

Illegal Earnings

James Goudkamp* and Lorenz Mayr**

Abstract: This article addresses the law governing claims in respect of lost illegal earnings. It focuses on common law jurisdictions (and the law in the United Kingdom in particular) where such claims, despite being commonplace, have been largely ignored by academics. It describes the existing law and calls in aid in this regard a four-fold taxonomy of cases. The article then turns attention to how claims in respect of lost illegal earnings ought to be decided. At this juncture, the article looks to ideas emanating from German tort law, which has developed a highly sophisticated jurisprudence on the subject of illegal earnings. The German approach, stated simply, requires tort law to defer to rules in other departments of private law. If, for example, contract law would not protect an interest that a claimant has in a particular transaction by reason of the transaction being tainted with illegality, tort law will not allow a claimant indirectly to obtain the benefits of that transaction via a claim for lost illegal earnings. It is argued that the German solution holds considerable promise and merits serious consideration as an alternative to the significantly more complicated principles that common law courts have developed, which principles currently lack any thoroughgoing rationalisation.

I. INTRODUCTION

When can a claimant recover damages in respect of a loss of earnings where that loss is tainted by illegality on the claimant's part? The applicability of the illegality doctrine to claims for lost illegal earnings has received almost no academic attention in any of the

* Associate Professor, Oxford Law Faculty; Fellow, Keble College, Oxford; Associate Academic Fellow, Inner Temple; Senior Honorary Research Fellow, Faculty of Law, University of Western Australia; Professorial Fellow, School of Law, University of Wollongong; barrister, 7 King's Bench Walk.

** Rechtsanwalt, Sernetz Schäfer Rechtsanwälte, Munich; former Research Fellow at the Institute of International and Foreign Law at the University of Passau, Germany. We are grateful to participants in the Oxford Obligations Discussion Group for their comments on a presentation based on an early draft of this article.

major common law jurisdictions. In an Australian case decided in 1968, the court grumbled that scholarly treatment of the subject was ‘meagre’.¹ Half a century later, that observation remains accurate. Thus, although the English Law Commission embarked on a marathon investigation of the illegality doctrine at the start of the twenty-first century,² it did not touch upon the problem of illegal earnings. Despite the immense scale of its treatment, none of the many illegal earnings cases was cited in any of its publications. Similarly, while some tort law textbooks refer to a handful of relevant cases,³ they neither delve into the reasoning in those cases nor engage with the thorny theoretical puzzles that they pose. Likewise, leading works on remedies⁴ and damages⁵ refer only fleetingly to the relevant authorities. Finally, although a staggering number of articles and chapters have been written about the illegality doctrine,⁶ the contributions concentrate on the doctrine *qua* absolute bar to the claimant’s cause of action rather than on the situation in which just one head of damages – damages for a loss of earnings – is tainted with wrongdoing on the claimant’s part. This article seeks to remedy this deficit in our

¹ *Baitis v Mills* [1968] VR 583 at 590 (Gowans J).

² *Law Commission*, The Illegality Defence in Tort (Law Com No 160, 2001); *Law Commission*, The Illegality Defence: A Consultative Report (Law Com Consultation Paper 189, 2009); *Law Commission*, The Illegality Defence (Law Com No 320, 2010).

³ The most comprehensive work on tort law in England addresses the relevant cases in just a few paragraphs: *AM Dugdale and MA Jones* (eds), *Clerk & Lindsell on Torts*, 21st ed (2014), paras 3-40-3-42, 28-93 fn 477.

⁴ See, eg, *A Burrows*, *Remedies of Torts and Breach of Contract*, 3rd ed (2004), 73 fn 1, 300.

⁵ See, eg, *H McGregor*, *McGregor on Damages*, 19th ed (London 2015), paras 38-076-38-077, 39-013

⁶ The literature is on a vast scale. For a small sample, see *EJ Weinrib*, *Illegality as a Tort Defence* (1976) 26 *University of Toronto Law Journal* 28; *G Virgo*, *Illegality’s Role in the Law of Torts*, in: M Dyson (ed), *Unravelling Tort and Crime* (2014); *B McLachlin*, *Weaving the Law’s Seamless Web: Reflections on the Illegality Defence in Tort Law*, in: A Dyson, J Goudkamp and F Wilmot-Smith (eds), *Defences in Tort* (2015); *RA Buckley*, *Illegality in the Supreme Court* (2015) 131 *Law Quarterly Review* 341; *J Fisher*, *The Ex Turpi Causa Principle in Houna and Servier* (2015) 78 *Modern Law Review* 854; *J Goudkamp*, *The Doctrine of Illegality: A Private Law Hydra* (2015) 6 *United Kingdom Supreme Court Yearbook* 254; *N Strauss*, *Ex Turpi Causa Oritur Actio?* (2016) 132 *Law Quarterly Review* 236; *S Erbacher*, *Negligence and Illegality* (2017); *A Grabiner*, *Illegality and Restitution Explained by the Supreme Court* (2017) 76 *Cambridge Law Journal* 18.

understanding regarding the illegality doctrine. Its focus, as we explain in more detail below, is on the common law and English law in particular.

A need for analysis exists in this connection for four main reasons. The first is that actions for lost earnings that are contaminated by illegality on the part of the claimant are undoubtedly commonplace (to which the many cases to which we will refer in this article bear witness).⁷ Anyone who has even passing familiarity with personal injury practice knows that claimants routinely seek damages in respect of, for example, lost earnings that were not declared to a government authority, whether in order (for example) to evade tax obligations in respect of them or fraudulently to claim welfare benefits. Accordingly, the issue addressed by this article is of some practical importance.

A second reason for analysis is that the recent flurry of appellate decisions in the United Kingdom on the law of illegality generally has left the law governing illegal earnings cases in that country in some doubt. The Supreme Court of the United Kingdom, following a struggle for supremacy between rival approaches to the illegality doctrine,⁸ recently decided in *Patel v Mirza*⁹ that the doctrine's application should be governed by a policy-based approach. That approach's competitor, a rule-based analysis involving a test of reliance, was decisively rejected. Pursuant to the policy-based approach, factors that militate against withholding a remedy are pitted against factors that weigh in favour of permitting recovery. Several important questions arise regarding the scope of the principles that were established in *Patel*. One is whether the policy-based

⁷ A different view is taken in *McGregor on Damages*. The author of that text wrote: 'It very occasionally may happen that the earnings ... have some impropriety or illegality attached to them': McGregor, (n 5) para 38-076. Andrew Burrows justifies his decision not to consider the illegality doctrine in his *Remedies of Torts and Breach of Contract* on the ground that it is 'practically always concerned with liability rather than with damages' (*Burrows* (n 4) 73 fn 1). In view of the wealth of authority on the problem of illegal earnings (which we cite below), these remarks are puzzling.

⁸ *Hounga v Allen* [2014] UKSC 47; [2014] ICR 847; *Les Laboratoires Servier v Apotex Inc* [2014] UKSC 55; [2015] AC 430; *Bilta (UK) Ltd v Nazir* [2015] UKSC 23; [2016] AC 1.

⁹ [2016] UKSC 42; [2016] 3 WLR 399. For discussion of *Patel*, see J Goudkamp, 'The End of an Era? Illegality in Private Law in the Supreme Court (2017) 133 Law Quarterly Review 14.

approach applies in tort law (*Patel* concerned a claim in unjust enrichment). Another question is whether, even if *Patel* extends beyond the setting of unjust enrichment, it overruled *sub silentio* authorities that are concerned specifically with illegal earnings. This article engages with both of these questions.

