Personal Injuries Bar Association Annual Lecture, Gray's Inn 10 October 2019

Mr Justice Turner

Compensating Criminals

The Decline and Fall of the Defence of Illegality in Personal Injury Law

I am alone the villain of the earth,
And feel I am so most…when my turpitude
Thou dost so crown with gold!

Anthony and Cleopatra. Act 4 Scene 6.

In contemplating the long list of what the Romans have ever done for us, one of the more controversial items in the catalogue must surely be the doctrine of ex turpi causa. Variously described by the authors of Winfield and Jolovicz as "a stain on the law of torts"[1], by Lord Sumption as "excessively complex and technical"[2] and by the Law

[1] Winfield and Jolovicz on Tort 19th Edition 26-067

[2] Reflexions on the Law of Illegality Lecture to the Chancery Bar Association, 23 April 2012

Commission as “uncertain and unjust”, its general unpopularity has been matched only by its durability.

In attempting to trace its Roman origins to provide the relevant context for this lecture, I have been disheartened by the wistful reflections of the members of a South African court who, when attempting to grapple with the Roman law of nullity, and referring to an old and familiar metaphor, remarked that they “were like blind men looking in a dark room for a black cat which wasn’t there.”[3]

Our journey starts in the early days of the Roman Republic when the law was the sole preserve of the Patricians and its administration was a semi-holy mystery known only to them.

How times change.

The starting point for reform was the advent of the Twelve Tables. According to tradition, ten men were sent to Greece in 451 BC to study the laws of Solon. By the following year, twelve bronze tablets reflecting the fruits of their labours had been set up in the market place in Rome for all to see and the inscriptions upon them were afforded the status of law. Schoolchildren were required to learn them by heart. The original tablets were destroyed by the Gauls in the sacking of Rome in 390 BC but the laws which they promulgated survived and some passages still remain available to us in the form of

[3] Reinhard Zimmerman, The Law of Obligations: Roman Foundations of the Civilian Tradition 678 ((1990)

quotations from later authors. The opening passage of the Tables contains the following:

"If a man is killed while committing theft in the night, that killing is not unlawful".

The echoes of this two and a half thousand year old precept continue to resonate with us even today, albeit not with the same consequences. In *Revill v Newberry*[4] a burglar was shot in the arm by his intended victim. The defence of ex turpi failed and the criminal was awarded damages subject to a deduction for contributory negligence. By what would appear to have been a curious oversight, the Twelve Tables were not cited to the Court of Appeal.

Fast forwarding by a millennium, by the sixth century AD, the Institutes of Justinian, a text for first year law students, records that:

"A promise made for an illegal or immoral purpose, as, for instance, to commit a sacrilege or homicide, is void."[5]

It is to be noted that the doctrine, at least as expressed in this context, appears to have been limited in its application to the law of obligations or contract. And so it was with the incorporation of the doctrine into the common law which, for very many years, was concerned with disputes almost exclusively involving contracts and property law rather than torts.

[4] [1996] Q.B. 567

[5] Book 3 Title 19, 24.

The basic principle, strongly redolent of Justinian, was authoritatively stated by Lord Mansfield C.J in *Holman v Johnson* nearly two hundred and fifty years ago[6] in the context of a contractual dispute involving tea smuggling, when he said:

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

Despite the purely contractual nature of the dispute in respect of which Lord Mansfield made these observations, his formulation of the law came, many years later, to be applied to personal injury claims - like Cinderella's slipper to the foot of an ugly sister. And so it would appear, perhaps counterintuitively, that, in the context of claims involving the breach of a general duty of care in negligence, the defence of illegality came into being centuries before the tort to which it was subsequently applied had even been born. One may speculate, for example, how effective a tin opener would likely to have been if it had been designed before tins had been invented.

Lack of clarity in distinguishing between the way in which the doctrine of illegality falls to be applied in the respective areas of contract, trusts and tort and a persistent determination in certain quarters to treat such applications as if they all formed part of a coherent conceptual framework have continued to cause problems which have still not been fully resolved.

[6] Holman v. Johnson (1775) 1 Cowp. 341, 343

This lecture does not, therefore, involve an examination of the fine nuances of the erratic development of every strand of the doctrine of illegality in the context of personal injury claims. Indeed, a search of Westlaw reveals no fewer than 1,057 entries making reference to the doctrine. Such an ambition would be doomed to failure within the time avaible and would provide more than enough material for a whole series of seminars. I must try to conceal my disappointment in having to leave any such undertaking to others.

