THE END OF AN ERA? ILLEGALITY IN PRIVATE LAW IN THE SUPREME COURT

Patel v Mirza [2016] UKSC 42; [2016] 3 W.L.R. 399 is a pivotal moment in English private law. By a majority, the Supreme Court declared that the landmark decision in *Tinsley v Milligan* [1994] 1 A.C. 340; [1993] 3 All E.R. 65 should not be followed in so far as it established that a claimant will fail for illegality where he or she needs to rely on his or her wrongdoing in order make out the cause of action. Instead of a reliance test, the illegality doctrine is to turn on a policy-based test pursuant to which various salient factors are weighed. Expressed in language that will now be familiar to disciples of this area of jurisprudence, *Patel* opts for a discretionary approach over a rule-based analysis. *Patel* apparently brings to a halt, at least for the moment, a debate regarding the illegality doctrine that has raged in the Supreme Court for several years.

Before addressing *Patel*, it is necessary to give a brief history of the saga that preceded it. The question in *Tinsley v Milligan* was whether a claimant who had contributed to the purchase price of a house could assert a beneficial interest in it where the house's legal title had been placed solely in the name of the claimant's cohabitee in order to facilitate the commission of an offence (on the facts, welfare fraud). A majority of the House of Lords answered this question in the affirmative, holding that the illegality doctrine was inapplicable. In essence, the reasoning was as follows: (1) the presumption of the resulting trust applied; (2) therefore, the claimant did not need to rely on her illegality in order to establish the elements of her claim (she had to prove only the contribution to the purchase price); and (3) it followed that she should succeed in her action. It was this reasoning that gave rise to the reliance test. Decades passed. Other approaches to the illegality doctrine applying in different parts of private law were born and buried. So matters stood until the Supreme Court addressed the law of illegality in a series of landmark decisions (considered by Strauss (2016) 132 L.Q.R. 236).

The first decision in the sequence was *Hounga v Allen* [2014] UKSC 47; [2014] 1 W.L.R. 2889. That appeal concerned the statutory tort of unlawful discrimination. Lord Wilson, who delivered the principal reasons, seemed to prefer the policy-based test (at [42]). The next decision was *Les Laboratoires Servier v Apotex Inc* [2014] UKSC 55; [2015] A.C. 430, in which the illegality doctrine was invoked to resist a claim under a cross-undertaking in damages. The asserted "turpitude" in *Apotex* was merely private law wrongdoing (breach of a patent), and all of the members of the Supreme Court agreed that such wrongdoing was insufficient to enliven the illegality doctrine, subject to exceptions. It was on this basis that the court disposed of the appeal. However, the court proceeded to consider the proper approach to determining when, if turpitude exists, the doctrine applies. The court divided sharply on this point. Lord Sumption (with whom Lords Neuberger and Clarke agreed) preferred a rule-based approach. The rule endorsed was the reliance test. By contrast, Lord Toulson argued for the policy-based test. This difference in opinion was left unresolved. The debate between these two camps played out again in *Bilta (UK) Ltd v Nazir (No.2)* [2015] UKSC 23; [2016] A.C. 1 but, again, no definite conclusion was reached. This prompted Lord Neuberger to remark that the illegality doctrine needed to be addressed again by the Supreme Court as soon as was appropriately possible (at [15]).

Patel v Mirza was the opportunity of which Lord Neuberger spoke. Mr Patel transferred to Mr Mirza £620,000 in order that the latter could use the money to trade shares on the basis of inside information. Although the promised inside information was not forthcoming, Mr Mirza refused to return the money. Mr Patel sued. Mr Mirza resisted the claim on the basis that the agreement between them constituted a conspiracy contrary to s.52 of the Criminal Justice Act 1993. At first instance ([2013] EWHC 1892 (Ch); [2013] Lloyd's Rep. F.C. 525), it was held

that the claim was barred for illegality. An appeal to the Court of Appeal was allowed ([2014] EWCA Civ 1047; [2015] Ch. 271).