Third, focusing on the application of the illegality doctrine to claims in respect of lost illegal earnings permits one to see clearly that the doctrine does not operate only as a bar on liability. Textbooks routinely present the illegality doctrine as though it, when enlivened, necessarily yields a verdict for the defendant.¹⁰ However, the doctrine can negate liability and, alternatively, affect only the quantum of recovery. Accordingly, the problem of illegal earnings illuminates the fact that the doctrine straddles the law governing liability and the law of remedies. This underappreciated feature of the doctrine is of theoretical interest not least because it reveals that a major conceptual distinction exists between the law of illegality and the law of contributory negligence.¹¹ The latter, unlike the former, goes (at least in the United Kingdom) only to the claimant's remedy.¹²

A fourth reason is that the issue of illegal earnings has officially been put on the agenda for the unification of European tort law. The Principles of European Tort Law developed by the European Group on Tort Law contains a provision that deals specifically with the issue. Article 2:103 stipulates that 'losses relating to activities or

¹⁰ See, eg, *P Cane*, Atiyah's Accidents, Compensation and the Law 8th ed (2013) 62 (where it is said that the defence applies 'where the court thinks that the claimant should recover nothing' (footnote omitted)).

¹¹ It is hence a mistake to perceive the law of illegality as a subset of the contributory negligence rule. An excellent illustration of confusion in this regard is *T Weir*, An Introduction to Tort Law, 2nd edn (2006) at 130, where the illegality doctrine is treated within a chapter that addresses contributory negligence.

¹² Until relatively recently, it was thought that the claimant's damages could be reduced by 100 per cent by reason of his or her contributory negligence. Where a 100 per cent reduction in damages was made, the claimant's action was regarded as failing totally. It is now accepted, however, that the concept of 100 per cent contributory negligence is incoherent with the result that the apportionment legislation will never extinguish liability: *Anderson v Newham College of Further Education* [2002] EWCA Civ 505; [2003] ICR 212; *Buyukardicli v Hammerson UK Properties plc* [2002] EWCA Civ 68 at [7]. See, further, *J Goudkamp*, Rethinking Contributory Negligence, in: SGA Pitel, JW Neyers and E Chamberlain (eds), *Tort Law: Challenging Orthodoxy* (2013) 309, 344-346.

sources which are regarded as illegitimate cannot be recovered'.¹³ Although the basic principle has thereby been addressed, the essential question when losses are to be regarded as 'illegitimate' remains unanswered.

Before proceeding, it is necessary to attend to several important preliminary points. First, we need to explain what we mean by 'illegality'. By 'illegality' we do not intend to refer only to criminal conduct. In *Apotex*, the Supreme Court of the United Kingdom clarified that while the doctrine is principally concerned with criminal behaviour,¹⁴ it may also be triggered by 'quasi-criminal' behaviour.¹⁵ Thus, Lord Sumption JSC wrote that such behaviour:¹⁶

includes cases of dishonesty or corruption, which have always been regarded as engaging the public interest even in the context of purely civil disputes; some anomalous categories of misconduct, such as prostitution, which without itself being criminal are contrary to public policy and involve criminal liability on the part of secondary parties; and the infringement of statutory rules enacted for the protection of the public interest and attracting civil sanctions of a penal character, such as competition law.

We use the term 'illegality' compendiously to refer to all types of conduct to which the illegal doctrine might attach in view of Lord Sumption JSC's statement of principle.

Another preliminary point concerns the jurisdictions with which this article is concerned. This article endeavours to explain the existing law regarding illegal earnings cases in common law jurisdictions. Attention in this regard is centred on the United

¹³ *European Group on Tort Law*, Principles of European Tort Law, Text and Commentary (2005) 34-36. The Principles of European Law on Non-Contractual Liability Arising out of Damage Caused to Another developed by the Study Group on a European Civil Code lacks an equivalent provision.

¹⁴ 'The paradigm case of an illegal act engaging the defence is a criminal offence': [2014] UKSC 55; [2015] AC 430 at [23] (Lord Sumption).

¹⁵ It had previously been unclear whether the illegality doctrine extended beyond criminal conduct, with the principal authority suggesting that it did was the much maligned decision in *Hegarty v Shine* (1878) 14 Cox CC 145.

¹⁶ [2014] UKSC 55; [2015] AC 430 at [25].

Kingdom although reference is made to several other common law jurisdictions, principally Australia, Canada and New Zealand. However, this article also addresses the normative question of what the law concerning a loss of illegal earnings ought to be, and we refer at length to German jurisprudence in this regard. We do so because the problem of illegal earnings has generated a vast body of authority in that jurisdiction¹⁷ and a correspondingly extensive academic literature.¹⁸ Indeed, as far as we have been able to tell, the issue of illegal earnings has been treated more thoroughly in Germany than anywhere else by very a substantial margin. Given the paucity of academic learning on the subject of lost illegal earnings in common law jurisdictions, looking to the situation in Germany promises to be worthwhile.

The reader will have noticed that we are speaking in this article of the illegality ‘doctrine’ rather than of, for example, the illegality ‘defence’. We have eschewed the term ‘defence’ because referring to a rule as a ‘defence’ sometimes suggests the rule concerned precludes liability from arising altogether.¹⁹ In illegal earnings cases, however, what is in issue is not whether the claimant has a valid cause of action but whether the claimant can recover damages in respect of his lost earnings given that the claim in respect of those earnings is infected with illegality. Deploying the term ‘defence’ in the present setting threatens to introduce confusion.

Finally, we should say something about the causes of action with which we are concerned. Virtually all of the relevant cases in common law jurisdictions comprise proceedings in which the claimant suffered personal injury in respect of which recovery

¹⁷ There are over fifty reported decisions, including twelve judgements rendered by the Federal Court of Justice (*Bundesgerichtshof*). Of particular importance are BGH (06.07.1976), NJW 1976, 1883, BGH (30.11.1979), NJW 1980, 775, and BGH (28.01.1986), NJW 1986, 1486.

¹⁸ Important contributions include *F Bydlinski*, Unerlaubte Vorteile als Schaden, in: HJ Ahrens et al (eds), *Festschrift für Erwin Deutsch* (1999), 63 and *R Stürner*, Der entgangene rechtswidrige oder sittenwidrige Gewinn *VersR* 1976, 1012.

¹⁹ For argument that the term ‘defence’ should be limited to such rules, see *J Goudkamp*, *Tort Law Defences* (2013) at 5-7.

was sought via a claim in the tort of negligence. The remainder are claims in defamation²⁰ and breach of contract.²¹ However, this article is not confined to claims in the action in negligence. Neither is our attention confined to the personal injury context. Our concern is, rather, with the problem of claims for lost illegal earnings generally.

The rest of this article is arranged as follows. In Part II, we describe four situations in which the problem of illegal earnings arises. We use this taxonomy to facilitate the analysis that follows. In Part III, we consider how the courts in common law jurisdictions (concentrating on the United Kingdom) dispose of cases that fall within each of the four categories within our schema. The analysis in Part III is descriptive. It is concerned to explicate what the current law is and to show how future cases that fall within each of the categories would be decided. Part IV assesses the normative considerations that are engaged by the illegality doctrine. At this juncture, German law comes to the fore. Our conclusions are summarised in Part V.

II. FOUR CATEGORIES OF CASE

Illegal earnings cases can be reduced to four categories. The first concerns claims in which the way in which the claimant obtained his or her income was illegal *per se*. This type of case is exemplified by the following example (*'Burglar'*). Suppose that C1, a career burglar, is tortiously injured by D1 in circumstances where C1 was acting perfectly lawfully at the time of the tort. C1's injuries prevent him from committing further burglaries and he seeks compensation in respect of, among other losses, income that he would have derived by committing burglaries. We stress that in *Burglar* C1 was not committing a burglary (or doing anything else unlawful) when he was injured. Had C1

²⁰ *Collins v Carnegie* (1834) 1 A & E 695, 110 ER 1373; *Smiths' Newspapers v Becker* (1932) 47 CLR 279.