The central question is therefore whether the operation of the illegality doctrine in the context of personal injury claims has now been finally absorbed into an overarching scheme applicable to all causes of action or still retains a distinct identity of its own and, if so, what.

Even one hundred and seventy five years after Lord Mansfield's influential statement of the doctrine of illegality, it was still far from clear that the rule had any application to claims in tort. In 1954, Lord Porter went so far as to say of the doctrine[7] that: "the adage itself is generally applied to a question of contract and I am by no means prepared to concede where concession is not required that it applies also to the case of a tort."

Perhaps one reason for the late introduction of the concept of illegality into personal injury claims was that, prior to 1945, contributory negligence was a complete defence and the doctrine of

[7] National Coal Board v England [1954] A.C. 403

ex turpi causa would often be redundant. So if a driver contributed to a collision by driving too fast then any claim against the other driver would automatically fail regardless of whether or not the plaintiff was committing a crime at the time.

As the years went by, however, the defence gradually insinuated itself into the realms of claims in tort and, in particular, those involving personal injury.

By 1991[8] in *Pitts v Hunt* the Court of Appeal unanimously rejected a claim for compensation brought by a pillion passenger against the rider of a motorcycle because he had encouraged the rider to drive recklessly whilst drunk. Ominously, however, the members of the Court of Appeal reached their respective conclusions on different conceptual grounds and thus perpetuated an unwholesome tradition of inconsistent reasoning not only as between cases but between the judgments of different members of the same court in any given case. This pattern, it may be argued, has been followed, all too eagerly, by successive appellate courts thereby serving not to focus and clarify the law over time but gradually to accumulate a voluminous library of material from which it has sometimes appeared that the devil could quote scripture for whatever use he might choose to deploy it. I note, in this context but without further comment, the rueful observations of Lord Dyson in his recently published autobiography:

[8] Pitts v Hunt [1991] 1 Q.B. 24

"..when I was in the Court of Appeal, I sensed that…each judgment that I wrote was a test in which I would be judged by my very clever colleagues. I had the impression that at least some of them wrote judgments to impress each other..."[9]

So fertile remained these pastures of authority, and so diverse the crops which flourished there, that no less an advocate and jurist than Lord Justice Irwin, as he now is, was still able to contend before the Court of Appeal as recently 1997 in the case of *Clunis v Camden and Islington Health Authority*[10] that:

"The maxim ex turpi causa non oritur actio must be applied narrowly and with care. The maxim only applies to contract law and, possibly, property law."

And, with particular prescience:

"The use of contract authorities in tort situations can be very misleading."

He had a point.

Parliament had been content for centuries to leave the development of the law relating to illegality in the context of civil claims to the courts. The inevitable consequence was that the traditional reticence of the judiciary to legislate, or at least to be caught out doing so, meant that the role of illegality in tort cases was an apple which could not be seen to fall too far from the tree of its contractual parent.[11]

[9] A Judge's Journey. Hart 2019

[10] [1998] Q.B. 978

[11] See Standard Chartered Bank v Pakistan National Shipping Corporation and others No 2 [2000] 1 Lloyd's rep 216

The upshot of all this was that claims in negligence were treated as if they had more in common with contractual claims than was ever really the case. In truth, the courts were struggling hard enough to develop a rational and coherent approach to contractual disputes alone and the additional burden of bringing tortious claims seamlessly into the fold appeared for decades to be beyond the skill of the judiciary. It was fast becoming the forensic equivalent of the physicists' elusive Theory of Everything.

A further difficulty arose because the common law, up until very recently, had interpreted its Roman law progenitor as requiring the courts simply to decline to adjudicate on claims based on an illegal cause. Accordingly, the loss would fall in contractual cases, as a matter of pure happenstance, on that party which had paid over the money, property or whatever without receiving the agreed consideration from the defaulting party. This meant, as Lord Mansfield both clearly foresaw and freely admitted, that the result would often be "contrary to the real justice, as between [the defendant] and the plaintiff".

One of the attractions of this approach, historically, was that it was seen to preserve the dignity of the judges from the contamination thought to be involved in sullying their hands with disputes between rogues. It may be thought, however, that such considerations, with their strong fragrance of the judicial sensitivities of a bygone age, ought to play no part in any modern approach. If courts in civil cases

were now consistently to decline to adjudicate on disputes involving dishonesty and fraud then tumbleweed would surely be drifting down the corridors of the Rolls Building.

