Outlaw and Order: Patel v Mirza Restores Order to the Law of Illegality

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Ex turpi causa non oritur actio literally translates to 'the action does not arise from a shameful cause'. In other words, as stated by Lord Mansfield CJ in *Holman v Johnson* (1775) 1 Cowp 341, 343:

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

This defence of illegality can be run in a wide variety of civil claims including, for present purposes, the law of tort. Prior to *Patel v Mirza* [2017] AC 474 the law of illegality was in a somewhat disordered state. Indeed in *Patel,* Lord Toulson remarked at [3]:

"the application of the doctrine of illegality to each of these different situations has caused a good deal of uncertainty, complexity and sometimes inconsistency."

The law of illegality has changed and evolved over the course of more than two centuries. Almost all of the early cases and many of the later cases concerned the law of contract. Consequently, it was not entirely straightforward identifying which principles were applicable to the law of tort. This was particularly so given the court's concern that the successful application of the defence of illegality in personal injury cases would give rise to far more draconian outcomes than when applied to commercial transactions.

In *Revill v Newbery* [1996] QB 567, Evans LJ observed that the application of the defence to a personal injury claim would mean that a Claimant who was a criminal would effectively become an outlaw, debarred by the law from recovering compensation for any injury he might sustain. Evans LJ went on to state at p. 579:

"it is one thing to deny a plaintiff any fruits from his illegal conduct, but different and more far-reaching to deprive him even of compensation for injury which he suffers and which otherwise he is entitled to recover at law".

The Law before *Patel*

For many years, the question of whether a claim would be barred by the defence of illegality was to be resolved by asking whether, *"the claimant's claim [was] so closely connected or inextricably bound up with his own criminal or illegal conduct that the court could not permit him to recover without appearing to condone that conduct"* per *Cross v Kirkby* [2000] EWCA Civ 426 at [76]. Put another way, did the Claimant's injury in respect of which his action was brought, arise from his own criminal conduct?

It became apparent however, that the courts were encountering difficulties applying the 'inextricable link' test. As observed by Lord Sumption in *Patel v Mirza* at [240]:

"The difficulty about inextricable linkage as a test of connection is that it is far from clear what it means. On the face of it, the only link between the illegal act and the claim which is truly "inextricable" is a link based on causation and necessary reliance. So far as the test of inextricable linkage broadens the required connection more widely, it seems to me to be contrary to principle."

The Fresh Approach in *Gray*

The case of *Gray v Thames Trains* [2009] AC 1339 marked a departure from the inextricable link test. The Claimant in *Gray* developed post-traumatic stress disorder after being injured in a train crash caused by the Defendant's negligence. The Claimant subsequently went on to kill someone whilst suffering the effects of PTSD. He was detained under a hospital order. He claimed damages against Thames Trains for *inter alia,* financial losses, feelings of guilt and remorse and damage to reputation as a result of the killing.

In his speech, Lord Hoffmann identified what has come to be known as the 'wider rule' of public policy, namely that you cannot recover compensation for loss suffered in consequence of your own criminal act. The narrower form of the rule identified in *Gray* was specific to the facts of the case: that you cannot recover damages following from loss of liberty, a fine or other punishment lawfully imposed as a result of your own unlawful act.

At [51], Lord Hoffman observed of the wider rule that it had to be:

"justified on the grounds that it is offensive to public notions of the fair distribution of resources that a claimant should be compensated (usually out of public funds) for the consequences of his own criminal conduct".

Lord Hoffmann recognised however that the wider rule could raise issues of causation stating as follows at [54]:

"This distinction, between causing something and merely providing the occasion for someone else to cause something, is one with which we are very familiar in the law of torts. It is the same principle by which the law normally holds that even though damage would not have occurred but for a tortious act, the defendant is not liable if the immediate cause was the deliberate act of another individual."

"... It might be better to avoid metaphors like 'inextricably linked' *and to treat the question as simply one of causation ... 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?"*

In *Gray*, the court found that although the damage and the Claimant's consequent losses would not have occurred but for the tortious conduct of the Defendant, they were caused by the criminal act of the Claimant.

Patel and the Trio of Considerations

Following *Gray*, there were three decisions by the Supreme Court involving the doctrine of illegality before it was considered by the Supreme Court in *Patel*. *Patel* concerned a contractual agreement which contravened the prohibition on insider dealing pursuant to section 52 of the Criminal Justice Act 1993. The facts are not important for present purposes.

In *Patel*, Lord Toulson in delivering the majority judgment, emphasised the essential rationale underpinning the doctrine of illegality, which 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 certain aspects of public morality. His Lordship stated at [120] that it was necessary for the court to have regard to a *"trio of considerations"* in assessing whether the public interest would be harmed in that way:

"(a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by the 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, 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 by than the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate".

The Effect of *Patel* on *Gray*

So what effect did the decision in *Patel* have on the principles established in *Gray*? This issue was ventilated before the Supreme Court in the case of *Henderson v Dorset Healthcare University NHS Trust* [2021] AC 564. The facts in *Henderson* are similar to those in *Gray*. The Claimant, who suffered from paranoid schizophrenia, killed her mother whilst she was experiencing a psychotic episode. The Claimant was under the Defendant Trust's care and treatment at the material time.