²¹ *Allen v Hounsa* [2011] Eq LR 569. This matter went on appeal to the Supreme Court, but the illegal earnings point had fallen away by that stage with the issue for the Court being whether the claimant's breaches of immigration rules deprived her of redress *in toto* in a claim for unlawful discrimination contrary to s 4(2)(c) of the Race Relations Act 1976 (UK) (which is now s 39(2)(c) of the Equality Act 2010 (UK)): see [2014] UKSC 47; [2014] ICR 847 at [24].

been injured *in flagrante delicto*, it is possible (indeed, likely) that a court would enter a verdict for the defendant.²² Hence, *Burglar* is not a case in which C1's action as a whole is contaminated with wrongdoing. Rather, it is only C1's claim for his lost illegal earnings that is affected by his wrongdoing.

In the second category of case, the type of work that the claimant performed is lawful but the manner in which it was carried out was not. Consider the following example ('*Trucker*'). C2, a truck driver, violates legislation that limits the number of hours for which he is permitted to drive within a 24-hour period.²³ C2 is negligently injured by D2 in circumstances that are unrelated to his work and those injuries prevent C2 from driving trucks. The difference between *Burglar* and *Trucker* is that in *Burglar* the work concerned was illegal *simpliciter* whereas in *Trucker* it was only the claimant's *modus operandi* that was unlawful. Again, we emphasise that C2 in *Trucker* was not injured while acting illegally and, consequently, the illegality doctrine would not apply to his cause of action more generally. At most, the illegality doctrine will preclude recovery in respect of a loss of earnings. C2's claim in respect of other losses suffered would remain intact.

The third category of case involves an unlawful failure by the claimant to declare income derived from lawful work to the relevant authorities. '*Tax Cheat*' illustrates this category. C3, a tradesperson, only accepts payment for his services in cash and unlawfully fails to declare receipt of such income to the revenue authorities.²⁴ C3 is then tortiously injured by D3 and rendered incapable of carrying on his business. A permutation on this

²² Consider *National Coal Board v England* [1954] AC 403 at 429 (Lord Tucker) ('If two burglars, A and B, agree to open a safe by means of explosives, and A so negligently handles the explosive charge as to injure B, B might find some difficulty in maintaining an action for negligence against A'). See also Criminal Justice Act 2003 (UK), s 329 (providing that the court's permission to sue is required where the claimant seeks to claim in trespass to the person and the alleged trespass was committed while the claimant was committing an act that led to the claimant being convicted of 'an imprisonable offence'). Cf *Revill v Newbery* [1996] QB 567 (permitting recovery by a burglar who had been shot by an occupier).

²³ Transport Act 1968 (UK), s 96(1).

²⁴ Consider s 106A of the Taxes Management Act 1970 (UK) and the common-law offence of cheating the public revenue.

scenario is ‘*Welfare Fraudster*’. In this example, C3 misrepresents his earnings in order fraudulently to claim welfare benefits.²⁵ C3 is tortiously injured and seeks compensation in respect of his lost undeclared income. The difference between *Tax Cheat* and *Welfare Fraudster* is that in the former the claimant illegally withholds money that is due to the State, while in the latter the claimant wrongfully obtains money from the State.

In the final category of case, the work performed by the claimant was both lawful in principle and carried out in a lawful way but the manner in which the claimant secured the work was illegal. Consider the following example (*Imposter*). C4 applies for a job as a professor at a university. When the university asks C4 to supply the names of referees who would be willing to support his application, C4 gives the names of three non-existent individuals in whose names C4 had created e-mail addresses. C4 then sends by email reports in the names of the ‘referees’ which extolled C’s academic credentials.²⁶ C4, in fact, had no relevant qualifications at all. The university appoints C4 to a chair on the strength of the ‘references’ supplied. D4 then negligently injures C4 whose injuries preclude C4 from continuing his employment with the university.

The four scenarios that we have outlined are not mutually exclusive. Consider *Pretend Lawyer*. In this example, C5 holds himself out as a lawyer and secures employment with a firm of solicitors despite his not having been admitted as a solicitor. D5 tortiously injures C5, who, because of his injuries, is rendered incapable of working for the firm. This example straddles the fourth category of case (exemplified by *Imposter*) because the work was obtained illegally and the second category (illustrated by *Trucker*) because it was illegal for C5 to offer legal services given that he had not been admitted as a legal practitioner.²⁷

²⁵ Potential offences committed by C4 as a result are legion. But consider s 112 of the Social Security Administration Act 1992 (UK).

²⁶ C thereby committed an offence under, *inter alia*, the Fraud Act 2006 (UK), s 2.

²⁷ Legal Services Act 2007 (UK), s 14(1). For another illustration of a case that straddles categories two and four, see *Vakante v Governing Body of Addey v Stanhope School (No 2)* [2004] ICR 279 (claimant obtained work by deception in circumstances where, because of his immigration status, he was not permitted to work).

Although the four categories overlap to a degree, we consider it convenient to analyse claims for lost illegal earnings by way of the four-fold taxonomy that we have devised.

It might be thought that an additional category of case is required in order to accommodate proceedings in which the claimant seeks compensation for income that he was unable to derive on account of a criminal law conviction being entered against him. There are many illustrations of this type of claim. *Gray v Thames Trains Ltd*²⁸ is one of the best known.²⁹ The claimant in *Gray* suffered psychiatric injuries due to the defendants' negligence. Because of those injuries, the claimant killed a stranger with whom he had become embroiled in an argument. The claimant was sentenced to detention in hospital and he then sought damages in respect of, *inter alia*, the loss of income that the detention caused. His claim for lost earnings in respect of the period of the detention was rejected for illegality.³⁰ However, *Gray*-type claims are irrelevant for the purposes of this article. Although the illegality doctrine applied in *Gray* to deny recovery in respect of (among other losses) the lost earnings, those earnings *themselves* were not tainted by illegality (the claimant had carried out entirely lawful work as a local authority employee prior to his killing the stranger). Our concern in this article is only with cases in which there was something unlawful about the way in which the forgone illegal earnings would have been derived but for the defendant's tort. Accordingly, cases that conform to the pattern as those in *Gray* will be put to one side.

²⁸ [2009] UKHL 33; [2009] 1 AC 1339. For analysis of *Gray*, see J Goudkamp, A Long, Hard Look at *Gray v Thames Trains Ltd*, in: P Davies and J Pila (eds), *The Jurisprudence of Lord Hoffmann: A Festschrift in Honour of Lord Leonard Hoffmann* (2015).

²⁹ See also *State Rail Authority of New South Wales v Wiegold* (1991) 25 NSWLR 500; *Clunis v Camden and Islington Health Authority* [1998] QB 978; *Worrall v British Railways Board* [1999] CLY 1413; *Cooper v Reed* [2001] EWCA Civ 224; *X v RDM* [2004] BCSC 1273; *HL v Canada* [2005] SCC 25; [2005] 1 SCR 401; *British Columbia v Zastowny* [2008] SCC 4; [2008] 1 SCR 27.

³⁰ [2009] UKHL 33; [2009] 1 AC 1339 esp at [50] (Lord Hoffmann).

III. THE DESCRIPTIVE ISSUE

The burden of this section is to explain the law governing illegal earnings in common law jurisdictions, with attention being centred on the United Kingdom. In Part I, above, we isolated two important issues arising from the recent jurisprudence of the Supreme Court of the United Kingdom regarding the illegality doctrine. The first is whether the policy-based analysis that was endorsed in the landmark decision of *Patel* – a case in the law of unjust enrichment – applies beyond that context. The other is, if *Patel* lays down the law beyond the realm of unjust enrichment, whether the analysis that it embraces displaces the many authorities that are concerned specifically with illegal earnings. We grapple with these twin problems before considering what the current law is in relation to the four categories that comprise our taxonomy.

