CALEB O'FEE

PATEL V MIRZA AND THE FUTURE OF THE ILLEGALITY DOCTRINE IN NEW ZEALAND

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Abstract

In 1775, Lord Mansfield CJ held that no court will lend its aid to a man who founds his cause of action on an immoral or an illegal act. From this simple dictum sprang a common law doctrine so complicated that it would take the courts 241 years to pronounce a definitive view on the correct approach to its application. Historical confusion about whether the illegality doctrine is an inflexible rule of law, or a discretionary public policy doctrine has generated a mass of inconsistent authority throughout the Commonwealth. In Patel v Mirza, the Supreme Court of England and Wales held that the illegality doctrine should be applied in a flexible manner, having due regard to the various policies militating for and against the application of the doctrine. This paper examines the historical position of the illegality doctrine in New Zealand and explores whether there is anything to be gained by the adoption of Patel in a New Zealand context.

Table of Contents

I Introduction

This paper is about an ancient common law doctrine, often encapsulated by the phrase *ex turpi causa non oritur actio*. The doctrine represents the broad public policy that no person should be able to found a claim on an illegal or immoral act. The following example shows how it might apply. Imagine I am something of a home handyman. Contrary to the Building Act 2004, and numerous local by-laws, I decide to build an extension to my house without obtaining a building consent. During barbecue season, my neighbour negligently starts a fire in his backyard which spreads to my house and destroys the extension. Should I be able to sue my neighbour for his negligent act which has destroyed my extension? In theory, my neighbour could cite the illegality doctrine and argue that I am prevented from bringing a claim on the basis that I would have to base my claim on an illegal act – the building of the extension. But many would take issue with this as an outcome. Although I am not blameless in this whole thing, my neighbour should also not be able to get away with putting my property a risk with his negligent barbecuing practices. This seemingly straightforward scenario provides a pertinent example of what can potentially be at stake when the illegality doctrine is relied on to extinguish an otherwise sound claim. However, this is but one example; the illegality doctrine encompasses an extremely wide range of situations across the private law spectrum.

This paper considers the future of the illegality doctrine in New Zealand following a landmark decision of the Supreme Court of the United Kingdom in *Patel v Mirza* (Patel). The first section of my paper considers the historical background to the illegality doctrine, its theoretical underpinning and key rationales. The second section explores the decision in *Patel v Mirza*, and its purported restatement of the law of illegality. Finally, the third section analyses the future of the illegality doctrine in New Zealand after *Patel*. Ultimately, this paper concludes that the position in New Zealand after *Patel* is not clear, but that New Zealand should nevertheless adopt an approach to illegality which is broadly along the same lines as that promulgated in *Patel*.

A What is the Illegality Doctrine?

In Holman v Johnson, Lord Mansfield CJ stated:[1]

> No court will lend its aid to a man who founds his cause of action on an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says that he has no right to be assisted. It is on that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action

[1] *Holman v Johnson* (1775) 1 Cowp 342 at 343.

> against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, potior est conditio defendentis.

Despite more than 240 years passing since Lord Mansfield CJ's famous dictum, the passage cited above remains one of the most authoritative pronouncements of the law of illegality. This simple fact is illustrative of the profound difficulty that the doctrine has given courts across the Commonwealth.

Lord Mansfield's dictum raises several questions that it does not answer. For example, what is an illegal act? What is an immoral act? What does it mean to say that a cause of action is founded upon that act? What if one party to the action is more guilty than the other? What is the effect of such an act? Is it that a claim will be simply dead in the water, or does the court have a duty to ensure that justice is nevertheless actually done? This final consideration, in my view, has resulted in the "incoherent mass of inconsistent authority" which pervades this area of the law.[2] In *Saunders v Edwards*, Bingham LJ described the issue thus:[3]

> Where issues of illegality are raised, the courts have (as it seems to me) to steer a middle course between two unacceptable positions. On the one hand it is unacceptable that any court of law should aid or lend its authority to a party seeking to pursue or enforce an object or agreement which the law prohibits. On the other hand, it is unacceptable that the court should, on the first indication of unlawfulness affecting any aspect of a transaction, draw up its skirts and refuse all assistance to the plaintiff, no matter how serious his loss nor how disproportionate his loss to the unlawfulness of his conduct.

For Wade, illegality cases force the courts to engage in a balancing process whereby they must consider:[4]

> on one side, the view that a court should not help a man who has engaged in an illegal transaction out of the predicament in which he has placed himself, and on the other the view that a court should not permit unjust enrichment of one person at the expense of another.

This seems to suggest that it is in fact open to the courts to steer a middle course between the two positions in order to achieve a result which is fair and appropriate in each case. However, there is a fundamental flaw with this view; the rule expounded in *Holman v Johnson* does not concern itself with achieving justice between the parties. Indeed, Lord Mansfield CJ stated

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[2] *Bilta (UK) Ltd (in liquidation) and others v Nazir and others (No 2)* [2015] UKSC 23, [2015] 2 WLR 1168 at [61] per Lord Sumption.

[3] *Saunders v Edwards* [1987] 1 WLR 1116 at 1134.

[4] John W. Wade "Benefits Obtained under Illegal Transactions – Reasons for and against allowing Restitution" (1946) 25 Tex. L. Rev. 31 at 60.

explicitly that "the doctrine is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say".[5]

Such a conclusion has led many to lament the tendency of the doctrine to produce outcomes which are arbitrary,[6] unjust,[7] and disproportionately harsh.[8] As a result, in a number of instances the courts have created exceptions to the general rules or otherwise strained the application of the rules so as to meet the justice of the case.[9] Alternatively, judges and commentators have simply suggested that one of the many justifications for the illegality doctrine provides the true basis for determining the general rule, albeit to the exclusion of other equally valid justifications.[10] Alternatively still, judges have avoided the doctrine's application by redefining illegality, by finding that the doctrine doesn't apply to a given set of facts, or by holding that an alternative doctrine trumps it.[11]

It is this employment of judicial entrepreneurship to achieve a just result in each case which is almost entirely responsible for the state of disarray in which the law of illegality finds itself. What's more, the failure of the courts to adequately enunciate the policy grounds behind their decisions has served to confuse and complicate this area of the law even further.[12]

B What is Illegality?

The definition of illegality is not settled and may in fact be deliberately redefined to avoid the doctrine's application in a particular case. Indeed, it is not even altogether accurate to suggest that the behaviour which is required to trigger the rule is in fact illegal; mere immoral behaviour may well suffice.[13] As Todd points out, "the ex turpi causa principle is not simply about illegality: it is about turpitude, or base causes."[14]

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[5] *Holman*, above n 1, at 343. See also Law Commission of England and Wales *The Illegality Defence: A Consultative Report* (Consultation Paper 189, 2009) at [2.2].

[6] *Patel v Mirza* [2016] UKSC 42, [2016] 3 WLR 399 at [91] per Lord Toulson.

[7] Lord Sumption "Reflections on the Law of Illegality" [2012] 20 RLR 1 at 12.

[8] Ernest Lim "Ex Turpi Causa: Reformation not Revolution" (2017) 80 MLR 927 at 927. See also Law Commission of England and Wales, above n 5, at [1.3].

[9] *Patel*, above n 6, at [21], [90] and [113] per Lord Toulson and [134] per Lord Kerr. See also Law Commission of England and Wales, above n 5, at [3.54].

[10] Wade, above n 4, at 60.

[11] Graham Virgo "Illegality's Role in the Law of Torts" in Matthew Dyson (ed) *Unravelling Tort and Crime* (Cambridge University Press, Cambridge, 2014) 174 at 177.

[12] W J Ford "Tort and Illegality: The Ex Turpi Causa Defence in Negligence Law" (1977) 11 MULR 32 at 32.

[13] Virgo, above n 11, at 181 – 182.

[14] Stephen Todd "Torts" [2016] NZ L Rev 829 at 865.

A better view is that any act which amounts to turpitude is likely to engage the defence.[15] Lord Sumption has suggested that an act will amount to turpitude if it engages the public interest; acts which are criminal and quasi-criminal being examples.[16] In contrast, his Lordship suggested that purely civil wrongs such as torts or breaches of contract are unlikely to amount to turpitude; the public interest is likely to be sufficiently served by the availability of a system of corrective justice to regulate consequences of such acts as between the affected parties.[17] As discussed below, this is unlikely to be the position in New Zealand.[18]

C Why Does the Doctrine Exist?

The answer to this question will largely depend on who is being asked. It is unsurprising that the rationale behind the doctrine appears to vary with the circumstances of each case given that the illegality doctrine purports to be a rule of public policy, and public policy is ostensibly only ever argued when other points fail.[19] Indeed, while it has been suggested that there is only one fundamental rationale behind the doctrine,[20] others have argued that the rationales number anywhere from two,[21] to six,[22] seven[23] and even nine.[24]

However, Wade argues that asserting that one of the rationales provides the "true basis for determining the general rule and the touchstone for deciding individual cases" lacks a "logical or legalistic basis", and accordingly, "cannot be safely done".[25] In *Gray v Thames Trains*, Lord Hoffman suggested that the illegality doctrine represents a policy which is not based on a single reason, but a group of reasons which will vary in different situations.[26] Several of these rationales are considered below.

1 Dignity of the Court

Early authority from the United Kingdom seemed to suggest that the primary rationale behind the doctrine was the desire to maintain the dignity of the court.[27] This has been described

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[15] *Les Laboratoires Servier and another v Apotex Inc and other* [2014] UKSC 55, [2014] 3 WLR 1257 at [21]. For an alternative view, see Virgo, above n 11, at 181 – 182.