The Supreme Court, sitting as a panel of nine, unanimously dismissed an appeal by Mr Mirza. The court split (broadly speaking) into two factions, with one preferring the reliance test and the other the policy-based test, with the latter faction prevailing (Lords Neuberger, Kerr, Wilson and Hodge, and Lady Hale; against Lords Mance, Clarke and Sumption). Lord Toulson delivered the principal opinion in support of the policy-based test. His Lordship said that "Mr Patel is seeking to unwind the arrangement, not to profit from it" (at [115]) and that:

> "no particular reason has been advanced … to justify Mr Mirza's retention of the monies beyond the fact that it [sic] was paid to him for the unlawful purpose of placing an insider bet" (at [116]).

It followed, Lord Toulson said, that the policy-based test did not preclude recovery. Lord Toulson also wrote:

> "I would hold that a person who satisfies the ordinary requirements of a claim in unjust enrichment will not prima facie be debarred from recovering money paid or property transferred by reason of the fact that the consideration which has failed was an unlawful consideration" (also at [116]).

The result, his Lordship indicated, was that cases in which a claim in unjust enrichment would fail for illegality would "be rare" (at [121]). The effect of the decision in *Patel* is, therefore, severely to confine the illegality doctrine, at least in the law of unjust enrichment (with the result that complaints that the policy-based test leads to an overly expansive illegality doctrine (see e.g., at [262(iv)] per Lord Sumption) seem to be misplaced).

The foregoing describes the essential conclusions reached in *Patel*. The rest of this note addresses several important questions that arise from the Justices' reasons. The first concerns the role that remains, if any, for other tests regarding the illegality doctrine. *Patel* does not merely endorse the policy-based test; it also flatly rejects the reliance test. Lord Toulson stated that *Tinsley v Milligan* "should no longer be followed" (at [110]). The demise of the reliance test should not be mourned. There are numerous fatal objections to it. One such objection is that it has never been explained precisely why it should matter that the claimant needs to rely on his or her illegality. Simply to assert (as Lord Sumption did at [239]) that a claimant cannot rely on the illegality is merely to restate the reliance test; it does *not* justify it. Another objection is that it is often a matter of luck whether a claimant needs to rely on his illegality. Whether or not the claimant has to rely on it depends on whether the fact to which the illegality pertains relates to an element of the claimant's cause of action (in which case the claimant will need to rely on it) or is instead a matter of defence (in which event the claimant will not). However, because issues are often allocated as between the action/defence categories apparently at random, the reliance test leaves the illegality doctrine hostage to luck.

But what room, if any, remains in the wake of *Patel* for other tests? In the context of proceedings in negligence, the courts have generally applied the causal approach endorsed by Lord Hoffmann in *Gray v Thames Trains Ltd* [2009] UKHL 33; [2009] 1 A.C. 1339, according to which the claimant will fail if his damage was caused by his or her own illegal act (see e.g., *Joyce v O'Brien* [2013] EWCA Civ 546; [2014] 1 W.L.R. 70). It is doubtful whether *Patel* leaves any space for this causal approach. There is little in Lord Toulson's reasons to suggest that the policy-based test is to be confined to the law of unjust enrichment. Nevertheless, given that the causal approach was not explicitly denounced, and because *Patel*

is a decision in the law of unjust enrichment, the causal analysis will probably continue to be employed in the negligence context, perhaps with the policy-based test being used as a cross-check.

A second important question is which policy factors are relevant to the policy-based test and what weight does each carry? Lord Toulson declined to identify the material factors exhaustively. His Lordship said:

> "I would not attempt to lay down a prescriptive or definitive list … Potentially relevant factors include the seriousness of the conduct, its centrality …, whether it was intentional and whether there was a marked disparity in the parties' respective culpability" (at [107]).

His Lordship did not comment expressly upon the relative weight of these factors. It seems that the significance of individual factors must vary from case to case.