In *Patel*, the claimant transferred £620,000 to the defendant with a view to the latter using those funds to trade in shares on the basis of inside information. Although the promised inside information was not forthcoming, the defendant failed to remit the funds to the claimant. Proceedings were issued in (relevantly) unjust enrichment. The key issue for the Supreme Court was whether the claimant's action in unjust enrichment was barred due to the illegal purpose for which the funds had been transferred.³¹ The Supreme Court unanimously held that the illegality doctrine was inapplicable. However, the Justices differed as to why this was the case. As discussed above, a majority of the Justices³² held that the applicable test was the policy-based test. However, it was not stated expressly whether that test now applies beyond the realm of unjust enrichment. Nonetheless, several clues as to the majority's intentions in this regard are available.

In the first place, even though the claim in *Patel* was one in unjust enrichment, none of the Justices said anything that suggested that they thought that there was anything

³¹ The Court accepted that the agreement constituted a conspiracy contrary to s 52 of the Criminal Justice Act 1993 (UK).

³² Lord Neuberger, Lord Kerr, Lord Wilson, Lord Hodge and Lady Hale. Lord Mance, Lord Clarke and Lord Sumption preferred the reliance test.

unique or peculiar about that context in so far as the illegality doctrine is concerned. In short, the unjust enrichment context did not seem to colour the Justices' approach. That suggests that the policy-based test is not confined to the unjust enrichment setting. Second, the Justices drew liberally on cases from other parts of private law.³³ Again, the clear implication is that the Court was not really concerned to lay down the proper approach just for the law of unjust enrichment. On this way of looking at things, *Patel* just so happened to be an unjust enrichment case, but nothing turned on that fact. These twin considerations strongly suggest that the approach in *Patel* applies across private law.

Subsequent judicial handling of *Patel* largely supports this conclusion. In *Tchengui v Grant Thornton UK LLP*,³⁴ Knowles J followed *Patel* in the course of rejecting for illegality claims in the torts of conspiracy and malicious prosecution. His Lordship simply assumed that *Patel* applied. In *McHugh v Okai-Koi*,³⁵ *Patel* was applied in a personal injury negligence action. The claimant had been killed while endeavouring to attack the defendant. The judge rejected the plea of illegality and, in doing so, followed *Patel*. Again, it was simply assumed that *Patel* was dispositive. Finally, in *Singularis Holdings Ltd v Daiwa Capital Markets Europe Ltd*,³⁶ Rose J held that had dishonest conduct been attributable to the claimant, he would have followed *Patel* in order to reach the conclusion that a claim in negligence for pure economic loss was not barred for illegality. His Lordship did not pause in arriving at that view on account of the fact that he was deciding a claim in tort. This trilogy of decisions leaves little room for the suggestion that *Patel* is restricted to the law of unjust enrichment.

³³ By way of illustration, Lord Toulson referred to decisions in the law of trusts (see, eg, *Tinsley v Milligan* [1994] AC 340; *Collier v Collier* [2002] EWCA Civ 1095; [2002] BPIR 1057), torts (see, eg, *Bowmakers Ltd v Barnet Instruments Ltd* [1945] KB 65; *Hall v Woolston Hall Leisure Ltd* [2001] 1 WLR 225; *Hounga v Allen* [2014] UKSC 47; [2014] ICR 847), and contract (*Singh v Ali* [1960] AC 167).

³⁴ [2016] EWHC 3727 (Comm).

³⁵ Unreported, Queen's Bench Division, 31 March 2017.

³⁶ [2017] EWHC 257 (Ch) [216].

If *Patel* extends in principle beyond the domain of unjust enrichment, as appears to be the case, does it lay down an exclusive regime that supersedes tests that had been devised for specific contexts? That question is of considerable importance for present purposes since the answer to it determines the extent to which cases that are concerned immediately with the problem of illegal earnings remain relevant. Save for cases in which the reliance test has been embraced, which test was specifically condemned in *Patel*, it seems unlikely that *Patel* has overruled *sub silentio* other tests that had been developed for particular types of case. Highly significant in this regard is the decision in *Henderson v Dorset Healthcare University NHS Foundation Trust*.³⁷ In that case, the claimant stabbed to death her mother while suffering from paranoid schizophrenia. It was common ground that the homicide would not have occurred but for the negligence of persons employed by the defendant health authority. The claimant was charged with murder and the prosecution accepted a plea of guilty to manslaughter on the basis of diminished responsibility. A hospital order was made and the claimant sought compensation in negligence in respect of various losses suffered, including a loss of liberty. Jay J considered that he was bound by the decision *Gray*,³⁸ which established (among other things) that damages cannot be recovered for the consequences of criminal law sanctions, which consequences formed the gist of the claimant's action in *Henderson*. His Lordship rejected the submission that the principles laid down in *Gray* should 'give way' to the policy-based analysis expounded in *Patel*.³⁹

In light of the foregoing, the most plausible way to understand *Patel* is, in our view, as follows: the policy-based test that was preferred by *Patel* now applies throughout private law, but that test does not supersede (although it may perhaps operate as a cross-check on) more specific tests that have been developed in relation to particular types of claim. If this analysis is correct, the cases that are specifically concerned with illegal earnings

³⁷ [2016] EWHC 3275 (QB).

³⁸ [2009] UKHL 33; [2009] 1 AC 1339.

³⁹ [2016] EWHC 3275 (QB) esp at [98]-[105].

remain relevant in the wake of *Patel*. This is so notwithstanding that none of them applies precisely the type of policy-based analysis that was endorsed in *Patel*. It is on this understanding that the treatment in the rest of this section proceeds, and we therefore now turn to consider the decisions that address illegal earnings. Our focus here, as we have explained above, is on English law although we also refer periodically to decisions from other common law jurisdictions.

A. Work performed is illegal per se

Burglar, which exemplifies claims within this category, is modelled on *Burns v Edman*.⁴⁰ In that famous case,⁴¹ the deceased had been tortiously killed and his widow brought claims on behalf of both the deceased's estate and herself and their children. Sitting in the High Court of England and Wales, Crichton J observed that the deceased had been imprisoned for various offences and that he was able to support his family despite there being no evidence that he had any assets or 'honest employment'. His Lordship inferred that the support that the deceased had provided 'came from the proceeds of criminal offences.'⁴² Crichton J held that no claim could be maintained in respect of those earnings, whether for the benefit of the deceased's estate or for the purposes of a dependency claim. The actions were said to have arisen '... mala causa or ex turpis causa ...'.⁴³ Crichton J found that the widow knew that the deceased derived his income illegally.⁴⁴ His Lordship did not state explicitly whether he would have decided the case differently had the widow been unaware of the source of the earnings. Nevertheless, it is tolerably clear that the outcome would have been the same. It is worth observing that Crichton J thought that

⁴⁰ [1970] 2 QB 541.

⁴¹ *Burns* is noted in *A Bissett-Johnson, A Criminal's Lot is not a Happy One!* (1971) 34 Cambridge Law Journal 91 and *DEC Yale, Ex turpi causa non oritur actio* (1971) 29 Cambridge Law Journal 17.

⁴² [1970] 2 QB 541 at 544.

⁴³ *id.*, at p 546.

⁴⁴ *id.*, at p 544.

the possibility that the deceased might have ‘taken up remunerative, honest work’ in the future was ‘entirely speculative’ and consequently refused to award anything in respect of it.⁴⁵

Why, specifically, did the claim in respect of the lost earnings fail? One way of analysing Crichton J’s decision is on the basis that no damage was suffered in connection with the loss of earnings. The idea is that no damage was sustained because nothing to which the deceased was entitled had been lost. This seems to have been how the Court of Appeal of England and Wales understood *Burns* in *Hewison v Meridian Shipping Services pte Ltd*.⁴⁶ Referring to *Burns*, Ward LJ said that a ‘professional burglar ... does not earn his money because he steals it.’⁴⁷ The implication is that because the ‘professional burglar’ is not entitled to money derived from committing burglaries, the loss of that ‘income’ is not damage in the law’s eyes.