Of course, judges, with perhaps a few exceptions whom I will not name, take no pleasure in reaching decisions which are, in Lord Mansfield's words, contrary to the real justice between the parties. And so the process began whereby the common law was developed to mitigate the full rigour of the original rule with exceptions in order to achieve justice on the facts of any given case. Whether or not this was a price worth paying is a moot point but the inevitable consequence was further incoherence, artificiality and uncertainty.

One significant strand of authority, which held sway until very recently, was that a party could still recover money, goods or property transferred under an arrangement otherwise tainted with illegality if he or she could plead their case without relying on such illegality. Thus when Ms Milligan contributed to the purchase price of a property but had the legal title conveyed to her partner Ms Tinsley in order to facilitate fraudulent benefit claims no one could doubt that the whole transaction was conceived, born and bred in illegality[12]. Nevertheless, simply by the operation of the presumption of the formation of a resulting trust, Ms Milligan was able to plead her case without making reference to the true basis upon which the payment was originally made and was thus permitted by a majority in the

[12] Tinsley v Milligan [1994] 1 A.C. 340

House of Lords to recover her money. Some would categorise this as the ultimate triumph of form over substance.

In the personal injury context, however, a strict application of this approach would arguably preclude the operation of the doctrine completely. Simply by pleading a claim in negligence without reference to the context in which such negligence had actually arisen would mean that there was no reliance on any illegal act. Judicial sympathies were, however, clearly not attracted to the prospect of awarding compensation to burglars, brawlers and killers. In this regard it would appear that judges were not altogether out of tune with the feelings of a significant number of members of the public. When, in 2011, it was revealed that serving prisoners had recovered compensation for injuries sustained as a result of the negligence of the prison service in the sum of £10M over the previous five years there was a public outcry with one commentator expressing the views of many when he asked: “What is the use of prison if it does not deprive you of your rights?”

Of course, this is an extreme point of view which effectively calls for the reintroduction of the status of outlawry and one which is unlikely, one would like to think, to be shared, in its undiluted form, by any member of the judiciary. Nevertheless, it does reflect an atavistic reluctance on the part of at least large swathes of society to compensate those who trespass seriously against their rules. The uncompromising instincts of a high proportion of the voting

population on this topic were always likely to be a disincentive to Parliamentary intervention.

Where, however, is the line to be drawn?

Irwin QC's brave bid in *Clunis* to limit the doctrine of ex turpi causa to the law of contract came to grief in the Court of Appeal but the conceptual boundaries of the doctrine remained in a state which might have been described by a cynic of one of constructive ambiguity.

Where did the solution lie?

Well, four years earlier, Lord Goff in *Tinsley*, sensitive of the risks of general unfairness inherent in the application of the doctrine within the parameters of which it was then understood to operate, gave this cri de coeur:

> "..I would welcome an investigation by the Law Commission, if this is considered desirable and practicable by the authorities concerned; and…I would be more than happy if a new system could be evolved which was both satisfactory in its effect and capable of avoiding the kind of result which flows from the established rules of law in cases such as the present."

In the event, things got off to a promising start; as disappointments so often do.

The Law Commission agreed to take up Lord Goff's invitation in 1995. By 1999, it had duly published Consultation Paper No.154 "Illegal Transactions: the Effect of Illegality on Contracts and Trusts". By 2001, however, the Commissioners had been persuaded that their remit should be extended to include consideration of the

application of the doctrine to the law of torts, mainly on the ground that "it would be desirable to have the same principles applying to illegality applying in all branches of the law." Undoubtedly, these sentiments were thoroughly well intentioned but in the event they gave rise to the risk that the Commissioners had bitten off more than they could chew. Like Napoleon's invasion of Russia, it must have seemed like a good idea at the time. The Consultation Paper was 139 pages long and referred to 100 decided cases, 27 textbooks and 29 articles in what was described as a "select bibliography".

There is no doubt that, at this stage, the doctrine of illegality in the context of personal injury claims was in a mess. It is easy enough to state in Latin that a man who has done a bad thing should be deprived of his remedy but, standing alone, this was always going to be far too blunt an instrument to achieve either justice or coherence.

In particular, no clear picture had emerged from the cases as to what would amount to turpitude which was both serious enough and proximate enough to the claim to engage the doctrine in any given case. There were and remain, I think, two particular challenges in this regard.

First, what is or is not to be regarded as turpitudinous by the standards of received opinion is in a constant state of flux. The doctrine has been applied to immoral conduct which is not illegal and held not to apply to conduct which is illegal but not (or at least not very) immoral. In such circumstances it is difficult to distinguish the

reasoning behind the judgment of any given court from the exercise of a camouflaged discretion. In this context, I note that Ambrose Bierce's Devil's Dictionary contains the following entry:

"Lawful adj. Compatible with the will of a judge having jurisdiction."