A third question is whether the policy-based test is satisfactory (for argument in support, see Buckley (2015) 131 L.Q.R. 341). It is touted for its flexibility. But what are the policy-based test's drawbacks? The complaint that is typically made of it is that it is intolerably uncertain in its application (see e.g., at [263]–[265] per Lord Sumption). Lord Toulson offered several points in reply to this criticism (at [113]). His Lordship argued that other approaches have not yielded certainty. This is true, but no answer to the complaint in question. Simply because other approaches suffer from uncertainty does not mean that the policy-based test should be accepted.

Lord Toulson's next retort was that he "was not aware of evidence that uncertainty has been a source of serious problems in those jurisdictions which have taken a relatively flexible approach". This remark is puzzling as no other jurisdiction adopts an approach to the illegality doctrine that is nearly as flexible as the policy-based test (cf. s.7 of the Illegal Contracts Act 1970 (NZ). Thus, in *Hall v Herbert* [1993] 2 S.C.R. 159 the Supreme Court of Canada emasculated the illegality doctrine. In that jurisdiction, a claim (in tort) will fail for illegality only if it would involve the civil law coming into conflict with criminal law. McLachlin J., delivering the principal reasons, embraced a very specific meaning of "inconsistency" (at 179–180), a point that has been disregarded so regularly in judicial consideration of her reasons in Britain that one suspects that the oversight is deliberate. As a careful reading of her reasons (and of the work of Weinrib, on which her reasons are based (Weinrib (1976) 26 U.T.L.J. 28)) reveals that an inconsistency arises only where granting a remedy would facilitate wrongful profiting or the evasion of a criminal law sanction. This test is very far from discretionary in nature. Illegality in Australia is governed primarily by statute. Those statutes, broadly speaking, deny recovery where the claimant's illegality is serious and closely connected to the damage about which complaint is made (see e.g., Civil Liability Act 2002 (NSW) s.54). These provisions are notable for their inflexibility.

Finally, Lord Toulson indicated that certainty might not be terribly important when it comes to people who are "contemplating unlawful activity" (at [113]). This sentiment was echoed by Lord Kerr, who wrote:

> "Certainty or predictability of outcome may be a laudable aim for those who seek the law's resolution of genuine, honest disputes. It is not a premium to which those engaged in disreputable conduct can claim automatic entitlement" (at [137]).

This idea has found traction in other contexts. Criminal law theorists have argued, for example, that certain defences to criminal liability, such as immunities, *should* be ambiguous. Paul Robinson observed that where a defendant is exempt from criminal liability only

because of the application of a "nonexculpatory public policy defense", the defendant's conduct is "generally deplored". He argued (see (1982) 82 Colum. L.Rev. 199 at 272–273) that, consequently:

> "vagueness and ambiguity in these defences may serve the useful purpose of deterring undesirable conduct by persons who in fact qualify for them … A chilling effect may have beneficial consequences".

This argument is obviously controversial. One response to it is that even if uncertainty in the law might discourage unwanted behaviour, such uncertainty tends to provoke litigation, which has its own costs (a point made by Lord Neuberger at [158]).

Thus, for the reasons that have been given, Lord Toulson seems not to have a compelling response to the uncertainty objection. To what other objections is the policy-based test vulnerable? Another line of attack concerns the factors to which the test is sensitive. Consider deterrence. This is a consideration to which the test responds (see e.g., *Hounga v Allen* [2014] 1 W.L.R. 2889 at [44]). However, it will be rare that denying recovery for illegality will have any meaningful deterrent effect given that the doctrine is not, surely, a matter of public knowledge. Even if the doctrine has the potential to influence behaviour, in cases in which the parties are jointly engaged in illegality, denying recovery makes offending *cheaper* for the defendant. As an objection to the policy-based test, however, this complaint is of limited force. This is because it focuses on the factors to which the test looks rather than on the test itself. If unconvincing factors were stripped from the test, this complaint would not bite.