There are many other cases in which recovery was denied because the lost income was derived through work that was illegal *per se*. *Meadows v Ferguson*, a decision of the Supreme Court of Victoria, is one of the more noteworthy.⁴⁸ Had the claimant not been tortiously injured, he would have derived income by working illegally as a bookmaker’s clerk. The claimant argued that he was entitled to have his loss of earning *capacity* compensated as opposed to the earnings that he had in fact lost. Pursuant to that submission, it was irrelevant that the work that the claimant would continue to have performed had he not been injured was illegal since the claimant had lost the ability to pursue a lawful calling and it was that loss that formed the gravamen of his claim. Hudson J rejected that submission on the basis that it was, in his view, inconsistent with the compensatory principle.⁴⁹ His Honour wrote: ‘if the conclusion is reached that the

⁴⁵ *id.*, at p 546.

⁴⁶ [2002] EWCA Civ 1821; [2003] ICR 766.

⁴⁷ *id.*, at [88].

⁴⁸ [1961] VR 594. See also *Beljanski v Smithwick* [2006] BCCA 399; (2006) 275 DLR (4th) 116 (‘career criminal’).

⁴⁹ [1961] VR 594 at 597.

earnings of which the plaintiff has been deprived are earnings derived from an illegal employment or activity, I am of opinion that on grounds of public policy the Court should not recognize those earnings as affording a proper basis for the award of damages'.⁵⁰ Hudson J concluded that since the earnings in question were 'plainly ... unlawful',⁵¹ recovery in respect of them should be denied.

To summarise, the basic position in relation to claims that fall within the first category within our taxonomy is straightforward: such claims will fail. This principle seems to hold good across the Commonwealth. It likely makes no difference whether the claim is brought by the injured person or on behalf of his or her estate or dependants rather than by the offender. And it probably does not matter, in a dependency case, whether the dependants knew how the deceased earned the income. One potential qualification to the foregoing, is that recovery (or partial recovery) might be permitted where the claimant might have repented and secured lawful employment in the future.

B. Lawful work performed in an unlawful way

The second category of case in our schema involves claims in which only the claimant's *modus operandi* was illegal. The example offered to illustrate it, *Trucker*, resembles the facts in *LeBagge v Buses Ltd*.⁵² In *LeBagge*, the deceased had been employed as a delivery driver. Part of that delivery work was done in breach of regulations that laid down the maximum number of hours for which one was permitted to drive within a given period. The deceased was tortiously killed and a dependency claim was brought. The Court of Appeal of New Zealand unanimously stressed that the contract itself was 'perfectly lawful' and that the 'breach of the Regulation occurred only in the performance of the contract'.⁵³ The contract was said to have been invoked 'merely ... for its evidentiary value as to the

⁵⁰ *id.*, at 597-598.

⁵¹ *id.*, at 598.

⁵² [1958] NZLR 630 at 646.

⁵³ *id.*

earnings of the deceased'.⁵⁴ The Court therefore concluded that the claim was unaffected by 'any illegality arising from the fact that the deceased in the performance of the contract infringed the Regulation' and allowed recovery.⁵⁵ The scanty and dated Canadian case law pertaining to this second category of case seems to be consistent with the New Zealand position.⁵⁶

Another example of a case that is within this category is the Australian decision in *Mills v Baitis*.⁵⁷ The claimant had been tortiously injured and sought damages in respect of earnings that he asserted he would have made by working as an automotive engineer but for the defendant's negligence. The work concerned was lawful in the abstract but the claimant had been carrying on his engineering business contrary to planning regulations. The trial judge refused to admit evidence going to a loss of earnings. On appeal to the Full Court of the Supreme Court of Victoria, Gowans J, who gave the principal opinion, considered that the position should be determined by reference to the legislature's intention in enacting the relevant planning laws. His Honour wrote:⁵⁸

If all that the statute does is to take an activity which is ordinarily permitted and to prohibit it only in respect of a particular time or a particular place ... it should not be inferred, in the absence of any other expression of intention, that it was the purpose of the law that it should carry any other privative consequences.

⁵⁴ *id.*, at 647.

⁵⁵ *id.*

⁵⁶ *Foster v Kerr* [1940] 2 DLR 47; *Lepine v Demeule* (1973) 36 DLR (3d) 388 at 396, 398.

⁵⁷ [1968] VR 583.

⁵⁸ *id.*, at 591. See also at 594 (Lush J). This approach was animated by the decision of the High Court of Australia in *Henwood v Municipal Tramways Trust (South Australia)* (1938) 60 CLR 438. *Henwood* was an illegality case (and, at the time *Mills* was decided, the leading Australian case) but not an illegal earnings case specifically.

Applying that approach, Gowans J thought that the claimant should be allowed to recover in respect of his lost earnings. Winneke CJ, concurring, considered that a contrary outcome would have been ‘... reminiscent of mid-Victorian hypocrisy...’.⁵⁹

However, more recent Australian authority is opposed to recovery in cases falling within the second category, and British courts have long taken the same view. Thus, compensation has been denied in respect of a loss of earnings where the claimant, had he not been tortiously injured, would have derived income contrary to immigration rules,⁶⁰ by holding himself out as a duly qualified medical practitioner in circumstances where he was not so qualified,⁶¹ by running illegal sparring matches,⁶² by using a truck to carry loads that were heavier than permitted,⁶³ and by re-birthing motor vehicles without possessing, contrary to regulations, a car traders’ licence.⁶⁴ The Australian position was recently summed up by Vickery J in the Supreme Court of Victoria, who said: ‘Damages are not recoverable in circumstances where the compensable losses claims are in respect of profits that the plaintiff made by operating a business illegally or are in respect of future profits which would be made by conducting a business illegally.’⁶⁵

In view of the foregoing, there seems to be a sharp split between different parts of the Commonwealth as regards the handling of cases that fall within the second category in our taxonomy. Recovery appears to be impermissible in Australia and Britain but allowed in Canada and New Zealand.

⁵⁹ [1968] VR 583 at 583.

⁶⁰ *Lee v McClellan* (1995) 127 FLR 383 at 387-388. See also *Allen v Hounga* [2011] Eq LR 569 at [64].

⁶¹ *Smiths’ Newspapers v Becker* (1932) 47 CLR 279. To similar effect, see *Collins v Carnegie* (1834) 1 A & E 695; 110 ER 1373.

⁶² *Hunt v Bell* (1822) 1 Bing 1; 130 ER 1.

⁶³ *Brownbill v Kenworth Truck Sales (NSW) Pty Ltd* (1982) 39 ALR 191.

⁶⁴ *Sami v Roads Corp* [2008] VSC 377.

⁶⁵ *id.*, at [143].

C. Illegal failure to declare lawfully derived income

The leading decision in the third category is the English case of *Hunter v Butler*.⁶⁶ The deceased had been tortiously killed and his widow brought a dependency claim. The widow asserted that she had suffered a loss of support in two ways: first, in respect of a loss of earnings that the deceased had been deriving and, second, due to a loss of welfare payments that the deceased had been receiving. However, the deceased (to his widow's knowledge) had been able to draw the welfare payments concerned only because he had concealed his earnings from the authorities. The Court of Appeal denied recovery in respect of both losses. It was left unclear whether the outcome would have been different had the widow been ignorant of the deceased's wrongdoing.

Hunter has been applied on many occasions on which the claimant claimed in respect of lost earnings that had not been disclosed for the purposes of defrauding welfare agencies.⁶⁷ However, *Hunter* seems not to be followed in so far as revenue fraud cases are concerned. Such claims, despite *Hunter*, are allowed on the basis that the claimant has not (in contrast with welfare fraud cases) obtained anything to which he was not entitled.⁶⁸ As was said in one case, 'the receipt of the income itself, unlike the benefit fraud, does not involve any criminal act'.⁶⁹

It is noteworthy that an unlawful failure to declare income can lead to a denial of recovery not on the basis of the illegality doctrine but on account of a lack of evidential support for the claim. Where the claimant has failed to report income to the tax authorities, for example, it will typically be the case that he or she will have considerable difficulty establishing the amount income that he or she would have derived but for the

⁶⁶ [1996] RTR 396.