Speaking for myself, it is difficult to conceive of a case in which any behaviour short of serious criminality would engage the doctrine in the personal injury sphere but no court has yet been brave enough to rule out the possibility.

Furthermore, the prodigious pace at which new criminal offences have been created has produced a context in which there are many thousands of ways in which to transgress the law in circumstances involving little or no moral turpitude at all. It has been estimated that in the year ending in May 2010 no fewer than 700 new criminal offences were created; although this may admittedly have been a bumper harvest.[13] In so far as it may be considered to have been meaningful, a recent study[14] purported to reveal that the average citizen who regards himself to be law abiding breaks 32 different laws each year. My faith in the utility of this study was, however, somewhat undermined by the confidence with which the authors later purported to reveal that people are most likely to break the law at precisely 1.52pm on a Saturday afternoon.

[13] Trials of the State Jonathan Sumption Profile Books 2019 5..

[14] https://www.independent.co.uk/life-style/average-briton-commits-32-crimes-a-year-bt-tv-research-happy-birthday-restaurant-pub-drunk-a7859001.html

Things were different in Lord Mansfield's day. A dispute over importing tea without paying the required duty might, at first blush, seem relatively trivial but the potential loss of revenue to the government was great and so were the punishments for crimes associated with smuggling. For example, the penalty for injuring a customs officer in the course of his duty was death. Even an unarmed smuggler resisting arrest faced transportation. Of course, there were far fewer criminal offences in the eighteenth century but the death penalty applied to over two hundred of them including the theft of property over a shilling in value, damaging Westminster Bridge or impersonating a Chelsea pensioner. It may not be unreasonable to suppose that this provided a disincentive to the bringing of civil claims which would expose even that rare plaintiff able to afford to go to law in the first place to the draconian punitive consequences of his illegality.

Even in the rather less exotic context of road traffic claims there is an obvious hierarchy of turpitude ranging from careless driving, through drink driving, driving a getaway vehicle, to causing death by dangerous driving or even murder. It is still far from clear where the line of turpitude is to be drawn or even if the line is to be drawn in different places in different cases in order to achieve proportionality in the circumstances of any given case.

As the authorities presently stand, it not "ex turpi" to drive carelessly while drunk[15] but according to the Court of Appeal in *Joyce v O'Brien* it is "ex turpi" to fall out of a van whilst hastening from the scene of the theft of ladders[16]. Whether this distinction is ethically valid is not a matter upon which I feel qualified to comment but more important is the issue as to whether any judge is equipped to draw such a distinction on grounds of discernible principle rather than instinct. It is to be noted that the Court in *Joyce* purported to justify its approach by pointing out that the maximum sentence for theft is seven years imprisonment. However, assuming, as we might, that the ladders were worth less than £500, the Sentencing Guideline provides for a starting point sentence comprising a low level community order. In contrast, for drink driving at the highest level of intoxication the Sentencing Guideline provides for a starting point of 36 weeks' custody.

Secondly, as I have already observed, in personal injury claims involving proof of negligence, in contrast to the position in contract, the cause of action is not usually, if ever, parasitic upon an illegal transaction and so some judgment must be exercised as to the extent to which the illegality must be proximate to the claim in the context of the infinite permutations of circumstances which are liable to arise. This, to say the least, provides a challenging environment in which to formulate helpful general rules of any real predictive value. Claimants will range from the dishonest benefits claimant run over on his way to

[15] Edwards v Jerman [2004] CLY 2743

[16] [2013] EWCA Civ 546

the post office and the bank robber passenger encouraging his getaway driver deliberately to drive recklessly in a police chase. In particular, it would now appear that in road traffic cases, perhaps counter-intuitively, the doctrine is more likely to apply to protect a partner in crime than another road user who is not acting criminally.[17]

This is a point to which I intend to return.

These considerations, and indeed many others, undoubtedly presented the Law Commission with a formidable challenge. In its 2001 Consultation Paper, the Law Commission had concluded that there was a lack of clarity in the way the illegality defence was being applied in tort cases and that this had the potential to produce injustice. Accordingly, it recommended that a discretionary regime should be introduced but expressed "serious doubts as to the appropriateness of the illegality doctrine operating in personal injury cases" under any circumstances. It reasoned that victims of negligence, even if engaged in illegal conduct, were not claiming to profit from their criminality but doing no more than seeking compensation for losses sustained. In any event, they still faced the sanctions of the criminal law in respect of their crime or crimes.