[16] At [21] and [25].

[17] At [28].

[18] See, for example, *Brown v Dunsmuir* [1994] 3 NZLR 485.

[19] *Richardson v Mellish* [1824-34] All ER Rep 258 at 266 per Burrough J.

[20] *Hall v Hebert* [1993] 2 SCR 159 at [21] per McLachlin J.

[21] *Patel*, above n 6, at [99] per Lord Touslon. Lord Toulson went on to state that there is only one rationale behind the doctrine; see [120].

[22] Law Commission of England and Wales, above n 5, at [2.5] – [2.34].

[23] Virgo, above n 11, at 184 – 189.

[24] Todd, above n 14, at 851.

[25] Wade, above n 4, at 60.

[26] *Gray v Thames Trains Ltd* [2009] UKHL 33, [2009] AC 1339.

[27] Virgo, above n 11, at 188. See also Wade, above n 4, at 42.

elsewhere as the pure fountain theory.[28] It is suggested that the court, by allowing a remedy for a claim tainted by illegality, may become tainted itself.[29] Such a rationale harks back to the days of outlawry whereby outlaws were deemed to have forfeited their right to assistance from the court.[30]

A good example of this rationale is provided by *Parkinson v Royal College of Ambulance*. In that case, the claimant sought the return of substantial donations he had given to the College under the mistaken premise that the donations would entitle him to a knighthood.[31] The Court refused the donor's claim as being contrary to public policy, concluding that:[32]

> No Court could try such an action and allow such damages to be awarded with any propriety or decency.

In recent years there have been considerable aspersions cast on this rationale. In *Cross v Kirkby*, the Court held that today there are no outlaws, and accordingly, criminals should be entitled to enjoy the existence and enforcement of their rights as much as anybody else.[33] In *Les Laboratoires Servier v Apotex Inc* (Apotex), Lord Sumption described this rationale as "self-indulgent", and suggested that the same concept would now likely be expressed as a principle of consistency.[34]

2 Consistency

The consistency rationale essentially suggests that the illegality doctrine should not operate in a way which is likely to introduce an inconsistency into the fabric of the law.[35] Such an inconsistency would be introduced if a plaintiff was able to profit from an illegal or wrongful act, or to evade a penalty prescribed by criminal law.[36] Put another way, the court should not

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[28] In *Collins v. Blantern* [1767] 95 ER 852 (K.B.) at 852, Lord Chief Justice Wilmot held "[N]o polluted hand shall touch the pure fountains of justice. Whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof . . . you shall not have a right of action when you come into a Court of Justice in this unclean manner to recover it back.". See also Law Commission of England and Wales, above n 5, at [2.24].

[29] Virgo, above n 11, at 188.

[30] At 189.

[31] *Parkinson v Royal College of Ambulance* [1925] 2 KB 1.

[32] At 13.

[33] *Cross v Kirkby* [2000] EWCA Civ 426 at [94].

[34] *Les Laboratoires Servier v Apotex Inc,* above n 15, at [24] per Lord Sumption.

[35] *Hall v Hebert*, above n 20, at [25]. The consistency rationale also found support in *Patel*, above n 6, at [100] – [101] per Lord Toulson.

[36] *Hall v Hebert*, at [25].

be seen to give with one hand what it has taken away with the other.[37] The desire here is to ensure that various areas of the law operate harmoniously.[38]

The desire to ensure that a plaintiff does not profit from his wrong has, in some cases, been a rationale in its own right.[39] However, even this rationale has not been applied consistently. In *Meah v McCreamer (No.2)*, Woolf J appeared to suggest that, in certain circumstances, a plaintiff should be able to profit from his wrong if it means he is able to compensate the victims of his crimes.[40]

A similar rationale behind the doctrine is the desire to further the purpose of the relevant rule or law which has been transgressed.[41] Put another way, a claim should not be upheld where doing so would serve to undermine the purpose of the law which has been transgressed.[42]

3 Deterrence

The Law Commission of England and Wales is of the view that this is the rationale cited most frequently by the courts.[43] For Virgo however, the deterrence rationale is absurd.[44] It assumes that a potential plaintiff knows not only how the law of illegality will operate in a given situation, but that their behaviour will be modified in light of that knowledge.[45] The law of illegality has elsewhere been described as "lawyers' law" on the basis of its inherent complexity.[46] It therefore seems rather implausible to suggest that the doctrine will have the intended deterrent effect if most non-lawyers would have difficulty comprehending it. In fact, a good base knowledge of the law of illegality may actually serve to encourage illegal behaviour. For example, a defendant who is aware that the illegality doctrine will operate to prevent a plaintiff from bringing a successful claim against them will likely be encouraged, not deterred, from committing that illegal act.[47]

4 Punishment

This rationale as the sole basis of the doctrine has not been generally accepted.[48] For Virgo, the extent of the punishment suffered by disallowing a claim will depend on the extent to

[37] *Hall v Hebert*, at [20].
[38] Ibid at [17].
[39] See for example *Beresford v Royal Insurance Co Ltd* [1938] AC 586 at 586.
[40] *Meah v McCreamer (No.2)* [1986] 1 All ER 943 at 951.
[41] Law Commission of England and Wales, above n 5, at [2.6] – [2.12].
[42] Todd, above n 14, at 851.
[43] Law Commission of England and Wales, above n 5, at [2.18].
[44] Virgo, above n 11, at 187.
[45] Ibid.
[46] M P Furmston, "The Illegal Contracts Act 1970 – An English View" 5 NZULR 151 at 161.
[47] Virgo, at 187.
[48] See Law Commission of England and Wales, above n 5, at [2.28] – [2.29]; Virgo, at 187.

which the claimant has suffered loss.[49] The greater the loss, the greater punishment, irrespective of the nature of the crime which has been committed. This completely undermines one of the fundamental principles of the criminal law; punishment should be proportionate to the crime committed.[50] In addition, there may be situations where a plaintiff is punished by bringing a claim, while a defendant actually obtains a windfall.[51] Others have simply suggested punishment is the preserve of the criminal law, and accordingly, it should not be invoked by the civil courts.[52]

In a similar vein, the courts have in some cases indicated that wrongdoers are not entitled to certainty in the law. In *Patel*, Lord Toulson suggested that there are areas in the law where legal certainty is particularly important, but that the law in respect of those contemplating unlawful activity is not one of them.[53] One interpretation of this point is that there is utility in defences of a criminal nature being ambiguous, as it may serve to deter undesirable conduct by preventing those who would potentially qualify for such defences from engaging in illegal conduct in the first place.[54] Another interpretation, which appears to be the one adopted by Lord Kerr in *Patel*, is that those engaging in illegal conduct are not deserving of the same certainty in the law as "those who seek the law's resolution of genuine, honest disputes."[55] Such an interpretation should be resisted for two reasons. Firstly, it does not distinguish between illegal acts which fundamentally differ in kind or extent.[56] For example, it is difficult to argue that a claimant who "stumbles into illegality" is equally disentitled from certainty in the law as a claimant who has paid a defendant to commit murder.[57] Secondly, innocent third parties who have been somehow affected by illegality are also denied certainty in the law, despite having no part to play in the illegality.[58]

With the above discussion in mind, this paper now turns to the position of the illegality doctrine in the United Kingdom, and the landmark decision in *Patel*.

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[49] Virgo, at 188; Wade, above n 4, at 36.

[50] Virgo, at 188.

[51] Wade, above n 4, at 36.

[52] Law Commission of England and Wales, above n 5, at [2.28].

[53] *Patel*, above n 6, at [113] per Lord Toulson.

[54] James Goudkamp "The end of an era? Illegality in private law in the Supreme Court" [2017] 133 L.Q.R 14 at 18; Paul Robinson "Criminal Law Defences: A Systematic Analysis" (1982) 82 Colum. L.Rev. 199 at 272 – 273.

[55] *Patel*, at [137] per Lord Kerr.

[56] Lim, above n 8, at 936.

[57] Lim at 936; Mark Law and Rebecca Ong "'He who comes to Equity need not do so with clean hands?' illegality and resulting trusts after Patel v Mirza, what should the approach be?" (2017) 23 Trusts & Trustees 880 at 894.

[58] Lim at 936; *Patel*, at [158] per Lord Neuberger.

II Patel v Mirza and Illegality in the United Kingdom

A Introduction

The position of the illegality doctrine in the United Kingdom is perhaps best characterised by a fundamental tension between those judges advocating a rule-based approach to illegality, and those advocating a flexible, discretionary approach.

The Court of Appeal decision in *Bowmakers Ltd v Barnet Instruments Ltd* provides a good example of the rule-based approach to illegality.[59] In that case, the Court held that the illegality doctrine will not apply in circumstances where the claimant can establish his claim without having to rely on the relevant illegality. [60] This will be the case even if a claimant doesn't have to plead the illegality on technical grounds.[61]

An historical example of the flexible approach to illegality is provided by *Euro-Diam Ltd v Bathurst*.[62] In that case, the Court of Appeal held that the illegality doctrine will apply to prevent relief if "in all the circumstances it would be an affront to the public conscience to grant the plaintiff the relief which he seeks."[63] In contrast to the reliance rule, it is notable how few parameters are placed on this test; the question of whether something affronts the public conscience in a given case is a matter to be determined by the courts. It should be noted, however, that the public conscience test was overruled by the House of Lords in *Tinsley v Milligan*.[64]

Three Supreme Court decisions in the lead up to *Patel* starkly illustrated the extent the disagreement between advocates of the rule-based and flexible approaches to illegality. In *Hounga v Allen* (Hounga), the majority held that the defence of illegality is a rule which rests on the foundation of public policy.[65] Given that such rules do not belong "to the fixed or customary law", they are capable of expansion or modification where necessary.[66] Lord Wilson argued that the Courts are implored to ask two questions when issues of illegality are

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[59] *Bowmakers Limited v Barnet Instruments Limited* [1945] KB 65. See also, *Tinsley v Milligan* [1994] 1 AC 340.