A dispute arose between the parties as to whether there was any incompatibility between the ratio in *Gray* and the decision of the court in *Patel*.

The Supreme Court found in *Henderson* that the causation approach endorsed by Lord Hoffmann in *Gray* was based on the same policy considerations which gave rise to the trio of considerations in *Patel*. Whilst in *Gray* there was no express consideration of proportionality, it was noted that the factual circumstances of the case did not give rise to any issue of proportionality. *Henderson* confirmed that *Patel* had not overruled or departed from *Gray,* which was still binding authority.

Importantly, *Henderson* also confirmed that the principles established in *Patel* were intended to provide guidance as to the proper approach to the common law illegality defence across civil law generally, with the caveat that the decisions preceding *Patel* would remain of *"precedential value"* unless it could be shown that they were not compatible with the approach in *Patel*.

Applying the Trio of Considerations

So how does one apply the trio of considerations approach in each case? In delivering the lead judgment in *Henderson*, Lord Hamblen divided each consideration into three stages:

- *"The first stage"* or *"stage (a)"* to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by the denial of the claim.

- *"The second stage"* or *"stage (b)"* to consider any other relevant public policy on which the denial of the claim may have an impact.

- *"The third stage"* or *"stage (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.

Lord Hamblen observed at [116]:

"… questions arise as to how under the trio of considerations approach relevant policy considerations are to be weighed. It appears that this must involve a balancing between considerations arising at the first and second stages; the third stage relates to proportionality and factors specific to the case rather than general policy considerations. Stage (a) is directed at policy reasons which support denial of the claim and stage (b) is directed at policy reasons which support denial of the illegality defence…stage (b) is meant to operate "conversely" to stage (a)."

Lord Hamblen further observed at [119]-[120]:

"Stage (a) should not be interpreted as being confined to the specific purpose of the prohibition transgressed. Whilst that is of great importance, other general policy considerations that impact on the consistency of the law and integrity of the legal system also fall to be taken into account."

Lord Hamblen noted that if balancing the considerations at stage (a) and stage (b) comes down firmly against denial of the claim it will not be necessary to proceed to the third stage (stage (c)) and the issue of proportionality. This third stage was described by Lord Hamblen as a "*disproportionality check rather than a proportionality requirement*".

At [124], Lord Hamblen identified four factors likely to be of particular relevance in relation to proportionality namely:

"the seriousness of the conduct, its centrality [to the transaction], whether it was intentional and whether there was a marked disparity in the parties' respective culpability."

Lord Hamblen regarded centrality as a factor of particular importance stating at [124]:

"When considering the circumstances relating to the illegality, whether there is a causal link between the illegality and the claim and the closeness of that causal connection, will often be important considerations".

This endorses the approach taken by Lord Hoffmann in *Gray*.

Further Guidance from the Supreme Court after *Patel*

The Supreme Court provided further guidance on the application of the trio of considerations in the case of *Grondona v Stoffel & Co* [2021] AC 540 where Lord Lloyd-Jones said at [26]:

"It is important to bear in mind when applying the trio of necessary considerations described by Lord Toulson JSC in Patel … that they are relevant not because it may be considered desirable that a given policy should be promoted but because of their bearing on determining whether to allow a claim would damage the integrity of the law by permitting incoherent contradictions. Equally such an evaluation of policy considerations, while necessarily structured, must not be permitted to become another mechanistic process. In the application of stages (a) and (b) of this trio a court will be concerned to identify the relevant policy considerations at a relatively high level of generality before considering their application to the situation before the court…"

"The essential question is whether to allow the claim would damage the integrity of the legal system. The answer will depend on whether it would be inconsistent with the policies to which the legal system gives effect. The court is not concerned here to evaluate the policies in play or to carry out a policy-based evaluation of the relevant laws. It is simply seeking to identify the policies to which the law gives effect which are engaged by the question whether to allow the claim, to ascertain whether to allow it would be inconsistent with those policies or, where the policies compete, where the overall balance lies. In considering proportionality at stage (c), by contrast, it is likely that the court will have to give close scrutiny to the detail of the case in hand."

Conclusion

It is clear from the most recent Supreme Court decisions in *Henderson* and *Grondona* that we finally have clarity, unity and certainty in the previously disordered state of the law of illegality. It is clear that when considering the defence of *ex turpi causa* the courts are to apply the trio of considerations identified in *Patel,* adopting the approach outlined in *Henderson* and having regard to the guidance provided in *Grondona*. It is hoped that over time, as more courts grapple with these principles, there will be further clarity as to how they are to be applied in practice within the context of personal injury cases.

Note: There are different principles governing the defence of illegality in cases involving allegations of criminal joint enterprise. This topic is outwith the scope of this article. For further reading please review the cases of *McCracken v Smith* [2015] EWCA Civ 380 and *Wallett v Vickers* [2018] EWHC 3088 (QB).

https://ropewalk.co.uk/blog/outlaw-and-order-patel-v-mirza-restores-order-to-the-law-of-illegality/