anyone's intention could by itself affect the known risks of drinking the substance in question.

Perhaps the more apposite question was to ask whether any self-administration by Mr. Farquhar was truly voluntary in view of the preceding course of conduct perpetrated by Field involving deceit, emotional manipulation and the covert administration of drugs. In *Wallace* [2018] 2 Cr. App. R. 22, the Court of Appeal held that the decision of the victim of an acid attack to seek "voluntary" euthanasia was not necessarily voluntary for the purposes of the *novus actus* principle: it was not an event independent of the defendant's conduct, nor "the product of the sort of free and unfettered volition presupposed by the *novus actus* rule", rather it was a direct response to the inflicted injuries and to the circumstances created by them for which the defendant was responsible. In that case, the Court of Appeal held that the issue of evaluating the significance of the victim's own acts should be left to the jury by reference to the concept of foreseeability: "(b) Are you sure that at the time of the acid attack it was reasonably foreseeable that the defendant would commit suicide as a result of his injuries?"

Either way, decisions such as *Wallace* and *Field* illustrate that in analysing the causative significance of an "intervening act" in cases involving an alleged intent to kill or cause really serious bodily harm the Court of Appeal is willing to explore the range of the evaluative concept of voluntariness and whether an act is free, deliberate and informed, in order to limit the exculpatory effect of the *novus actus* principle articulated by Lord Bingham in *Kennedy (No 2)*. (See also *obiter* in *Gnango* [2012] 1 A.C. 827, at [83]–[92] (Lord Clarke), cf. [130]–[132] (Lord Kerr)). To the extent that such an evaluation is an issue for the jury, the issue should be left to them in a way that facilitates the principled evaluation by the jury of the respective causative effects of the defendant's culpable acts on the one hand, and the acts of the victim or third party on the other.

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ILLEGALITY AND TORT IN THE SUPREME COURT

THE effect of illegality on claims in private law is an exceptionally knotty problem. In *Patel v Mirza* [2016] UKSC 42, an unjust enrichment claim, the Supreme Court (following the Law Commission's nudge) adopted a discretionary approach, balancing relevant public policy concerns to determine whether an illegality defence applied. Lord Toulson identified a "trio of considerations":

> [o]ne cannot judge whether allowing a claim which is in some way tainted by illegality would be contrary to the public interest, because it would be harmful to the integrity of the legal system, without (a) considering the underlying purpose of the prohibition which has been transgressed, (b) considering conversely any other relevant public policies which may be rendered ineffective or less effective by denial of the claim, and (c) keeping in mind the possibility of overkill unless the law is applied with a due sense of proportionality. We are, after all, in the area of public policy… ([101]) …
>
> Potentially relevant factors [for c] include the seriousness of the conduct, its centrality to the contract, whether it was intentional and whether there was marked disparity in the parties' respective culpability. (At [107])

Patel discussed illegality comprehensively, citing authorities from all branches of private law, and the Supreme Court has confirmed in two recent decisions that the same approach applies in tort.

In *Stoffel & Co. v Grondona* [2020] UKSC 42, the claimant Grondona and her business associate M had agreed that she would help him raise finance by taking out secured loans on his properties, in return for a share in any sale proceeds. In 2002 M bought a flat for £30,000, with the aid of a mortgage loan from X, all duly registered at HM Land Registry. Four months later, Grondona purchased the flat from M for £90,000, with a mortgage advance of £76,475 from a building society (B). Though overall this transaction was not a sham, Grondona procured the mortgage advance from B by fraud: she had dishonestly stated it was not a private sale and that it was funded from her own resources. The purpose "was to raise capital finance for [M] from a high street lender which he would not otherwise have been able to obtain, rather than to fund the purchase of the property by [Grondona]" (at [6]).

The defendant firm of solicitors (D) acted for G and B (and also M!) on the conveyancing transaction. Completion took place smoothly: D paid part of B's mortgage advance to X to discharge its existing charge, and X in turn provided the Land Registry release form to D; the balance was paid to M and he provided the transfer document. At this point things went badly wrong. D negligently failed to register the three crucial documents at HM Land Registry, namely the transfer from M to Grondona; the form releasing X's charge; and B's charge. Grondona paid her mortgage instalments to B until 2006, when she defaulted, then discovered that she had no registered title to the flat, B had no registered charge over the flat, and X's charge was still registered. B pursued her for a money judgment and obtained summary judgment for £70,000 (other claims were going on in the background, B had also sued D and X, and settled both). Grondona brought Part 20 proceedings against D, who admitted she had a complete negligence cause of action (in tort and concurrently in contract), but invoked the defence of illegality. It was accepted that the issue should be resolved by the application of the *Patel* guidelines, which D submitted pointed clearly to the refusal of relief on the grounds of illegality. The

Supreme Court disagreed, holding unanimously (with judgment given by Lord Lloyd-Jones) that Grondona's claim succeeded.