[60] *Bowmakers,* at 69 – 71. This is what is known as the reliance test.

[61] In *Tinsley*, the plaintiff's claim succeeded because she did not need to rely on her illegal conduct to rebut the presumption of advancement. In *Patel*, above n 6, at [24] and [87], Lord Toulson criticised this result, and the reliance rule more generally for producing "different results according to procedural technicality" which have "nothing to do with the underlying policies." *Tinsley* was eventually overruled by the majority in *Patel*, see [110] per Lord Toulson.

[62] *Euro-Diam Limited v Bathurst* [1988] 2 WLR 517.

[63] At 526. This is what is known as the public conscience test.

[64] *Tinsley,* above n 59, at 363.

[65] *Hounga v Allen and Another* [2014] UKSC 47; [2014] WLR 2889 at [42] per Lord Toulson.

[66] Ibid.

raised: "What is the aspect of public policy which founds the defence?" and "is there another aspect of public policy to which application of the defence would run counter?"[67] In contrast, Lord Hughes was of the view that, although public policy underlies the rules on illegality, the case law does not establish a separate trumping test of public policy.[68]

In *Les Laboratoires Servier v Apotex Inc* (Apotex), Lord Sumption held that the illegality doctrine is a rule of law, and not a mere discretionary power.[69] His Lordship also argued that the illegality doctrine is based on public policy and not the perceived balance of merits between the parties to a dispute. [70] For Lord Sumption, a discretionary approach to illegality "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."[71] Lord Toulson disagreed, preferring the approach adopted by the Court of Appeal in the present case, and the majority in *Hounga*.[72] He held that where circumstances arose which were not directly covered by existing law, the courts should proceed carefully on a case by case basis, considering the policies which underlie the broad principle.[73]

Finally, in *Jetivia SA v Bilta (UK) Limited* (Bilta), Lord Sumption reiterated the view that the illegality defence is a rule of law that will apply regardless of the equities of a case.[74] In his view, the mere fact that the defence is based on public policy does not mean that the courts are able to "apply the illegality defence or not according to the relative importance which they attach to the policy underlying it by comparison with desirability of allowing an otherwise sound claim to succeed".[75] The law of illegality is a vindication of the public interest as against the legal rights of the parties.[76] As such, private law rights may be overridden if a claim based on them is founded on "acts which are contrary to the public law of the state and engage the public interest".[77] In contrast, Lord Toulson cited with approval the competing public policies approach of the majority in *Hounga*.[78]

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[67] Ibid.

[68] At [55] per Lord Wilson.

[69] *Les Laboratoires Servier and another v Apotex Inc and other*, above n 15, at [13] per Lord Sumption.

[70] Ibid.

[71] At [20].

[72] See *Les Laboratoires Servier and another v Apotex Inc and other* [2012] EWCA Civ 593 (CA), *Hounga*, above n 65, at 2903.

[73] *Apotex*, above n 15, at [57] per Lord Toulson. See also *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277 at 293 and *Gray*, above n 26, at 1370 for a similar approach.

[74] *Bilta*, above n 2, at [62] per Lord Sumption.

[75] At [99].

[76] At [60].

[77] At [100].

[78] At [173] per Lord Toulson.

For Lord Neuberger, the longstanding debate about the correct approach to illegality epitomises the tension between – on one hand – the need for principle, clarity and certainty in the law – and on the other – the desire to ensure that a fair and appropriate result is reached in each case.[79] For Fisher, this is an oversimplification.[80] Nevertheless, the Supreme Court in *Patel* cut this Gordian knot [81] by giving a clear direction in which the law of illegality must head.[82] The following sections consider this landmark decision in the law of illegality.

B The Facts

The facts of *Patel v Mirza* are simple. Mr Patel entered into an agreement with Mr Mirza whereby he transferred some £620,000 for the purpose of betting on the movement of Royal Bank of Scotland shares, using inside information which Mr Mirza expected to obtain.[83] As it turned out, the inside information was not forthcoming and the relevant betting did not take place.[84] Mr Patel eventually sued Mr Mirza after his attempts to have the money returned were unsuccessful.[85] Importantly, the agreement between Mr Patel and Mr Mirza amounted to a conspiracy to commit an offence of insider dealing under section 52 of the Criminal Justice Act 1993.[86] Mr Mirza pleaded illegality, arguing that, as the contract was illegal, the ex turpi doctrine applied to prevent Mr Patel from bringing a claim.

C The Result

The Court was unanimous in allowing Mr Patel's claim, and ordering the return of the money. However, the majority of the Supreme Court went surprisingly further and attempted to restate the law of illegality. Lord Toulson, with whom Lady Hale and Lords Kerr, Wilson and Hodge agreed, held that:[87]

> 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.

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[79] At [13] per Lord Neuberger.

[80]James Fisher "The Latest Word on Illegality: Patel v Mirza." [2016] 4 L.M.C.L.Q 483 at 488.

[81] Law and Ong, above n 57, at 880.

[82] Cf Nicholas Strauss QC "Ex turpi causa oritur actio" [2016] 132 L.Q.R. 236 at 264 – 265 who is of the view that it is unnecessary to adopt one approach over the other. In his view, both approaches have validity in different kinds of cases.

[83] *Patel*, above n 6, at [11] per Lord Toulson.

[84] Ibid.

[85] Ibid.

[86] At [12].

[87] At [120].

To determine whether this is the case, the Court must consider three things:[88]

a) the underlying purpose of the law which has been transgressed, and whether that purpose will be enhanced by denial of the claim;
b) any other relevant public policy on which the denial of the claim may have an impact; and
c) whether denial of the claim would be a proportionate response to the illegality.

This broad discretionary approach – hereafter the 'range-of-factors' approach[89] – was met with fierce resistance by the minority.[90] The minority view was that the power of the court to deny recovery on the ground of illegality should be limited to well-defined circumstances.[91] Lord Sumption argued that the approach adopted by the majority was "far too vague and potentially far too wide to serve as the basis on which a person may be denied his legal rights", and that it would convert a legal principle into an exercise of judicial discretion, resulting in no change to the "complexity, uncertainty, arbitrariness and lack of transparency" which had previously beset the law of illegality.[92] To introduce the approach advocated by the majority would be merely to substitute a new mess for the old one.[93]

The majority finding in *Patel* finally brought an end to the debate regarding the proper approach to illegality. Despite receiving mixed treatment in several cases since *Patel*,[94] Lord Toulson's range-of-factors approach to illegality has clearly established the approach to be adopted for the foreseeable future.[95] The remainder of this paper considers the New Zealand position in light of *Patel* and concludes that a modified form of the range-of-factors approach should be adopted in New Zealand.

III Illegality in New Zealand

A Introduction

This section examines the position of the illegality doctrine in New Zealand, both historically, and in light of *Patel*. It begins with a consideration of the impact of two

[88] Ibid. For a useful summary of the majority approach, see Lim, above n 8, at 930 – 931.

[89] This approach has elsewhere been described as a 'structured discretion' or a 'balancing of factors': see Andrew Burrows "Illegality after *Patel v Mirza*" (2017) 70 Current Legal Problems 55 at 67.

[90] For a useful summary of the minority approach, see Lim, above n 8, at 931 – 932.

[91] *Patel*, above n 6, at [214] per Lord Clarke.

[92] At [265] per Lord Sumption.

[93] Ibid.

[94] See *Singularis Holdings Ltd (In Liquidation) v Daiwa Capital Markets Europe Ltd* [2018] 1 WLR 2777; *Gujra v Roath* [2018] 1 W.L.R. 3208; *Henderson v Dorset Healthcare University NHS Trust* [2018] EWCA Civ 1841.

[95] R. A. Buckley *Illegality and Public Policy* (4th ed, Sweet & Maxwell, London, 2017) at 328.

legislative developments on common law illegality in New Zealand. It provides a brief overview of the key illegality cases and an examination of the early judicial treatment of *Patel*. The section concludes by outlining a number of reasons why New Zealand should adopt a modified form of the range-of-factors approach.

B Legislative carve-outs

New Zealand's unique approach to the illegality doctrine has not avoided the inconsistencies and injustices which have pervaded the law in the United Kingdom. Nevertheless, the application of the doctrine in New Zealand has not generated the same volume of case law or number of issues as it has in the United Kingdom. The reason for New Zealand's unique approach to illegality is largely the result of two significant pieces of legislation; the Accident Compensation Act 2001 and the Illegal Contracts Act 1970.

Section 317(1) of the Accident Compensation Act prevents the bringing of any claim for personal injury independently of the Act.[96] In *ACC v Curtis*, the Court held that the Act "was plainly intended as a departure from existing common law", including the law of illegality.[97] In addition, the Court considered that drawing on the illegality doctrine in this context would be contrary to the overriding purpose of the Act; comprehensive no-fault cover.[98] Accordingly, the Act prevents the illegality doctrine from applying to personal injury claims. In practice, this has resulted in considerably fewer illegality cases coming before the courts.