⁶⁷ See, eg, *Kanu v Kashif* [2002] EWCA Civ 1620.

⁶⁸ Although the court will award damages in respect of net rather than gross earnings.

⁶⁹ *Finnis v James Caulfield t/a James Car Hire* [2002] EWHC 3223 (QB) at [19]. See also *Duller v South East Lines Engineers* [1981] CLY 585; *Newman v Folkes* [2002] EWCA Civ 591 at [48]; cf *Wooldridge v Wooldridge* [2016] Fam Law 451 at [76] (where the judge appears to have elided revenue and welfare fraud cases).

defendant's tort.⁷⁰ Documentary evidence will usually be sparse or non-existent. That will tend to compromise any claim for a loss of income. Needless to say, there is clearly a fundamental difference between disposing of a claim in respect of a loss of earnings on the basis that the earnings were illegally concealed and rejecting such a claim because it was insufficiently substantiated.

D. Lawful work secured unlawfully

A leading authority in the fourth category is the English case of *Hewison v Meridian Shipping Services pte Ltd*.⁷¹ The claimant had been employed by the defendant as a crane driver. He suffered a serious injury while at work due to the defendant's negligence. The claimant sued in respect of a loss of earnings that he would have derived by working as a crane driver but for the accident. The defendant resisted liability in respect of that loss on the ground that the claimant had obtained his employment by unlawful deception.⁷² The claimant had represented to the defendant that he was fit to drive cranes. A majority of the Court of Appeal denied the claim in respect of the lost earnings.⁷³ Clarke LJ thought that the applicable test was whether the illegality was 'collateral'⁷⁴ or 'central'⁷⁵ to the employment. His Lordship considered that it was the latter on the facts of the case. The illegality struck, he said, 'at the root of the contract under which he earned remuneration and that it would have done so in the future.'⁷⁶ Clarke LJ recognised that the illegality doctrine would not apply were the illegality was 'insignificant'⁷⁷ but concluded that the

⁷⁰ See the comments in *Newman v Folkes* [2002] EWCA Civ 591 at [8].

⁷¹ [2002] EWCA Civ 1821; [2003] ICR 766.

⁷² Theft Act 1968 (UK), s 16. See, now, the Fraud Act 2006 (UK), s 3.

⁷³ Permission to appeal to the House of Lords was refused: [2002] EWCA Civ 1821; [2003] ICR 766 at [92].

⁷⁴ [2002] EWCA Civ 1821; [2003] ICR 766 at [38].

⁷⁵ *id.*, at [44].

⁷⁶ *id.*

⁷⁷ *id.*, at [43].

behaviour in issue was sufficiently serious to engage the doctrine given the magnitude of the harm that might result if the claimant suffered a seizure while driving a crane.⁷⁸ Tuckey LJ, in brief reasons, agreed with Clarke LJ.⁷⁹ Ward LJ dissented. His Lordship thought that the wrongdoing was insufficiently serious to attract the illegality doctrine.⁸⁰ Ward LJ also considered the claimant should be awarded 80 per cent of his lost future income on the ground that there was a 20 per cent chance that the claimant would have suffered a seizure while at work and consequently would have been preventing from continuing his employment had he not been injured.⁸¹ This result, he said, would not facilitate wrongful profiting by the claimant because there was nothing illegal in the employment itself but only in the manner in which the work had been obtained.⁸²

Hewison was considered at length by the Court of Appeal of England and Wales in *Major v Ministry of Defence*.⁸³ In *Major*, the defendant negligently caused the claimant psychiatric injury. The claimant then obtained employment with the defendant by deception, the deception being that she concealed her psychiatric illness. The claimant was subsequently dismissed from the defendant's employment when the fact of her illness was discovered. Buxton LJ, delivering reasons with which Lord Woolf LCJ and Chadwick LJ agreed, held that the claimant was entitled to recover damages in respect of earnings that she would have derived from her employment with the defendant. His Lordship sought to distinguish *Hewison* as follows:⁸⁴

[The claimant] is not, unlike Mr Hewison, a person who is congenitally unable to

⁷⁸ *id.*, at [44].

⁷⁹ See *id.*, esp, at [51]-[52], where Tuckey LJ agreed with Clarke LJ that what matters is whether the illegality complained of is collateral to the claim for lost earnings.

⁸⁰ *id.*, at [85].

⁸¹ *id.*, at [90].

⁸² *id.*, at [89].

⁸³ [2003] EWCA Civ 1433.

⁸⁴ *id.*, at [12].

work without telling lies about his condition. She was put in a position of being unable to work by the tort of the defendants. The fact that in order to gain any employment she would have to behave deceitfully is a matter that she is entitled to complain of in respect of the tort of the defendants. That was not a matter on which Mr Hewison could rely in quantifying his damages.

The idea is that in *Major*, the defendant's tort precluded the claimant from securing the employment other than by fraud whereas in *Hewison* the claimant was always unfit for the work. It appears, therefore, that securing work by fraud is fatal to a claim for lost earnings (as in *Hewison*) unless the claimant, by virtue of the defendant's tort, could only have obtained the employment concerned by committing fraud (as in *Major*). That this is the law might strike some as surprising.

E. Conclusion

This section of the article sought to explain the common law governing illegal earnings cases by reference to a four-fold taxonomy. Two points of general importance arise from this analysis. One is that although the four-fold taxonomy describes how illegal earnings cases are handled pursuant to the common law and thereby makes it easier to understand the relevant rules, it does not rationalise the existing law. Description is not the same as justification. The other point is that the authorities that have been discussed do not canvass in any detail any rationales for the rules that they lay down. Indeed, the lack of a thoroughgoing rationalisation in the cases for the principles that they establish is perhaps their most conspicuous feature. There has been, quite simply, no sustained attempt in any common law jurisdiction to identify reasons why claims for lost illegal earnings should fail or succeed. The judges who have decided the cases in issue have simply been concerned, instead, to identify what they consider to be important features of the facts in proceedings before them in an attempt to show why those proceedings should be decided in the same way or differently from other illegal earnings cases. Accordingly, at this juncture we leave behind the positive law and consider what the law regarding illegal earnings cases ought to be. That is the burden of the next section.

IV. THE NORMATIVE ISSUE

A. Potential justifications

It is convenient to begin by considering some possible justifications for the illegality doctrine generally before looking specifically at the context of illegal earnings. It is sometimes suggested that the illegality doctrine is supportable on the basis that it deters wrongdoing by denying a remedy. However, it seems highly unlikely that the denial of recovery on account of illegal conduct on the part of the claimant would ever have any meaningful deterrent effect. If the threat of criminal law sanctions is insufficient to deter, the risk that the civil law will appreciably influence behaviour by withholding a remedy in circumstances where one might otherwise be available appears doubtful. Furthermore, it should not be forgotten that denying relief makes it ‘cheaper’ for the defendant, who may be a joint offender, to participate in the wrongful conduct in question. Accordingly, even if the illegality doctrine influences decision-making, it may tend to increase unwanted behaviour.

A second potential rationalisation for the illegality doctrine concerns punishment. The idea is that the doctrine is supported on the basis that it metes out punishment where punishment is deserved by denying the wrongdoing claimant redress. The principal problem with this justification is that the doctrine is a thoroughly unsuitable mechanism for dispensing punishment. The magnitude of the punishment handed out by denying a remedy depends on the extent of the claimant’s loss – the greater the loss, the greater the punishment entailed in denying a remedy. However, the extent of the claimant’s loss bears no necessary relation to the blameworthiness of the claimant’s conduct in issue. Accordingly, the punishment meted out is liable to be disproportionate to the gravity of the claimant’s wrongdoing.