Their Consultation paper literally and immediately got a bad press. The Daily Express of 30 June 2001 reported: "Law paves way for thugs to sue victims". The Sunday Times on the following day, in a

[17] See McCracken v Smith [2015] EWCA Civ 380 but Cf. Clunis p986 F-H

headline which has an all too familiar ring, described the Law Commission as an "Enemy of the People".

It was a further eight years before the Commissioners responded to the representations of the various consultees and, even then, not with a final report but with an invitation to engage in further consultation.[18] This Consultative Report was even longer than its predecessor stretching as it did to over 150 pages but it was plain that, in the intervening period, the Commissioners had lost their appetite for the promotion of statutory intervention in reforming the law relating to the illegality defence in tort. Rather than recommend Parliamentary intervention, it expressed confidence that, so long as the courts continued to base their decisions on balancing the merits of various policy arguments, then, to paraphrase, all would be for the best in the best of all possible worlds.

The Final Report[19] was published in March 2010 fifteen years after the Law Commission had first agreed to take on the task of considering the law relating to illegality. Its recommendation with respect to claims in tort continued to be to leave reform to the courts. Only in the realms of trust law did it propose legislation.

Lord Sumption was one of a number of commentators who considered this outcome to be "extremely unfortunate"; his characteristically diplomatic choice of language almost implying that

[18] The Illegality Defence (2009), Consultation Paper No.189 (CP 189)

[19] The Illegality Defence (March 2010) (Report 320).

somehow the Law Commission's proposals had been occasioned by an unlucky accident for which they bore no responsibility.[20] Less tactful was his remark in a lecture to the Chancery Bar Association that the Commissioners had followed in the footsteps of the Grand Old Duke of York who had marched his men to the top of the hill and marched them down again.

He concluded his paper with the following observation:

"It is true that in some cases the courts have been able to escape the harshness of the law, but they have done it by cheating, a process which is not conducive to either clarity or coherence in the law. The government is, I believe, still considering its response to the Law Commission's final report. We may be permitted to hope that it will prefer the more imaginative proposals which the Commission had put forward in its early consultation documents to the abandonment of the cause which is evident in its final report."

In this instance, however, hope did not spring eternal; not least because it had already died.

By the time Lord Sumption's paper was delivered, the Ministry of Justice had already published its "Report on the Implementation of the Law Commission Proposals". The contrast between the painstaking and voluminous analysis of the Law Commission and the brevity of the Government's response could hardly have been starker. The Ministry rejected the Commission's recommendations concerning the reform of the doctrine of illegality in the realm of trusts in two succinct paragraphs and made not even a single passing

[20] Reflexions on the Law of Illegality - Chancery Bar Association 23 April 2012

reference to the recommendation that nothing should be done concerning the law of tort.

Perhaps it was thought that an invitation to a Government Department to do nothing was so self-evidently attractive that any further appraisal would have been superfluous.

The Law Commissioners responded to the Ministry by announcing that "this project is complete." Their sense of relief is almost palpable.

Nineteen years of painstaking work and nothing concrete to show for it. This was an endeavour which had taken approximately twice the time which had occupied the Government of France to produce the entire Napoleonic Civil Code of 1804.

Worse still, not all judges were prepared to fulfil the Law Commission's sanguine prediction that injustices and inconsistences could be ironed out by the courts; as Doctor Johnson might have put it, the triumph of hope over experience. In Les Laboratoires Servier v Apotex Inc.[21] Lord Sumption had, and used, the opportunity to translate the misgivings he had already expressed in his paper to the Chancery Bar Association into his judgment. Of the Law Commission's optimism that the courts could be trusted to carry out any necessary reforms by being more upfront about the competing policy issues which underlie their judgments, he said:

[21] [2015] A.C. 430

"I confess that I find this difficult to justify as an approach to authority or the proper development of the law. …It makes the law uncertain, by inviting the courts to depart from existing rules of law in circumstances where it is difficult for them to acknowledge openly what they are doing or to substitute a coherent alternative structure."

Lord Sumption had thus firmly set his face against the flexible approach advocated by the Law Commision. Others, however, did not share his lack of enthusiasm and the scene was set for a clash of ideology between different Justices of the Supreme Court in a series of cases the scale of the impact of which has still to be worked out to a conclusion.

It did not end there.

The evidence upon which the Law Commission had identified a new-found confidence that the reform of the illegality doctrine could be safely entrusted to the courts without Parliamentary intervention was substantially based upon two House of Lords cases: *Stone and Rolls Ltd v Moore Stephens*[22] and *Gray v Thames Trains*[23] both of which had been decided shortly before its final report.