The other key legislative carve-out is now found in subpart 5 of part 2 of the Contract and Commercial Law Act 2017 (CCLA).[99] The Act removes the application of the common law of illegality to illegal contracts.[100] The former legislation, the Illegal Contracts Act 1970, was introduced following a report by the Contracts and Commercial Law Reform Committee in 1969.[101] In respect of the purported need for legal reform in the area of illegal contracts, the Committee made the following observation:[102]

> That there is need for change in the law relating to illegal contracts needs little argument. During the past two decades there have been repeated judicial expressions of concern at the harshness of the consequences which flow from illegality.

[96] Accident Compensation Act 2001, section 317(1). See also *Leason v Attorney-General* [2013] NZCA 509, [2014] 2 NZLR 224 at [106].

[97] *Accident Compensation Corporation v Curtis; Accident Compensation Corporation v McKee* [1994] 2 NZLR 519 at 524 – 525.

[98] Ibid.

[99] Contract and Commercial Law Act 2017, ss 70 – 84.

[100] The CCLA leaves the definition of an illegal contract to the common law, however.

[101] Contracts and Commercial Law Reform Committee *Report of The Contracts and Commercial Law Reform Committee on the Law Governing Illegal Contracts* (October 1969).

[102] At [3].

An excellent illustration of this problem is provided by a decision of the Court of Appeal in *Carey v Hastie*.[103] In that case, a builder had been contracted to undertake building work for which he had failed to obtain the necessary permits.[104] The builder was not paid for his services, and so sued for the contract price.[105] The Court held that, because it was illegal to commence the work without first obtaining a building permit, the builder was accordingly prevented from recovering the contract price.[106] Unsurprisingly, this was not a conclusion that the Court was comfortable to arrive at. McCarthy J lamented the apparent unfairness of the builder's inability to recover, suggesting that the time may have come for the Legislature to "look carefully at this subject and consider doing something to remove the over-severe consequences" which flow from the doctrine's strict application.[107]

The Committee proposed the introduction of legislation which would deem an illegal contract to be of no effect, so that "no rights would pass under them and the position of the parties will be the same as if the illegal contract had never been entered into."[108] However, the courts would be given a broad discretion to order the enforcement of an illegal contract, provided it was in the public interest to do so.[109] The Committee acknowledged that while conferring such a wide discretion on the courts was prone to accusations of "uncertainty and an abdication by the legislature of its proper functions in favour of the courts", such a discretion was a much lesser evil than to leave the law as it stood.[110] Indeed, the balance of the academic commentary tends to suggest that any fears of uncertainty, or the draconian exercise of discretion by the courts, have proven unfounded.[111]

The recommendations contained in the Committee's report were given almost immediate effect with the enactment of the Illegal Contracts Act 1970 (now subpart 5 of part 2 of the CCLA). In accordance with the Committee's recommendations, the Act provides that "every

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[103] *Carey v Hastie* [1968] NZLR 276.

[104] At 279 per North P. The work was subsequently undertaken without a permit, contrary to Auckland Council bylaws deeming such work to be illegal.

[105] Ibid.

[106] *Carey v Hastie*, above n 103, at 279 – 280.

[107] At 282 – 283 per McCarthy J.

[108] Contracts and Commercial Law Reform Committee, above n 101, at [11].

[109] Ibid.

[110] Ibid.

[111] See generally David McLauchlan "Contract and Commercial Law Reform in New Zealand" (1984) 11 NZULR 36 at 41; Andrew Beck "Illegality and the Courts' Discretion: The New Zealand Illegal Contracts Act in Action" (1989) 13 NZULR 389 at 418; Law Commission *Contract Statutes Review* (NZLC R25, 1993) at 173. For a contrary view, see generally Furmston, above n 46.

illegal contract shall be of no effect."[112] The Act gives the courts a broad discretion to grant relief provided that to do so would not be contrary to the public interest.[113] Such wide discretionary powers have been described as a useful tool to combat the unfairness of common law illegality, protect innocent parties, and ensure that the guilty do not profit.[114]

A considerable number of illegality cases involve illegal contracts. As such, the impact of the illegality provisions of the CCLA on the development of illegality doctrine in New Zealand cannot be understated. Nor can the impact of the Accident Compensation Act's no-fault compensation scheme be so minimised. In my view, these two pieces of legislation have changed the illegality landscape in New Zealand so drastically as to make it almost unrecognisable when viewed alongside other Commonwealth jurisdictions. Nevertheless, there are a handful of illegality cases not captured by the aforementioned legislative developments which have managed to make it before the courts. Such cases have tended to involve rather anomalous facts, making them very difficult to reconcile.

C Illegality in the Courts

The leading case on common law illegality is *Leason v Attorney-General* (Leason). Prior to this decision, the courts appeared to be of the view that the circumstances in which the doctrine would apply in New Zealand had not yet been settled.[115]

In *Leason*, the defendants – certain that the Waihopai spy base was being used to illegally collect information in aid of wars overseas – trespassed upon the land on which Waihopai stood and deflated a radome covering one of the base's antennae, causing $1.2m of damage.[116] The defendants argued that the Crown's claim for trespass arose ex turpi, as it was brought in reliance on the illegal activities being undertaken at Waihopai.[117]

The Court unanimously held that the defence of illegality was not available, primarily on the basis that the Crown did not have to rely on its alleged illegal activities to found its claim in trespass; all it needed to prove was that it had legal title to the land.[118]

The Court went on to undertake a broader analysis of the illegality doctrine in New Zealand. It held that aspects of the New Zealand law on illegality are in a state of development,[119] and

[112] Contract and Commercial Law Act 2017, s 75.
[113] Sections 75 – 79.
[114] Beck, above n 111, at 418.
[115] *ABB Ltd v NZ Insulators Ltd* [2007] 11 TCLR 978 at [80]. This is rather surprising given that the doctrine is over 240 years old.
[116] *Leason*, above n 96, at [7] – [9].
[117] At [10] and [84].
[118] At [125].

that no single formulation of the defence has so far emerged.[120] Rather than attempting to overcome this problem by providing such a formulation, the Court simply identified several approaches which are apparent in the case law, and went on to apply each of them to the facts of the case.[121] The Court appeared to be of the view that "the basis for, and application of the defence of ex turpi causa will depend on the particular situations in which it is sought to be applied."[122]

In *R v Collis*, a police search of Collis' property found a quantity of cannabis and $103,000 in cash.[123] Collis was only convicted of possession for supply, and so sought the return of the cash which had been confiscated by police.[124] Although Collis admitted that the money was the proceeds of the illegal sale of cannabis, the Court nevertheless upheld his claim on the basis that he didn't have to rely on the illegality to establish his claim; he merely had to establish that he had better title to the money than the police. Counsel for the Crown unsuccessfully argued for a broader interpretation of the illegality doctrine as being engaged wherever it would be an affront to the public conscience to afford the relief sought.[125] The majority of the Court disagreed, suggesting that such an approach would amount to the exercise of a discretion which, although tempting, "could lead to the erosion of the even-handed administration of justice under the law." [126]

In stark contrast, in *Brown v Dunsmuir*, the Court completely contradicted the Court of Appeal in *Collis* by holding that relief could be refused on public policy grounds if granting relief would affront or shock the public conscience applied to claims in tort.[127] In *Brown*, the plaintiff mistakenly excavated part of the defendant's land without a permit.[128] In response, the defendant placed soil on the plaintiff's land to prevent his own land from subsiding.[129] The plaintiff then sued for trespass. The Court refused the claim on the basis that it would be

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[119] At [132].
[120] At [115].
[121] At [132].
[122] At [116].
[123] *R v Collis* [1990] 2 NZLR 287 at 287. A very similar observation was made by Lord Hoffman in *Thames Trains*, above n 26, at [30] where his Lordship stated that "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."
[124] *Collis* at 287.
[125] At 291.
[126] At 293, per Casey J, cf Wylie J at 306.
[127] *Brown v Dunsmuir*, above n 18, at 485.
[128] Ibid.
[129] Ibid.

an affront to the public conscience applied to claims in tort to maintain a trespass action which was likely a consequence of the plaintiff's own illegal act.[130]

In other cases, the courts have simply refused to consider the doctrine altogether. In *Green v Costello,* the plaintiff sued for personal injury after he had been involved in a fight in which he suffered a fractured jaw.[131] The defendant sought to strike out the claim on the basis of the plaintiff's own illegality in engaging in the fight.[132] Barrowclough CJ refused to accept that the mere fact that the plaintiff is a wrongdoer is in general a defence to an action in tort.[133] He further held that, although it may from an academic point of view be attractive to pursue the inquiry as to the operation of the doctrine, there was little to be gained from such an exercise in the present case.[134]

Although the cases referred to above do not provide a comprehensive overview of the law, they clearly the incoherence of the law of illegality in New Zealand. Despite this conclusion, the doctrine has caused very little controversy in New Zealand. The final subsections consider the position of the doctrine in the wake of *Patel*.

D Early Judicial Treatment of Patel

Since *Patel* was decided it has only been cited in a total of three reported judgments. None of the judgments have explicitly applied the range-of-factors approach or even considered the majority's reasoning in any great depth.[135]

In the first case, *H and H v S*, counsel for the defendants cited the Court of Appeal decision in *Patel*.[136] However, the Court did not discuss *Patel* in any depth, ostensibly preferring the approach of the Supreme Court in *Servier*.[137] In the end, the Court was of the view that this is an unsettled and developing area of the law, and that an analysis of the principles in *Servier* was not appropriate in the context of a strike-out application.[138] The second case, *Lynds v*

[130] Ibid.
[131] *Green v Costello* [1961] NZLR 1010 at 1010.
[132] At 1011.
[133] At 1011 – 1012.
[134] *Green v Costello* at 1012.
[135] This is likely due to the fact that none of the cases cited below turned on the existence of the illegality.
[136] *H v H and S* [2015] NZHC 310 at [70].
[137] At [88] – [92].
[138] At [114].