A third possible justification concerns wrongful profiting. The suggestion is that the illegality doctrine is required in order to preclude a wrongdoer from gaining from his or

her transgression of the law.⁸⁵ It is necessary in considering this justification to draw several distinctions. Where a claimant is seeking recovery in respect of personal injury, the wrongful profiting argument has little or no purchase. That is because, by awarding damages in respect of such injuries, the courts do not aspire to put the claimant into a better position than he or she would have enjoyed. Rather, the goal is simply to put the claimant into the position that he or she would have occupied but for the defendant's conduct in question. As Ward LJ succinctly put it in *Hewison*, 'compensation is not profit'.⁸⁶

However, in certain other types of case, the wrongful profiting argument would appear to have more force. Consider *Burglar*, our hypothetical example in which the claimant, because of injuries that he suffered, was unable to continue making money by committing burglaries. If such a claimant were awarded damages in respect of the lost gains that he would have made through carrying out burglaries but for the defendant's tort, it would *prima facie* appear that the law would be facilitating wrongful profiting on his part. That is because the claimant would be obtaining money in respect to lost gains to which he was not entitled. However, even in relation to such a case, it is not entirely clear that wrongful profiting would in fact be involved were compensation ordered. Things depend in this regard on what, precisely, is the object of compensation. If the object of compensation is the lost *gains* themselves, the case for contending that the claimant in *Burglar* would have made a wrongful profit if he were compensated would be strong. That is because his pre-tort position would be being enhanced were compensation paid. However, if the object of compensation is the loss of the claimant's earning *capacity*, the case is considerably weaker, since the compensation would simply be returning the claimant to his pre-tort position. The claimant would, notionally, simply be having his

⁸⁵ '...the defence of illegality is an appeal to a self-evident legal principle or policy that justice, and access to it, does not require courts and tribunals to assist litigants to benefit from their illegal conduct, if it is inextricably bound up in their claim': *Vakante v Governing Body of Addey and Stanhope School (No 2)* [2004] EWCA Civ 1065; [2005] ICR 231 at [2].

⁸⁶ [2002] EWCA Civ 1821; [2003] ICR 766 at [81].

damaged earning capacity repaired. Ultimately, the difference between these two ways of understanding the object of compensation may be less significant than it initially appears since even if the object of compensation is the loss of earning capacity, the law may value that loss by reference to the gains that would have been made had that capacity not been diminished.

A fourth potential rationale for the illegality doctrine is the need to maintain the coherence of the legal system. That rationale for the doctrine has been regularly endorsed at the highest judicial level in several jurisdictions⁸⁷ since it was first clearly promoted by Ernest Weinrib in the 1970s.⁸⁸ Although the coherence principle enjoys significant support, it is often left rather ambiguous what, precisely, it entails. It has been interpreted in a wide and narrow sense (which senses have often not been neatly segregated from each other in either the case law or literature).

According to the wide version, a legal system will be incoherent unless one branch of the law embraces the same goals as the others. This version of the coherence rationale has resonated with the judiciary in Australia, with the High Court having said that private law should advance via the illegality doctrine the same policies as the criminal law statute that the claimant violated.⁸⁹ The idea is that relief in tort law should be withheld if the denial of a remedy would further the legislature's objective in enacting the criminal law prohibition concerned.

The narrow version of the coherence rationale posits that one part of the law should not positively undo that which another part has done. This version of the coherence justification has been endorsed in Canada in the landmark decision in *Hall v Hebert*. In that case, the Supreme Court held that it is impermissible to obtain a remedy in respect of a criminal law sanction that was imposed as that would involve tort law unravelling what

⁸⁷ See, eg, *Hall v Hebert* [1993] 2 SCR 159 at 176, 179; *Miller v Miller* [2011] HCA 9; (2011) 242 CLR 446; *Patel v Mirza* [2016] UKSC 42; [2016] 3 WLR 399.

⁸⁸ *Weinrib* (n 6) 42.

⁸⁹ *Nelson v Nelson* (1995) 184 CLR 538 (trusts); *Miller v Miller* [2011] HCA 9; (2011) 242 CLR 446 (tort); *Equuscorp Pty Ltd v Haxton* [2012] HCA 7; (2012) 246 CLR 498 (unjust enrichment).

the criminal law had done.⁹⁰ As McLachlin J said in a classic dictum, the law must not ‘punish conduct with one hand while rewarding it with the other’.⁹¹

Having isolated two (rather different) expressions of the coherence principle, the next question that arises is whether the principle is a compelling justification for the illegality doctrine. The issue here is why coherence is important. It seems to us to be plausible to think that coherence matters because the more coherent that a legal system is, the greater the ability of people to predict what the legal consequences of their behaviour will be. Ensuring that people have a reasonable opportunity to foresee how the law will respond to particular conduct is widely considered to be a facet of the rule of law.⁹² Another possible reason why coherence might matter is that incoherence may diminish the effectiveness of the law’s incentives. The idea is that an incoherent legal system is one that, by definition, sends mixed messages and whatever incentives that the law might create to engage in or abstain from particular courses of conduct are thereby blunted.

One important point that we do not think has been properly appreciated to date is that the wrongful profiting rationale in support of the illegality doctrine is really nothing more than one facet of the coherence rationale. That is because a profit that is conferred by way of an award of tort damages will be wrongful only if some other set of rules within the legal system identifies the claimant as being an unworthy recipient of the award as a result of having engaged in discreditable behaviour.

B. The application of the coherence principle in German law

In the previous subsection, we canvassed several possible justifications for the illegality doctrine generally: (1) deterrence, (2) punishment, (3) wrongful profiting and

⁹⁰ *Hall v Hebert* [1993] 2 SCR 159 at 176, 179.

⁹¹ *id.*, 176.

⁹² Jeremy Waldron observes that ‘the connection between liberty and law’s predictability is a powerful theme in the modern rule-of-law literature’: *J Waldron, Stare Decisis and the Rule of Law: A Lawyered Approach* (2012) 111 *Michigan Law Review* 1, 9.

(4) coherence. We dismissed the first two of these and suggested that the third is, in fact, nothing more than a facet of the fourth. We further intimated that the coherence rationale appears to be significantly more compelling than the others. How, in light of this analysis, should claims in respect of lost illegal earnings be decided?

At this juncture, it is revealing to consider the position in Germany, where the coherence principle has been firmly embraced and the issue of illegal earnings extensively treated (indeed, illegal earnings cases represents the main situation in which the illegality doctrine has arisen for consideration in the German law of torts).⁹³ Tort law resorts in this connection to contract law, where it is asked whether the individual transaction via which the claimant would have derived the income but for the defendant's wrong would be protected by the law notwithstanding its illegal character.⁹⁴ The entitlement to tort damages in respect of a loss of earnings thus depends on the validity of the contract pursuant to which the transaction was effected. That issue is, in turn, determined by §§ 134 and 138 of the BGB, which provide that a legal transaction that violates a statutory provision or 'good morals' is null and void. The thus established congruence between tort law and contract law in respect of the legal protection of expected profits is simultaneously the practical consequence and the theoretical justification of this approach. This analysis, which is traceable to a decision of the Reichsgericht in 1917,⁹⁵ has been expressly endorsed by the Federal Court of Justice in a notorious case concerning whether a prostitute who was rendered incapable of working after having been injured in a car accident was entitled to damages in respect of her loss of earnings.⁹⁶

⁹³ See the decisions and academic contributions cited in nn 17-18. For analysis of the illegality doctrine in German tort law generally, see *L. Mayr, Der verwerflich handelnde Geschädigte* (2015).

⁹⁴ The landmark decision being BGH (30.11.1979), NJW 1980, 775, 776 (confirmed in BGH (15.01.1981), NJW 1980, 920, 922; BGH (28.01.1986), NJW 1986, 1486, 1487; BGH (11.01.1994), NJW 1994, 851, 852).