In the event, these twin pillars of confidence proved to be very shaky indeed.

Only an inveterate Pollyanna could hold up *Stone and Rolls*, in particular, as a model of forensic clarity. Their Lordship's speeches ran to 277 paragraphs generously supplemented by an annexe on

[22] [2009] AC 1391

[23] [2009] 1 A.C. 1339

foreign law. All five Law Lords who heard the appeal delivered separate and mutually inconsistent reasons for their decision.

Worse still, only five years later, the fruits of their sedulous efforts were all but obliterated in *Bilta (UK) Ltd v Nazir (No 2)*[24] in which Lord Neuberger declared:

"Subject to these points, the time has come in my view for us to hold that the decision in *Stone & Rolls* should, as Lord Denning MR graphically put it in relation to another case in In re King, decd [1963] Ch 459, 483, be put "on one side in a pile and marked 'not to be looked at again'". Without disrespect to the thinking and research that went into the reasoning of the five Law Lords in that case, and although persuasive points and observations may be found from each of the individual opinions, it is not in the interests of the future clarity of the law for it to be treated as authoritative or of assistance save as already indicated."

Thus it was that a case, which the Law Commission in its final report had been satisfied showed "the law is developing in the way in which we hoped", had been rapidly and unceremoniously binned.

In contrast to *Stone and Rolls*, the facts of the case of *Gray* were relatively straightforward. Mr Gray was seriously injured in a train crash which was the responsibility of Thames trains. One consequence was that he underwent a personality change which made him susceptible to irrational outbursts of anger. It was during one of these episodes that he stabbed a man to death. He pleaded guilty to manslaughter on the ground of diminished responsibility. He thereafter brought a claim against the railway company for damages

[24] [2016] A.C. 1

for his detention, his loss of earnings after his release, his loss of reputation, and his grief and remorse after the manslaughter together with an indemnity against any liability that he might have to his victims' dependents. The Law Commissioners were particularly reassured by what they perceived to be the pragmatism deployed by the Law Lords in their approach to illegality and found particular comfort in the speech of Lord Hoffman. He identified a narrow and a wider basis within which the doctrine of illegality operated in the realm of tortious claims. The narrow basis precluded the awarding of compensation in respect of the punishment meted out to a criminal in consequence of his offending. It would be inconsistent for the Crown Court to pass a custodial sentence on a criminal on the one hand only for the High Court thereafter to sugar the pill by compensating him in damages for the consequences of his detention and thereby effectively putting him, in a position, insofar as money ever could, as if he had never been punished in the first place. The cognitive dissonance involved would be even more uncomfortable where, as is often the case, the civil defendant was a public body. The enthusiasm of the taxpayer to compensate convicted criminals for being locked up was never likely to be overwhelming.

Most would not take issue with this narrow approach (although even this has its detractors) but the wider basis remains more problematic. Lord Hoffman held:

"Can one say that, although the damage would not have happened but for the tortious conduct of the defendant, it was caused by the

criminal act of the claimant? Or is the position that although the damage would not have happened without the criminal act of the claimant, it was caused by the tortious act of the defendant?"

However, this formulation is not without its problems. In cases such as *Gray*, if the claimant would have killed his victim regardless of the defendant's tort then, as a matter of trite law, the claim would fail without any need to consider the doctrine of ex turpi causa. Thus the "but for" test must be satisfied as a first hurdle. The question which then follows is as to whether the criminal conduct of the claimant is the immediate cause of the damage in respect of which he brings his claim. But this exercise, however, necessarily involves a balance of policy considerations as Lord Hoffman observed:

"The maxim ex turpi causa expresses not so much a principle as a policy. Furthermore, that policy is not based upon a single justification but on a group of reasons, which vary in different situations."

Lord Hoffman says nothing more about which reasons might apply or how the court should set about weighing such reasons as part of the process of determining whether a cause is to be categorised as immediate or not. And so, although the Law Commission rightly acknowledged that in *Gray* the House of Lords had been more explicit in its reference to the role of policy in the determination of cases in which the doctrine of ex turpi causa was to be considered, its confidence that the future direction of the law was leading to the sunlit uplands of clarity and consistency might be thought to have been somewhat optimistic.

And so it proved to be.