Fitzherbert Rowe, was decided after the Supreme Court decision in *Patel*.[139] *Patel* was again cited by the parties, but not referred to by the Court.[140]

In the final case, *Horsfall v Potter*, the Supreme Court was faced with illegality arguments by counsel for both parties.[141] The case concerned a property purchased in 2003 by a couple, Mr Horsfall and Ms Potter, which was owned in their joint names.[142] In 2004, the property was sold, and the proceeds – less $50,000, which was given to Ms Potter for the use of her name on the property registration – were transferred to a company with which Mr Horsfall was associated.[143] Ms Potter argued that the disposal of the proceeds of sale to the company had been done deliberately to defeat her rights under the Property (Relationships) Act 1976, and sought an order under s 44 of the Act.[144] Mr Horsfall gave evidence that the property was beneficially owned by 168 Group Limited, and that he had registered the property in their joint names to avoid liability for both GST and income tax on the proceeds of sale.[145] Counsel for Ms Potter argued that Mr Horsfall was prevented from bringing evidence of his fraudulent intention to evade GST and income tax to support the existence of a resulting trust.[146] Counsel for Mr Horsfall argued that Ms Potter, as a party to the fraudulent purpose, was also prevented from bringing a claim.[147] The majority held that Ms Potter had acquired a beneficial interest in the property, and as such, she had a right to the proceeds of sale.[148] Mr Potter – in treating the proceeds of sale as if they had belonged to 168 Group Limited when they had not – had to be taken to have intended to defeat Ms Potter's interest in the proceeds.[149] Ms Potter was accordingly entitled to relief under s 44.

Given the majority's conclusion that the property was intended to be beneficially owned by both parties, the Court was not required to consider the effect of the fraudulent purpose. Nevertheless, the majority held that if there had been a mutual intention to defraud, it would constitute an illegal agreement, and would therefore be dealt with under the CCLA.[150] The majority also held that cases akin to *Tinsley v Milligan*[151] and *Nelson v Nelson*[152] should be

[139] *Lynds v Fitzherbert Rowe* [2017] NZHC 1297.
[140] At [253].
[141] *Horsfall v Potter* [2017] NZSC 196, [2018] 1 NZLR 638.
[142] At 638.
[143] Ibid
[144] *Horsfall*, above n 141, at 638.
[145] Ibid.
[146] At 642.
[147] At 641.
[148] At 638 – 639 per William Young, Glazebrook, O'Regan and McGrath JJ.
[149] At 639.
[150] At [56] – [58]; Contract and Commercial Law Act, above n 99, ss 70 – 84.
[151] *Tinsley v Milligan*, above n 59.
[152] *Nelson v Nelson* (1995) 132 ALR 133.

dealt with under the CCLA, thus narrowing the scope for common law illegality in New Zealand even further. In terms of *Patel,* the majority referred to the range-of-factors approach, but did not apply the approach or consider it in any detail.[153] Elias CJ, dissenting, held that only "proof of actual illegality or something amounting to abuse of process would justify preventing the husband asserting that the wife was not a beneficial owner of the property", apparently indicating a preference for the reasoning of *Patel* over that of *Potter v Potter*.[154] However it was not made clear which aspect of the reasoning in *Patel* was being referred to when this comment was made. As such, it is rather difficult discern anything meaningful from either the majority or dissenting judgments in this case.

Given that *Patel* has not been explicitly applied in New Zealand, in the final section I consider the normative question of what the law in New Zealand ought to be in the wake of *Patel*.

E How should Patel v Mirza be treated in New Zealand?

As discussed above, New Zealand courts are yet to pronounce a definitive view on *Patel*. However, it is my view that there are several distinct reasons why the range-of-factors approach, in a modified form, should be adopted in New Zealand.

It will be recalled that the primary rationale of the range-of-factors approach is to ensure that the integrity of the legal system is maintained.[155] The court will be required to consider three heads in determining whether to allow a claim which is somehow affected by illegality:[156]

a) the underlying purpose of the law which has been transgressed, and whether that purpose will be enhanced by denial of the claim;
b) any other relevant public policy on which the denial of the claim may have an impact; and
c) whether denial of the claim would be a proportionate response to the illegality.

The range-of-factors approach is largely based on a section of Professor Andrew Burrows' contract text.[157] For Burrows, one of the relevant factors which must be considered is how serious a sanction the denial of enforcement is for the party seeking enforcement.[158] Put another way, the court must consider whether denial of the claim would be a proportionate response to the illegality. The Supreme Court in *Patel* did not consider proportionality as one

[153] *Horsfall* at [54].
[154] At [139] per Elias CJ.
[155] Patel, above n 6, at [120].
[156] Ibid. For a useful summary of the majority approach, see Lim, above n 8, at 930 – 931.
[157] Andrew Burrows *A Restatement of the English Law of Contract* (Oxford University Press, Oxford, 2016) at 229 – 230.
[158] Ibid.

factor which ought to be weighed against the other public policy factors, but rather, as a factor deserving of its own separate limb.[159] As such, Law and Ong suggest there are only three possible outcomes under the range of factors approach:[160]

1. the illegality will not offend and/or will be able to be reconciled with the 'underlying policies' and the claim will be allowed;
2. the illegality will offend the 'underlying policies', but the claim will be allowed because denying it would yield a 'disproportionate' result; or
3. the illegality will offend the 'underlying policies' and barring the claim will be a 'proportionate' response.

While it is accepted that the first outcome is unlikely to be problematic, the second allows the claimant to profit from his own wrong and opens the floodgates to allow most claims involving illegality.[161] The third outcome is equally objectionable as it results in a defendant obtaining an unjust benefit.[162]

For Lim, the solution to this problem lies in the subordination of the proportionality requirement to the other two limbs.[163] In his view, the proportionality requirement has the potential to result in "considerable uncertainty and even arbitrariness."[164] Two examples aptly demonstrate this critique. Consider a case involving a statutory provision which clearly requires that the claimant be denied relief.[165] The way the test is formulated, the Courts would nevertheless be able to arbitrarily override this statutory provision where denying the claimant relief would be a disproportionate response to the illegality.[166] Similarly, where the relevant conduct offends the second limb of the test by running counter to another established public policy, the courts could similarly circumvent this policy by holding that to give effect to the policy would a disproportionate response to the illegality.

On this basis, there is certainly merit in Lim's argument that elevating the proportionality requirement to the same level as the other two limbs will likely "cause far greater damage to the integrity of the legal system."[167] Erbacher goes further, suggesting that the proportionality

[159] Lim, at 939; Sharon Erbacher "Another Misstep in Negligence and Illegality" (2017) 27 NZULR 1060 at 1070.
[160] Law and Ong, above n 57, at 891.
[161] Law and Ong, above n 57, at 891.
[162] Ibid.
[163] Lim, above n 8, at 937.
[164] At 939.
[165] At 938.
[166] Ibid.
[167] Ibid.

requirement involves a level of discretion which is unacceptable, and gives judges a licence to pursue their own penal philosophies.[168]

In my view, the range-of-factors approach should be modified so that judges are required to consider two limbs only. Although these two limbs were described in *Patel* as, on one hand, "the underlying purpose of the law which has been transgressed, and whether that purpose will be enhanced by denial of the claim" and "any other relevant public policy on which the denial of the claim may have an impact", it would nevertheless be open to the courts in New Zealand to modify the limbs as they deem fit. The essence of the new approach is an invitation to the courts to engage in a balancing exercise which considers the policies for and against granting relief in an open and transparent manner. In conducting this exercise, the existing common law rules should form an important backdrop. However, as it was suggested in *Hounga*, "rules which rest on the foundation of public policy, not being rules which belong to the fixed or customary law, are capable, on proper occasion, of expansion or modification."[169] I now consider the reasons why this approach should be adopted in New Zealand.

1 No workable rule-based approach exists

Despite more than 240 years of common law development, no judge or commentator has yet been able to formulate a series of rules capable of responding to the many and varied situations involving illegality.[170] For Strauss, "after nearly a quarter of a millennium of failing to achieve anything more definite, it is perhaps time to admit defeat."[171] Indeed, in *Patel*, Lord Neuberger described the range-of-factors approach as "a structured approach to a hitherto intractable problem".[172] New Zealand has not been immune to this issue. In several modern New Zealand decisions, the Courts have remarked upon the fact that the law in this area remains unsettled.[173]

Lord Sumption suggested that the range-of-factors approach merely substitutes "a new mess for the old one."[174] Goudkamp agreed, suggesting that simply because other approaches are uncertain does not mean that the range-of-factors approach should be accepted.[175] However, whether the new approach replaces existing uncertainties with another level of uncertainty

[168] Erbacher, above n 159, at 1070.

[169] *Hounga*, above n 54, at [42] per Lord Wilson.

[170] Burrows, above n 89, at 56.

[171] Strauss, above n 82, at 265. See also Burrows, above n 89, at 56.

[172] *Patel*, above n 6, at [123] per Lord Neuberger.

[173] *Leason*, above n 96, at [132]; *H v H and S*, above n 136, at [114]; *ABB Ltd*, above n 115 at [80].

[174] At [265] per Lord Sumption.

[175] Goudkamp, above n 54, at 17.

can only be determined empirically.[176] In contrast there is existing empirical evidence that the rule-based approach has already generated unacceptable uncertainty.[177] As such, there is little to be lost and everything to be gained in adopting the range-of-factors approach in New Zealand.