⁹⁵ RG (05.06.1917), RGZ 90, 305, 306 ('a benefit the acquisition of which is prohibited by law cannot become a legitimate and legally protected one via the detour of a claim for damages') (confirmed in BGH (07.05.1974), NJW 1974, 1374, 1376; BGH (14.07.1954), VersR 1954, 498).

⁹⁶ Although the court acknowledged that the coherence of the legal system does not allow a claimant to recover for a loss of earnings derived by legally prohibited acts, it went on to argue that 'the emphasis lies somewhat

The German approach to illegal earnings cases of deferring to the rules of contract law to determine whether tort damages are recoverable guarantees a coherent solution to two interrelated problems. The rules of contract law dictate when an expectation to profit is legally protected. The issue of whether tort law should compensate for lost earnings is essentially the same question, which should therefore be answered according to the same principles. It would be incongruous if the law denied a contract its direct effect between the parties to it for illegality, but at the same time acknowledged that it can have indirect effect by protecting the expected profit against wrongdoing by third parties. There is no apparent reason to treat the issue differently in tort law and contract law. An added and, to our mind, significant additional advantage of proceeding in this way is that the law is kept more compact and therefore simpler. Instead of having two sets of rules – rules that determine when there is a contractual entitlement and when a claim lies in tort for loss of that entitlement – tort law simply looks across the divide to the solution imposed by the law of contract. Furthermore, the German approach enhances the generality of the law. Rules that specify the position as a matter of contract law automatically extend to tort law by virtue of the principle that the outcome in tort law is to be determined by reference to the contract law rule.

Importantly, the German approach to the problem of illegal earnings, animated by the coherence principle, does not only require that tort law make recourse to contract law.⁹⁷ Consider, again, our hypothetical example, *Burglar*. Burglars make their money by stealing

differently if ... the proceeds lost as a result of a tortious act derive from an activity which is immoral but, although legally not recognized, appears to be tolerated? BGH (06.07.1976), NJW 1976, 1883, 1885. In seeking to balance the interests of both parties, the court then limited the recoverable damages to the amount of a subsistence income that every healthy person could obtain. This outcome has been widely criticized: see R *Stürner*, JZ 1977, 176 and R *Born*, Entgangener Dirnenlohn als erstattungsfähiger Erwerbsschaden? VersR 1977, 118, 119, 120.

⁹⁷ The German approach is a general principle that is not restricted to coherence between tort law and contract law. There is, however, no precedent that specifically demonstrates how the German approach works in relation to other parts of private law, e.g. property law.

property to which, by definition, they have no entitlement vis-à-vis the rightful owner.⁹⁸ German law's commitment to the coherence principle would appear to dictate that tort law should turn to the law of property in order to determine whether the claim for lost illegal earnings in *Burglar* should succeed. Because the law of property says that the burglar has no entitlement to the earnings, tort law should follow suit and deny redress. That is because the law would be inconsistent if it compensated the burglar for the lost opportunity to acquire property that he has no right to possess.

Three further matters merit emphasis in light of the above discussion of German law. First, the German experience reveals that the principle of coherence is *not* restricted to the relationship between private law and criminal law; coherence within private law is important, too. This is noteworthy because virtually all discussions of the coherence rationale in common law jurisdictions, judicial and academic, concentrate, at least implicitly, on the link between private law and criminal law.⁹⁹ However, as the treatment that has just been offered shows, the coherence principle can require alignment between different branches of private law as well. It follows that the coherence principle is a considerably more powerful concept than has previously been thought to be the case in common law countries.

Second, the German solution is certainly not a panacea to all problems that might arise in illegal earnings cases. The German approach requires, and only requires, that tort law defer to principles laid down in other parts of private law. It does not stipulate what, for example, the contract law or property law rules for dealing with illegality should be. Thus, were the German rule embraced in common law jurisdictions, the courts would still need to decide, for example, what rule should determine when a claim in breach of contract should fail due to offending on the claimant's part. The German approach may well

⁹⁸ The burglar is still entitled to protection against wrongful interference with the stolen goods by third parties (*Costello v Chief Constable of Derbyshire Constabulary* [2001] EWCA Civ 381; [2001] 1 WLR 1437). For more details, see J Goudkamp and L Mayr, *The Doctrine of Illegality and Interference with Chattels*, in: A Dyson, J Goudkamp and F Wilmot-Smith (eds), *Defences in Tort* (2015).

⁹⁹ Including the seminal treatment in *Hall v Hebert* [1993] 2 SCR 159 at 172-180.

dictate that whatever rule is adopted should be justified by the coherence principle. But it leaves open the issue of what the precise contours of the rule, informed by that principle, should be.

Third, it should be obvious from what we have said so far that we think that the German approach to the problem of illegal earnings has significant advantages, in principle, relative to the common law rules. The analysis offered in Part II of this article demonstrated that illegal earnings cases can be organised within a four-fold taxonomy. Part III then explained how cases falling within each category would be decided according to the law in various common law jurisdictions. However, in none of the cases was sufficiently careful attention given to the rationales that underpin the illegality doctrine. Rather, the tendency has been for judges simply to remark, for example, that recovery is impermissible because the claim arose ‘... mala causa or ex turpis causa ...’,¹⁰⁰ because the earnings were ‘plainly ... unlawful’,¹⁰¹ or because the claimant’s illegality was ‘central’¹⁰² to the employment via which the earnings were derived. When they are inclined to allow recovery, judges tend to reach for different sets of slogans (e.g. describing the illegality as being merely ‘collateral’¹⁰³), which slogans similarly do not really explain why recovery is being allowed. Adopting the German approach, which is underpinned by the coherence rationale for the illegality doctrine, would eliminate the disparate treatment between the different categories of case, which disparate treatment is currently unexplained and unjustified.

V. CONCLUSION

This article had two main objectives. Its first was to describe the law governing illegal earnings cases in common law jurisdictions, focusing on the United Kingdom. A four-

¹⁰⁰ *Burns v Edman* [1970] 2 QB 541 at 546.

¹⁰¹ *Meadoms v Ferguson* [1961] VR 594 at 598.

¹⁰² *Hewison v Meridian Shipping Services pte Ltd* [2002] EWCA Civ 1821; [2003] ICR 766 at [44].

¹⁰³ *id.*, [38].

fold taxonomy was developed and used as a vehicle for exposition in this regard. Our ultimate assessment of the law is that it is doubtful that there is any compelling reason for responding to illegal earnings claims differently depending on the category within the taxonomy within which they fall. Certainly, none has been identified by the courts. The fact of the matter is that the law has developed haphazardly and that the disparate approaches taken to the case law seem merely to be a reaction to the perceived merits of the parties in individual cases.

Accordingly, the article, as its second objective, considered what the law regarding illegal earnings cases should be. It was suggested that the German approach appears to be significant superior because it is grounded in what seems to be the only compelling rationale for the illegality doctrine. When confronted with an illegal earnings case, German tort law looks to other branches of private law and asks whether the lost earnings in issue derive from a transaction or holding that would be protected by the branch concerned, with tort law then echoing the approach taken by that other branch. The German approach is animated by a concern to achieve coherence between the various branches of private law. The principle of coherence, while it still requires greater refinement, is in our view the only compelling justification for the illegal doctrine generally, including as it operates in the illegal earnings context. The German solution also has the advantage of being vastly simpler than the various regimes that obtain in common law jurisdictions.

Needless to say, adopting the German solution to illegal earnings cases would not solve all problems in this difficulty area of the law. In a sense, the German approach merely shifts the problem onto other areas of private law. It depends upon defensible rules regarding illegality being developed in private law's other compartments. That, obviously, is not a small problem. But aligning tort law with other parts of private law would arguably set the law down the right path in terms of its handling of illegal earnings cases.