 'real' reason why the Court of Appeal would have dismissed the saboteur's claim on the basis of illegality was 'that the Court of Appeal did not like the cut of his jib.' Like most attempts to peer into other people's souls and discern the 'real' reasons for their actions, this seems pretty unfair – but also makes it clear that there would be no judicial support nowadays, post-*Patel* v *Mirza*, for using the defence of illegality to protect *Bella* from being sued by *Lonely*.

(e) *Refugee*. *Hilda* enters the UK illegally and straightaway asks for asylum in the UK on the grounds that she has a reasonable fear of being persecuted in her home country. While her application for asylum is being considered, she is forbidden from obtaining paid employment. Nevertheless, *Hilda* gets a job in a nearby factory. One day, she is carelessly run down by *Drunk*, and her injuries are such that she is unable to continue working at the factory. She wishes to sue *Drunk* for the loss of the money she would have earned at the factory. Here again it seems that under the old law, *Hilda*'s claim would have been barred on the basis of illegality: there would have been too close a link between her illegally taking paid employment and the loss suffered by her for her to be allowed to sue for that loss. Under the new law, *Hilda*'s claim might be thought to run foul of Lord Toulson's first policy basis for the law on illegality – not allowing people to profit from their wrongdoing. However, under the 'range of factors' approach favoured by Lord Toulson, that would not necessarily prove fatal to *Hilda*'s claim. It would also have to be considered whether barring *Hilda*'s claim for loss of earnings would be 'disproportionate' given all the circumstances. Here we get into the difficulties pointed out by Lords Mance, Clarke and Sumption. It is difficult to know how a particular judge might be expected to decide whether barring *Hilda*'s claim would be 'disproportionate'. I won't even attempt to reach a conclusion on this issue, other than to observe that it easy to see how a particular judge's political outlook and range of sensibilities could easily affect what conclusion they reach.

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