2 The rule-based approach already gives discretion by stealth

The principal critique of the range-of-factors approach is its propensity to create further incoherence and inconsistency in the law. For Virgo, the range-of-factors approach heralds a return to the public conscience test which the House of Lords expressly rejected in *Tinsley v Milligan*.[178] Those advocating for a rule-based approach argue that the existing rules [179] and exceptions [180] in respect of the illegality doctrine are sufficiently flexible, thus rendering the flexible approach unnecessary.[181]

However, I prefer the view of the Law Reform Commission of British Columbia that the illegality doctrine is only flexible in the sense that "there exists a sufficient state of confusion that a court can, if pressed, arrive at a fair result in some cases by the use of artificial technical devices and ill-defined exceptions".[182] As discussed in part 0, in a number of instances the courts have avoided the application of the doctrine by creating exceptions to the general rules or straining the application of the rules according to the justice of the case.[183] In other cases, the doctrine has been avoided by redefining illegality, by finding that the doctrine

[176] Lim, above n 8, at 936.

[177] Lim, at 936; Burrows, above n 89, at 56. Lord Toulson made the same remark in *Patel*, above n 6, at [113].

[178] Graham Virgo "*Patel v Mirza*: one step forward and two steps back" (2016) 22 Trusts & Trustees 1090 at 1094; *Tinsley v Milligan*, above n 59, at 363. In *Tinsley*, Lord Goff, in rejecting the public conscience test, held that "the adoption of the public conscience test … would constitute a revolution in this branch of the law, under which what is in effect a discretion would become vested in the court to deal with the matter by the process of a balancing operation, in place of a system of rules, ultimately derived from the principle of public policy enunciated by Lord Mansfield C.J. in Holman v. Johnson, which lies at the root of the law relating to claims which are, in one way or another, tainted by illegality."

[179] For example, the reliance test from *Bowmakers*, above n 59, at 69 – 71, or the inextricable link test from *Cross v Kirkby,* above n 33, at [76] and [103], subsequently refined in *Gray v Thames Trains*, above n 26, at [54] per Lord Hoffman.

[180] For example, the "in pari delicto" exception, as described in *Patel*, above n 6, at [241] – [244]. See also the "locus poenitentiae exception", as described in *Vakante v Addey & Stanhope School* [2004] 4 All ER 1056 at 1060; Virgo, above n 178, at 1092.

[181] *Patel*, above n 6, at [264] per Lord Sumption.

[182] Law Reform Commission of British Columbia "Report on Illegal Transactions" (LRC 69, 1989) at 66 – 67. See also Wade, above n 4, at 60; Virgo, above n 11, at 177; Andrew Burrows "A New Dawn for the Law of Illegality" in Sarah Green and Alan Bogg (eds) *Illegality After Patel v Mirza* (Hart Publishing, Oxford, 2018) 23 at 29.

[183] *Patel*, above n 6, at [21], [90] and [113] per Lord Toulson and [134] per Lord Kerr. See also Law Commission of England and Wales, above n 5, at [3.54].

doesn't apply to a given set of facts, or by holding that an alternative doctrine trumps it.[184] Using this kind of judicial entrepreneurship as a means of avoiding the application of the doctrine amounts to the exercise of discretion by stealth. Such an approach adds further uncertainty to the law as it turns an ostensibly rule-based doctrine into an unprincipled exercise of discretion. It is not surprising that the courts have adopted such an approach to illegality given that the doctrine itself was formulated, as a rule,[185] at a time when society was much less regulated than it is today.[186] As the regulation of society became more extensive, the number of situations potentially impacted by the illegality doctrine increased exponentially. To mitigate the, sometimes harsh, consequences of a broader illegality doctrine, the courts resorted to the use of artificial technical devices to avoid the doctrine's application.

The rule-based approach to illegality has held itself out as being rule-based, despite operating in a discretionary manner in many cases. The courts' failure to acknowledge or evaluate the policy grounds behind their decisions has resulted in a mass of incoherent and inconsistent law.[187] The range-of-factors approach overcomes this limitation by doing away with the conceptualisation of the doctrine as a rule and calling on judges to undertake a more transparent balancing of the respective policies weighing for and against the doctrine's application.[188]

3 The existing common law will remain relevant

Another critique of the range-of-factors approach centres on its purported failure to address the ongoing status of the existing common law rules around illegality.[189] If it is accepted that the range-of-factors approach is essentially discretionary, it is difficult to foresee the previous common law rules playing a particularly substantive role in the law's application. Indeed, the Law Reform Commission of British Columbia was of the view that "retaining the common law is fundamentally inconsistent with a discretionary power to grant relief."[190]

[184] Virgo, above n 11, at 177.

[185] Graham Virgo "Judicial discretion in Private Law" (2016) 14 Otago LR 257 at 260.

[186] See Law Reform Commission of British Columbia, above n 182, at 1; *Nelson v Nelson*, above n 152, at 191 per McHugh J. In *Nelson*, McHugh J argued that "the Holman rule, stated in the bald dictum, "No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act" is too extreme and inflexible to represent sound legal policy in the late twentieth century even when account is taken of the recognised exceptions to this dictum."

[187] Ford, above n 12, at 32.

[188] Burrows, above n 89, at 61. For a contrary view, see Erbacher, above n 159, at 1074 – 1077.

[189] Goudkamp, above n 54, at 16 – 17.

[190] Law Reform Commission of British Columbia, above n 182, at 63.

However, in *Henderson v Dorset Healthcare University NHS Trust* [191] – a case decided after *Patel* – the Court of Appeal refused to apply the range-of-factors approach, considering itself bound by previous decisions of the Court of Appeal and Supreme Court in *Clunis* [192] and *Gray.*[193]. The Court held that:[194]

> considerable caution must be taken … in determining whether there are any other cases in other areas of the law which the Supreme Court in *Patel* held by necessary implication to be overruled or such that they should no longer be followed.

For Strauss, *Henderson* must therefore be interpreted as holding that all of the appellate decisions on illegality since *Holman*, except those concerning restitution, are not affected by the "conflicting obiter dicta in Patel".[195] Such decisions remain binding, despite being based on the principle rejected by the majority in *Patel*.[196]

I am of the view, however, that there is a possible middle ground whereby the previous common law rules may inform the application of the law, without necessarily being determinative. When New Zealand enacted the Illegal Contracts Act, questions were raised about the ongoing relevance of the previous common law rules. In *Harding v Coburn*, the Court held that section 7(7) of the Act does away with the refinements of the common law rules, while leaving the court free to have regard to the same underlying ideas when exercising the statutory discretion.[197] In my view, there is no reason why a similar method could not be used when applying the range-of-factors approach. The courts would be entitled to consider previous common law authorities dealing with the same subject matter as a starting point but would not be bound to follow such cases if it was inappropriate to do so. The retention of the common law in this way would provide useful guidance for the courts, without forcing the courts to reach conclusions which are arbitrary, or unjust.

4 The impact of the new approach is likely to be limited

As discussed in part III, New Zealand has considerably narrowed the scope of the illegality doctrine by statute. Firstly, pursuant to the Accident Compensation Act 2001, any claim for personal injury cannot be brought independently of the Act.[198] In addition, in *ACC v Curtis*,

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[191] *Henderson*, above n 94, at [3].

[192] *Clunis v Camden and Islington Health Authority* [1998] 1 WLR 1093.

[193] *Gray v Thames Trains,* above n 26.

[194] *Henderson*, at [87]. Burrows is of the view that this case was wrongly decided, see Burrows, above n 182, at footnote 33.

[195] Nicholas Strauss QC "Illegality decisions after Patel v Mirza" (2018) 134 L.Q.R. 538 at 540.

[196] Ibid.

[197] *Harding v Coburn* [1976] 2 NZLR 577 at 585.

[198] Accident Compensation Act, above n 96, s 317(1).

the Court held that the overriding purpose of the Act was the provision of comprehensive no-fault cover, and as such, it was intended as a departure from the common law.[199]

The other carve-out is the former Illegal Contracts Act 1970, now contained in subpart 5 of part 2 of the CCLA.[200] As noted above, the CCLA effectively circumscribes the illegality doctrine in respect of illegal contracts. Despite the somewhat radical discretionary approach to illegality implemented by the Act, the balance of commentary suggests that it has not been a source of "serious problems" in New Zealand.[201]

Finally, the recent Supreme Court decision in *Horsfall v Potter* held that paradigm illegality cases where an illegal purpose must be relied upon to found a property interest ought to be dealt with under the CCLA.[202]

As such, it is likely that the remaining scope for the doctrine will be limited. There is good authority that the doctrine will apply to tort claims [203] and claims based on collateral contracts which may be tainted by an illegal contract.[204] However, beyond this, it cannot be accurately stated what scope remains for the illegality doctrine. Nevertheless, the doctrine certainly has a narrower scope of application than in the United Kingdom. Accordingly, any argument that the adoption of a flexible approach to illegality will open the floodgates to judicial capriciousness is unlikely to gain much traction in a New Zealand context.

5 New Zealand has generally adopted a flexible approach to illegality

As noted above, in 1970, New Zealand led the world when it enacted the Illegal Contracts Act. The Act gives the courts a wide discretion to grant relief, provided that to do so would not be contrary to the public interest.[205] In a similar vein, there is a Bill currently before Parliament which would provide the Tenancy Tribunal with a statutory discretion to deal with

[199] *ACC v Curtis*, above n 97, at 524 – 525.

[200] Contract and Commercial Law Act, above n 99, ss 70 – 84.