In *Patel v Mirza* [25] the issue before the Supreme Court was whether a claim to recover money paid by the claimant to the defendant pursuant to an illegal agreement to be used in betting on the movement of shares on the basis of inside information was barred by illegality. A nine judge court was deployed in an attempt to break the log jam which had been created by a fast expanding back catalogue of virtually irreconcilable decisions at the highest level. The stage was set for a decisive showdown between those Justices who favoured flexibility and those who wished to retain a rule based approached. The flexiteers and the retainers went head to head. In the event, the flexiteers carried the field. Lord Toulson (with whom five other Supreme Court Justices agreed and from whose reasoning Lord Sumption and two others dissented) concluded that:

"The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system (or, possibly, certain aspects of public morality, the boundaries of which have never been made entirely clear and which do not arise for consideration in this case). In assessing whether the public interest would be harmed in that way, it is necessary (a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, (b) to consider any other relevant public policy on which the denial of the claim may have an impact and (c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts. Within that framework,

[25] [2017] AC 467

various factors may be relevant, but it would be a mistake to suggest that the court is free to decide a case in an undisciplined way. The public interest is best served by a principled and transparent assessment of the considerations identified, rather than by the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate."

Lord Sumption, did not go gently into the good night of defeat and roundly condemned the approach of the majority as nothing more than the thinly disguised exercise of unprincipled discretion. He protested that Lord Toulson's so-called "range of factors approach":

"..is far too vague and potentially far too wide to serve as the basis on which a person may be denied his legal rights. It converts a legal principle into an exercise of judicial discretion, the process exhibiting all the vices of "complexity, uncertainty, arbitrariness and lack of transparency" which Lord Toulson JSC attributes to the present law. I would not deny that in the past the law of illegality has been a mess. The proper response of this court is not to leave the problem to 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. We would be doing no service to the coherent development of the law if we simply substituted a new mess for the old one."

Nevertheless, despite and in the face of Lord Sumption's baleful predictions, the Court effectively overruled *Tinsley v Milligan* and introduced, at least in the context of contractual claims, a new and, for better or worse, far more flexible approach. The essentially procedural formulation of Lord Mansfield was abandoned in favour of the three P's: purpose, policy and proportionality. The maxim ex turpi causa had effectively been emasculated. It was now: Ex turpi causa

numquam oritur actio. Out of an illegal cause no action will arise – sometimes.

But this decision once more shone a spotlight on the Irwin warning in *Clunis* concerning whether and with what consequences decisions on the scope of the doctrine in unjust enrichment or contract should apply to claims in tort. Was the old approach to ex turpi in personal injury claims now fully abandoned to be replaced by a quasi-discretionary approach or would it, like the monster in the horror film, just appear to be dead only to startle the audience by springing back into life just in time for a sequel?

The answer to this question was not made explicit in *Patel* but none of the Justices purported to limit the scope of the new flexible approach so as to exclude claims in tort and all of them referred, at least in passing, to authorities falling outside the realms of unjust enrichment.

However, the matter is still not beyond doubt and a significant issue remains, in any event, as to the extent to which *Patel* is to be seen as:

(a) superseding earlier ex turpi decisions in personal injury cases, even if not expressly overruling them, and thereby introducing a new degree of flexibility difficult to distinguish from the exercise of a discretion; or

(b) endorsing earlier decisions retrospectively as happy and useful examples of ways in which the courts have pre-emptively deployed the more general three stage framework only later articulated in *Patel.*

Was Lord Hoffman in *Gray*, therefore, a to be compared to a latter day Mr Jourdain much gratified to be informed that he had been speaking prose for forty years without realising it?

But if Lord Toulson's conclusion that "the essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system" is applied literally to claims in tort then it is difficult to see what scope there is for the "wider test" laid down by Lord Hoffman in *Gray* unless it falls within Lord Toulson's reference to "certain aspects of public morality, the boundaries of which have never been made entirely clear." It may come as no surprise, therefore, that, in later decisions, the courts have, so far, taken refuge in the conclusion that the two stage test in *Gray* has survived *Patel*.

In Henderson v Dorset Healthcare University NHS Foundation Trust[26], the circumstances of the claim were very similar to those arising in *Gray*. The claimant, who had a history of paranoid schizophrenia, sought damages arising out of her conviction and punishment for manslaughter. The defendant admitted breach of duty but relied upon the doctrine of illegality. It was argued on her behalf that the formulation of the wide and narrow grounds of liability articulated in *Gray* had been superseded by the decision in *Patel*.