A different criticism of the policy-based test is that it requires the courts to weigh incommensurable factors (for sophisticated development of this idea in another context, see Stevens, "Contributory Fault—Analogue or Digital?" in Dyson, Goudkamp and Wilmot-Smith (eds), *Defences in Tort* (2015) at 255). This objection proceeds as follows. If factors are to be weighed against each other, there must be some common metric. However, the policy-based test identifies no such metric. Thus, the need, for example, to prevent wrongful profiting cannot be pitched against, for instance, the desirability of responding proportionately to the seriousness of the claimant's offending. The policy-based test is, therefore, flawed because it requires the courts to do the impossible. Requiring judges to compare the factors in play is akin to asking them whether five litres is greater than two meters. One reply to this criticism is that judges seem to have no difficulty weighing the factors to which the policy-based test is sensitive. A (compelling) retort to this, however, is that that fact is beside the point: that responses can be given to an incoherent question does not make the question coherent.

A fourth question is what are the ramifications of *Patel*? One important consequence of the entrenchment of the policy-based test is that, generally speaking, appeals regarding the illegality doctrine are now extremely unpromising. It is well established that the circumstances in which appellate disturbance of a first instance decision is warranted depend on the nature of the decision below (see e.g., *South Cone v Bessant* [2002] EWCA Civ 763; [2003] R.P.C. 5 at [26]). In relation to discretionary decisions, the appellate court must recognise that "different judges may legitimately take different views" and "those differing views should be respected, within the limits of reasonable disagreement" (*Jackson v Murray* [2015] UKSC 5; [2015] 2 All E.R. 805 at [28]). In the absence of an identifiable error, an appellate court should interfere only where it concludes that the court below reached a decision which "was not one which was reasonably open to it" (also at [28]). Since the policy-based test gives trial judges considerable freedom to decide which factors are material and the weight that they carry, the test is highly discretionary. Consequently, decisions regarding the illegality doctrine will be largely impervious to appellate review.

By way of conclusion, a few points regarding the judicial methodology adopted in *Patel* merit comment. The first concerns the fact that the Justices understood there to be just two options before them. Either the policy-based test could be embraced or the solution in *Tinsley v Milligan* could be endorsed. Thus, Lord Kerr said:

> "The way is now open for this court to make its choice between, on the one hand, cleaving to the rule-based approach exemplified by *Tinsley* … and, on the other hand, a more flexible approach, taking into account the policy considerations …" (at [133]).

This, however, is a false choice. It is mystifying why the many other possible tests for which the Supreme Court could have opted (such as the Canadian rule, which has been referred to above) were removed from the table at the outset. It seems that this blinkered view of the problem was self-imposed, with Lord Sumption revealing that neither party had argued for the policy-based test (at [261]).

Another interesting methodological point concerns the fact that the division in the Supreme Court between the merits of a more discretionary analysis and a rule-based approach is not confined to the context of illegality. As Graham Virgo observes, this is just one theatre in which this conflict has been fought (see Virgo (2015) 6 U.K.S.C.Y. 233 at 233). Oddly, the combatants appear to have switched sides periodically. For example, Lord Toulson's reasons in *Michael v Chief Constable of South Wales Police* [2015] UKSC 2; [2015] A.C. 1732, a case about the duty of care element in the tort of negligence, marginalised the nakedly policy-based *Caparo* test in the course of advancing a rule-based articulation of the assumption of responsibility test. This, of course, is diametrically opposed to the position that he adopted in *Patel*.

Finally, observe that *Patel* in essence gives effect to proposals that the Law Commission had advanced in its investigation of the illegality doctrine (see Law Commission, *The Illegality Defence in Tort: A Consultation Paper* (CP No.160, 2001), at para.6.5ff; Law Commission, *The Illegality Defence* (No.320, 2010), at para.2.22) on which the legislature did not act. This is one of the most controversial aspects of *Patel*. While it is true that there may be many reasons for legislative inaction (for searching discussion, see Atiyah (1985) 48 M.L.R. 1 at 25–28), it is striking that the Supreme Court proceeded in the way that it did in the circumstances.

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