[201] See generally David McLauchlan "Contract and Commercial Law Reform in New Zealand" (1984) 11 NZULR 36 at 41; Andrew Beck "Illegality and the Courts' Discretion: The New Zealand Illegal Contracts Act in Action" (1989) 13 NZULR 389 at 418; Law Commission *Contract Statutes Review* (NZLC R25, 1993) at 173. For a contrary view, see generally Furmston, above n 46. In *Patel*, above n 6, at [113] Lord Toulson commented that his Lordship was "not aware of evidence that uncertainty has been a source of serious problems in those jurisdictions which have taken a relatively flexible approach." It is likely that Lord Toulson had New Zealand in mind when this comment was made.

[202] *Horsfall*, above n 141, at [56] – [58].

[203] See for example *Brown*, above n 127; *Leason*, above n 96; *Willms v Kaluza* [2011] DCR 62; *Bliss v Attorney-General* [2009] NZAR 672.

[204] *Hickman and others v Turner and Waverley Limited* [2012] NZSC 72 at [131] – [134] per Tipping J.

[205] CCLA, above n 99, ss 75 – 79.

claims relating to unlawful residential tenancies.[206] Clause 18 of the Bill was drafted in response to the difficulty the Tribunal was having in adopting a consistent approach to claims involving residential tenancies which are unlawful.[207]

In terms of case law, although there have been very few illegality cases in New Zealand, those that have made it before the courts have generally been dealt with in a flexible manner. A good example of this is the number of cases which have explicitly adopted a "public conscience" test when deciding matters involving illegality.[208] Such a test effectively gives the courts a discretion to refuse relief where to do so would be regarded as unacceptable to the community; what is regarded as unacceptable by the community being liable to change over time.[209] In *Leason* – the leading New Zealand decision on illegality – it was held that "no single formulation for the defence of ex turpi causa has so far emerged".[210] The Court went on to apply a number of different illegality tests to the facts of the case, including the public conscience and reliance tests.[211] As such, the Court did not appear to consider itself bound by the hitherto formal, rule-based approach adopted in the United Kingdom.

The illegal contracts legislation, Residential Tenancies Amendment Bill, and treatment of illegality in the courts all point clearly to the adoption of a flexible approach to illegality in New Zealand. As such, it is well and truly open to the New Zealand courts to adopt a flexible, discretionary approach to illegality.

6 New Zealand courts have recognised that the law is in a state of development

In *Leason*, *H v H and S*, and *ABB Ltd v NZ Insulators Ltd*, it was suggested that the precise metes and bounds of the ex turpi causa doctrine in New Zealand have not been authoritatively settled, and that the law of illegality is in a state of development.[212] In my view, following the trio of Supreme Court decisions in *Hounga, Apotex* and *Bilta* and the subsequent reconsideration of all three in *Patel*, this development of the law of illegality has now

[206] Residential Tenancies Amendment Bill (No 2) 2017 (258-2), cl 18. Clause 18 provides the Tribunal with relatively broad powers to deal with unlawful tenancies in a way that "having regard to the special circumstances of the matter" it deems appropriate.

[207] See for example *Ministry of Business, Innovation and Employment v Prime Property Group Ltd* NZTT Wellington, Application Number 4071192, 6 June 2017; *Anderson v FM Custodians Ltd* [2013] NZHC 2423; cf *Parbhu v Want* [2018] NZHC 2079. See also Ministry of Business, Innovation and Employment *Regulatory Impact Statement: Application of the Residential Tenancies Act 1986 to rental premises which are not lawful for residential purposes* (15 February 2017) at 4 – 6 for a good overview of the issue.

[208] See for example *Brown*, above n 18, at 485; *ABB Ltd*, above n 115, at [80] – [82]; *Bliss*, above n 203, at 673; *Collis*, above n 123, at 306 per Wylie J.

[209] *ABB Ltd*, above n 115, at [81].

[210] *Leason*, above n 96, at [115].

[211] At [133] – [135].

[212] *Leason*, at [132]; *H v H and S*, above n 136, at [114]; *ABB Ltd*, at [80].

happened. In *Patel*, the Supreme Court indicated that questions of illegality would be approached flexibly, using the range-of-factors approach. As such, the New Zealand courts have a strong obligation to at least consider how the range-of-factors approach would apply in a New Zealand context.

This conclusion is fortified by the fact that legislative reform of the illegality doctrine is unlikely to be high on Parliament's agenda. In the United Kingdom, the Law Commission examined possible reform in this area of the law on no less than four occasions[213] before it was concluded that the best way forward was for the law to develop through the courts.[214] The Supreme Court in *Patel* and several academic commentators also shared the pragmatic view that, given that the prospect of legislation can be ignored, it is open to the courts to develop the law as they deem fit.[215] I have found little to suggest that the position in New Zealand is any different.[216]

In light of the recognition that the law is in a state of development, and the fact that legislation in this area is unlikely to be forthcoming, the door is wide open for the New Zealand judiciary to develop the law in accordance with the range-of-factors approach.

7 The illegality doctrine is just another public policy doctrine

Despite its initial formulation as a defence to a contractual claim, the illegality doctrine has now found application throughout private law.[217] The breadth of the doctrine's application and the fact that the law of illegality involves so many variables makes the formulation of rules in the ordinary way problematic.[218] Courts in this context are often asked to weigh up incommensurate factors in deciding whether or not to apply the doctrine. For Goudkamp, asking the court to consider, for example, the desirability of preventing claimants from profiting from their wrong against the desirability of responding proportionately to the seriousness of the claimant's offending is akin to asking the court whether five litres is

[213] See Law Commission of England and Wales *Illegal Transactions: the Effect of Illegality on Contracts and Trusts* (Consultation Paper 154, 1999); *The Illegality Defence in Tort* (Consultation Paper 160, 2001); *The Illegality Defence: A Consultative Report* (Consultation Paper 189, 2009), *The Illegality Defence* (Report 320, 2010).

[214] See Consultation Paper 189, at [1.6]; Report 320, at [3.37] – [3.41]. It should be noted that statutory discretion was suggested in respect of trusts.

[215]. *Patel*, above n 6, at [114]; Burrows, above n 89, at 60. Sandra Booysen "Contractual Illegality and Flexibility - a Rose by Any Other Name" (2015) 32 Journal of Contract Law 170 at 189.

[216] However, as noted above, there is a Bill currently before Parliament which would provide the Tenancy Tribunal with a statutory discretion to deal with claims relating to "unlawful residential premises". See Residential Tenancies Amendment Bill (No 2), above n 206, cl 18.

[217] Ernest Weinrib "Illegality as a Tort Defence" (1976) 26 U.T.L.J 28 at 28; Lim, above n 8, at 927.

[218] Burrows, above n 89, at 56.

greater than two meters.[219] It is suggested that the courts are "constitutionally incompetent or incapable of balancing incommensurable policy factors", and that judges are acting as mini-legislators when they attempt to do so.[220] For Stevens, if judges cannot come up with an answer without resorting to such a balancing exercise, they should rethink, or resign.[221]

However, there is a compelling counter-argument. As Burrows points out, there are analogous contexts – such as the tort of negligence or the application of the principle of "Wednesbury unreasonableness" – where the ability of the courts to weigh up incommensurable factors is not only necessary, but desirous.[222] A New Zealand example from a negligence context is apposite. In *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd*, the Court of Appeal held that, when considering whether a duty of care should apply in a novel negligence case, the ultimate question is whether, in the light of all the circumstances of the case, it is just and reasonable that such a duty be imposed.[223] The courts will focus on two broad fields of inquiry.[224] The first will be the degree of proximity or relationship between the parties.[225] The second area of focus will be whether there are other wider policy considerations that tend to negative or restrict or strengthen the existence of a duty in a given case.[226] This area of focus will be concerned with the effect of the recognition of a duty on other legal duties and, more generally, on society.[227]

In my view, there is very little difference between the weighing of public policies in negligence context, and an illegality context.[228] In the former context, the courts are asked to determine whether, in light of a range of often incommensurate factors, a duty of care ought to exist. In the latter context, the question is whether, in light of the various public policies, a claimant should be prevented from bringing a claim. Despite this similarity, it is only in the illegality context where serious issue with this balancing exercise is taken. There is no logical distinction to be made between public policy analyses in a negligence or illegality context. As such, the illegality doctrine ought to be treated in the same manner as the policy aspect of

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[219] Goudkamp, above n 54, at 19.

[220] Burrows, above n 89, at 69 – 70; Burrows, above n 182, at 35 – 38. For a contrary view, see also Robert Stevens *Torts and Rights* (Oxford University Press, Oxford, 2007) at 306 – 319.

[221] Stevens at 314.

[222] Burrows, above n 89, at 69 – 70.

[223] *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324 at [58].

[224] Ibid.

[225] Ibid.

[226] Ibid.

[227] Ibid. See also *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282; *North Shore City Council v Attorney-General* [2012] NZSC 49, [2012] 3 NZLR 341 at 342.

[228] The same argument could be made in respect of the equitable maxim "he who comes to equity must do so with clean hands". See Alastair Hudson *Equity and Trusts* (Routledge, Abingdon, 2016) at 114.

negligence, the "Wednesbury unreasonableness" test, and the clean hands maxim; illegality is just another public policy doctrine.[229] Accordingly, there is little to fear in explicitly adopting the range-of-factors approach to illegality in New Zealand.