This argument failed both at first instance and before the Court of Appeal but the case is now on its way to the Supreme Court. Will the

[26] [2018] 3 WLR 1651

Court be tempted to abandon Lord Hoffman's wider test altogether and thus reflect the Law Commissioners' early doubts concerning the role of illegality as a defence in personal injury claims or will it retain the elusive concept of causation as the litmus test for the determination of liability?

A further outstanding and related issue concerns cases in which one of those engaged in a criminal joint venture is injured as a result of the negligence of the other. This is a question which may well not fall for consideration in *Henderson* because it does not arise on its facts but an injection of clarity is well overdue.

In *Joyce v O'Brien*[27] Elias LJ dealt with the application of the wider test in *Gray* to claims between the driver and his passenger in a getaway vehicle concluding:

"29. I would formulate the principle as follows: where the character of the joint criminal enterprise is such that it is foreseeable that a party or parties may be subject to unusual or increased risks of harm as a consequence of the activities of the parties in pursuance of their criminal objectives, and the risk materialises, the injury can properly be said to be caused by the criminal act of the claimant even if it results from the negligent or intentional act of another party to the illegal enterprise."

In *McCracken v Smith*[28] the claimant was engaged in a joint criminal venture of joyriding a stolen moped on a footpath which crashed into a vehicle turning across their path driven by one Mr Bell. The Court

[27] [2014] 1 W.L.R. 70

[28] [2015] EWCA Civ 380

of Appeal held that the proper application of *Joyce* and *Gray* meant that the claimant could not succeed in his claim against his partner in crime but that the claim against Mr Bell was successful because his negligence was causatively distinct from that of the joyriders.

But can this be right? The Court in *McCracken* did not refer to a passage in the judgment in *Clunis*[29]:

"The [ex turpi] argument is *even more pertinent* if the claim to damages is against someone who has not participated in the crime."

As the late Tony Weir remarked with unconcealed distaste of the decision in *Revill*, the injured burglar case:

"We must therefore suppose it to be the law that a criminal who would be refused damages if he sued his accomplice is to be granted them if he sues his victim instead."

"Any more decisions like that" he went on to comment "and the Court of Appeal will forfeit the respect of lawyer and layman alike."

Nor, it would appear, could the purely negligent defendant obtain a contribution from the far more culpable claimant's partner in crime by the operation of the Civil Liability (Contribution) Act 1978 section 1(1) of which provides:

"Subject to the following provisions of this section, any person liable in respect of any damage suffered by another person may recover contribution from **any other person liable in respect of the same damage** (whether jointly with him or otherwise)."

[29] Ibid p986H

Indeed, it is difficult to reconcile any hard and fast rule that joint participation in a serious crime must automatically preclude recovery by the application of the *Patel* "range of factors" approach. After all, the claimant and defendant in *Patel* were both engaged in a criminal conspiracy to break the law but this did not preclude the claimant from recovering his money.

A similar issue arose in *Wallett v Vickers*[30] in which two drivers were racing when one lost control of his vehicle and was killed. The court held that a personal injury claim by his passengers against the driver of the other vehicle succeeded on the basis that the two drivers had not been proved to have shared the necessary intent to commit a joint criminal act. The case was made more complicated by the fact that there arose issues as to what had or had not been argued below as a result of which the appeal, rightly or wrongly, was eventually determined on a somewhat narrow basis. Nevertheless, it might be asked whether, in the light of *Mirza*, the emphasis placed on the black and white question as to whether the acts of the two drivers met the test for criminal joint enterprise was either a necessary or sufficient basis upon which the appeal fell to be resolved.

So where will the courts go from here?

One solution would be to follow in the path of Canada and limit the operation of the ex turpi causa doctrine in tort to the narrow ground referred to in *Gray*. This approach has the advantage of relative

[30] [2019] P.I.Q.R. P6

clarity but suffers from two drawbacks. Firstly, the instinctive reaction of most members of the public is that if a burglar is injured falling out of the back of a speeding getaway van he has got what was coming to him. Secondly, this is a solution which, even if it were found to be attractive, would require a higher than usual degree of judicial activism to achieve without legislation; and legislation is simply not going to happen.

Alternatively, the Supreme Court might be tempted, whether in *Henderson* or in any other claim, to expand upon the scope of Lord Hoffman's wider ground as articulated in *Gray* with at least a list of factors, albeit non-exhaustive, to which the courts may have regard when adjudicating on the level of turpitude and the level of proximity to the civil claim with which it coincides in broad accordance with the "range of factors" approach in *Patel*.

Perhaps it would be too much to hope for one judgment which is that of all the SCJs and which would bring greater clarity and resolution to this area.

There is, after all, recent precedent for this.