IV Conclusion

The landmark decision of the Supreme Court in *Patel* has given new life to an aging common law doctrine that has not fared well in a society which is now far more regulated than it was at the time of the doctrine's inception. The range-of-factors approach provides a structured discretion, giving the courts the necessary flexibility to give effect to Parliament's intention, and the values of the community, while still ensuring that unjust outcomes are avoided. In addition, the approach requires that the balancing of public policies is done in an open and transparent manner. As such, the range-of-factors approach should be considered a triumph in the law of illegality.[230]

As outlined above, there are a number of reasons why a modified form of the range-of-factors approach should be adopted in New Zealand. The law in New Zealand is just as confusing and arbitrary as other jurisdictions, with the predominant approach already providing discretion by stealth. In addition, the impact of the new approach is likely to be limited and the guidance provided by previous decision will be retained. The courts have also recognised that the law is in a state of development and *Patel* has provided a clear direction for this development to take. Finally, New Zealand has already adopted a highly flexible approach to illegality, whether through the illegal contracts legislation, or the adoption of the public conscience test in illegality cases. While there are still valid doubts about the appropriateness of this approach in a negligence context;[231] and concerns about the ability to appeal decisions drawing on the approach,[232] these are minor issues which will likely be ironed out as the law develops. The law of illegality would undoubtedly be improved if the courts were to adopt a modified form of the range-of-factors approach in New Zealand.

[229] See also Burrows, above n 182, at 36 – 37 where Burrows provides several examples of situations in the law of obligations where judges are required to explicitly weigh-up policy factors.

[230] Burrows, above n 89, at 56.

[231] Erbacher, above n 159, at 1076 – 1080. Erbacher argues that there is sufficient flexibility built in to the existing tests for negligence, thus rendering the flexibility of the range-of-factors approach redundant.

[232] Goudkamp, above n 54, at 19. For a directly contrary view, see Law and Ong, above n 57, at 894.

V Bibliography

*A **Cases***

1 New Zealand

ABB Ltd v NZ Insulators Ltd [2007] 11 TCLR 978.

Accident Compensation Corporation v Curtis; Accident Compensation Corporation v McKee [1994] 2 NZLR 519.

Anderson v FM Custodians Ltd [2013] NZHC 2423.

Bliss v Attorney-General [2009] NZAR 672.

Brown v Dunsmuir [1994] 3 NZLR 485.

Carey v Hastie [1968] NZLR 276.

Green v Costello [1961] NZLR 1010.

H v H and S [2015] NZHC 310.

Harding v Coburn [1976] 2 NZLR 577.

Hickman and others v Turner and Waverley Limited [2012] NZSC 72.

Horsfall v Potter [2017] NZSC 196, [2018] 1 NZLR 638.

Leason v Attorney-General [2013] NZCA 509, [2014] 2 NZLR 224.

Lynds v Fitzherbert Rowe [2017] NZHC 1297.

Ministry of Business, Innovation and Employment v Prime Property Group Ltd NZTT Wellington, Application Number 4071192, 6 June 2017.

North Shore City Council v Attorney-General [2012] NZSC 49, [2012] 3 NZLR 341.

Parbhu v Want [2018] NZHC 2079.

R v Collis [1990] 2 NZLR 287.

Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd [2005] 1 NZLR 324.

South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd [1992] 2 NZLR 282.

Willms v Kaluza [2011] DCR 62.

2 Australia

Nelson v Nelson (1995) 132 ALR 133.

3 England and Wales

Beresford v Royal Insurance Co Ltd [1938] AC 586.

Bilta (UK) Ltd (in liquidation) and others v Nazir and others (No 2) [2015] UKSC 23, [2015] 2 WLR 1168.

Bowmakers Limited v Barnet Instruments Limited [1945] KB 65.

Clunis v Camden and Islington Health Authority [1998] 1 WLR 1093.

Collins v. Blantern [1767] 95 ER 852 (K.B.).

Cross v Kirkby [2000] EWCA Civ 426.

Euro-Diam Limited v Bathurst [1988] 2 WLR 517.

Gray v Thames Trains Ltd [2009] UKHL 33, [2009] AC 1339.

Gujra v Roath [2018] 1 W.L.R. 3208.

Henderson v Dorset Healthcare University NHS Trust [2018] EWCA Civ 1841.

Holman v Johnson (1775) 1 Cowp 342.

Hounga v Allen and Another [2014] UKSC 47; [2014] WLR 2889.

Les Laboratoires Servier and another v Apotex Inc and other [2012] EWCA Civ 593 (CA).

Les Laboratoires Servier and another v Apotex Inc and other [2014] UKSC 55, [2014] 3 WLR 1257.

Meah v McCreamer (No.2) [1986] 1 All ER 943.

Parkinson v Royal College of Ambulance [1925] 2 KB 1.

Patel v Mirza [2016] UKSC 42, [2016] 3 WLR 399.

Richardson v Mellish [1824-34] All ER Rep 258.

Saunders v Edwards [1987] 1 WLR 1116.

Singularis Holdings Ltd (In Liquidation) v Daiwa Capital Markets Europe Ltd [2018] 1 WLR 2777.

Tinsley v Milligan [1994] 1 AC 340.

Vakante v Addey & Stanhope School [2004] 4 All ER 1056.

Vita Food Products Inc v Unus Shipping Co Ltd [1939] AC 277.

4 Canada

Hall v Hebert [1993] 2 SCR 159.

B Legislation

1 New Zealand

Accident Compensation Act 2001.

Contract and Commercial Law Act 2017.

Illegal Contracts Act 1970.

Residential Tenancies Amendment Bill (No 2) 2017 (258-2).

C Books and Chapters in Books

R. A. Buckley *Illegality and Public Policy* (4th ed, Sweet & Maxwell, London, 2017).

Andrew Burrows "A New Dawn for the Law of Illegality" in Sarah Green and Alan Bogg (eds) *Illegality After Patel v Mirza* (Hart Publishing, Oxford, 2018) 23.

Andrew Burrows *A Restatement of the English Law of Contract* (Oxford University Press, Oxford, 2016).

Alastair Hudson *Equity and Trusts* (9th ed, Routledge, Abingdon, 2016).

Robert Stevens *Torts and Rights* (Oxford University Press, Oxford, 2007).

Graham Virgo "Illegality's Role in the Law of Torts" in Matthew Dyson (ed) *Unravelling Tort and Crime* (Cambridge University Press, Cambridge, 2014).

D Journal Articles

Andrew Beck "Illegality and the Courts' Discretion: The New Zealand Illegal Contracts Act in Action" (1989) 13 NZULR 389.

Sandra Booysen "Contractual Illegality and Flexibility - a Rose by Any Other Name" (2015) 32 Journal of Contract Law 170.

Andrew Burrows "Illegality after *Patel v Mirza*" (2017) 70 Current Legal Problems 55.

Sharon Erbacher "Another Misstep in Negligence and Illegality" (2017) 27 NZULR 1060.

James Fisher "The Latest Word on Illegality: Patel v Mirza." [2016] 4 L.M.C.L.Q 483.

W J Ford "Tort and Illegality: The Ex Turpi Causa Defence in Negligence Law" (1977) 11 MULR 32.

M P Furmston, "The Illegal Contracts Act 1970 – An English View" 5 NZULR 151.

James Goudkamp "The end of an era? Illegality in private law in the Supreme Court" [2017] 133 L.Q.R 14.

Ernest Lim "Ex Turpi Causa: Reformation not Revolution" (2017) 80 MLR 927.

Mark Law and Rebecca Ong "'He who comes to Equity need not do so with clean hands?' illegality and resulting trusts after Patel v Mirza, what should the approach be?" (2017) 23 Trusts & Trustees 880.

David McLauchlan "Contract and Commercial Law Reform in New Zealand" (1984) 11 NZULR 36.

Paul Robinson "Criminal Law Defences: A Systematic Analysis" (1982) 82 Colum. L.Rev. 199.

Nicholas Strauss QC "Ex turpi causa oritur actio" [2016] 132 L.Q.R. 236.

Nicholas Strauss QC "Illegality decisions after Patel v Mirza" (2018) 134 L.Q.R. 538.

Lord Sumption "Reflections on the Law of Illegality" [2012] 20 RLR 1.

Stephen Todd "Torts" [2016] NZ L Rev 829.

Graham Virgo "Judicial discretion in Private Law" (2016) 14 Otago LR 257.

Graham Virgo "*Patel v Mirza*: one step forward and two steps back" (2016) 22 Trusts & Trustees 1090.

John W. Wade "Benefits Obtained under Illegal Transactions – Reasons for and against allowing Restitution" (1946) 25 Tex. L. Rev. 31.

Ernest Weinrib "Illegality as a Tort Defence" (1976) 26 U.T.L.J 28.

E Parliamentary and Government Materials

1 New Zealand

Contracts and Commercial Law Reform Committee *Report of The Contracts and Commercial Law Reform Committee on the Law Governing Illegal Contracts* (October 1969).

Law Commission *Contract Statutes Review* (NZLC R25, 1993).

Ministry of Business, Innovation and Employment *Regulatory Impact Statement: Application of the Residential Tenancies Act 1986 to rental premises which are not lawful for residential purposes* (15 February 2017).

2 England and Wales

Law Commission of England and Wales *Illegal Transactions: the Effect of Illegality on Contracts and Trusts* (Consultation Paper 154, 1999).

Law Commission of England and Wales *The Illegality Defence* (Report 320, 2010).

Law Commission of England and Wales *The Illegality Defence: A Consultative Report* (Consultation Paper 189, 2009).

Law Commission of England and Wales *The Illegality Defence in Tort* (Consultation Paper 160, 2001).

3 Canada

Law Reform Commission of British Columbia *Report on Illegal Transactions* (LRC 69, 1989).