This was tested by applying *Patel*'s trio of considerations. The first focused on the seriousness of fraud and the need to protect mortgagees (though here allowing Grondona's claim would actually help her mortgagee by enabling her to meet her repayments). The Supreme Court held this was outweighed by the contrary arguments, including the public policy that conveyancing solicitors should perform their duties, and that, since the law recognises that Grondona acquired equitable property rights despite the illegality, it would be "incoherent" to refuse, on the basis of the same illegality, to permit proceedings in respect of D's failure to protect that equitable interest at the Land Registry. This made it strictly unnecessary to consider the third issue, proportionality, whether denying the claim would lead to overkill, but *obiter* it supported the same view. Grondona's fraud was "incidental" to her claim, lacked "centrality" (one of the factors mentioned in *Patel* in determining proportionality), and was conceptually entirely separate, having been completed, and B having already been defrauded, before D's negligence.

In the second case, *Henderson v Dorset Health University NHS Foundation Trust* [2020] UKSC 43, the claimant (C) had suffered from paranoid schizophrenia since adolescence. After various periods as a compulsory in-patient, she was placed on a community treatment order, her care plan stating that there should be a low threshold for recall to hospital. During a florid psychotic episode, C stabbed her mother to death in a frenzied attack. C was charged with murder, but the Crown Court judge accepted her plea of manslaughter by reason of diminished responsibility. Describing it as a "desperately sad and tragic case", he imposed a hospital order under section 37 and an unlimited restriction order (to protect the safety of the public) under section 41 of the Mental Health Act 1983, commenting, "When you recovered from that psychotic episode, as you did, you appreciated fully what you had done, and you were distressed beyond measure... there is no suggestion in your case that you should be seen as bearing a significant degree of responsibility for what you did" (at [16]).

C subsequently sued the defendant health authority (D), claiming damages for her loss of liberty, general damages for PTSD and loss of amenity, the cost of future psychotherapy, and loss of half her interest in her mother's estate under the Forfeiture Act 1982 (under an earlier consent order, the forfeiture provisions were excluded as to the other half). D admitted liability in negligence in failing to return C to hospital, having been made aware by concerned parties that she was exhibiting a manifest psychotic state some weeks before the killing, but pleaded the illegality defence, relying on *Gray v Thames Trains* [2009] UKHL 33 (in which the claimant, who suffered PTSD in a rail crash caused by the defendant's negligence and who committed manslaughter as a result, was denied damages by the House

of Lords on the basis of his illegality). C's response was that *Gray* could be distinguished, and further that its reasoning had been superseded by *Patel.*

In attempting to distinguish *Gray*, C relied on a dictum of Lord Phillips:

> More difficult is the situation where it is the criminal act of the defendant that demonstrates the need to detain the defendant both for his own treatment and for the protection of the public, but the judge makes it clear that he does not consider that the defendant should bear significant personal responsibility for his crime. I would reserve judgment as to whether *ex turpi causa* applies in either of these situations, for we did not hear full argument in relation to them. (*Gray*, at [15])

The Supreme Court (judgment delivered by Lord Hamblen) declined to distinguish *Gray* on this basis, holding that Lord Phillips' reservation was *obiter*, moreover:

> Although there does not appear to have been any specific finding by the trial judge as to the degree of [Gray's] responsibility, I am prepared to assume that he was regarded as bearing a significant degree of responsibility. The difficulty for the appellant, however, is that the degree of responsibility involved forms no part of the reasoning of the majority. The crucial consideration for the majority was the fact that the claimant had been found to be criminally responsible, not the degree of personal responsibility which that reflected. (At [83])

More generally, *Gray* was consistent with *Patel* and should not be departed from (and likewise *Clunis v Camden and Islington Health Authority* [1998] Q.B. 978 should not be overruled). Lord Hoffmann's narrow and wide grounds in *Gray* (maintaining the integrity of the legal system by not awarding damages for the consequences of a criminal sentence, and more generally avoiding inconsistency in legal responses) reflected the *Patel* public policy approach, as did his eschewal of a test based on reliance on the illegality. Applying *Patel*'s trio of considerations led to the same outcome as the approach in *Gray*. The first consideration invoked the gravity of the wrongdoing, the fact that the defendant was the publicly funded NHS, the closeness of connection between the illegality and the losses being claimed, the importance of deterrence and of public condemnation of unlawful killing. These factors completely outweighed the counter arguments, namely the importance of encouraging the NHS to care for the most vulnerable and of providing compensation where the victim was not significantly personally responsible. Nor, third, would it be disproportionate to deny the claim, which was defeated in full by the illegality defence.

There is much to welcome in these two decisions. It had been assumed that *Patel* applies to tort as much as unjust enrichment claims, but we now have Supreme Court confirmation. It is equally helpful that there is only one composite judgment for each case (unlike *Patel*'s six significantly different judgments). Moreover both decisions provide reassurance that *Patel*'s discretionary approach does not oust existing precedent, particularly welcome

in view of the Law Commission's troubling phraseology: "It would be preferable if the courts were to base their decisions transparently on these policies. They could then accept that existing authority helps, but only insofar as the case law illustrates the various policies to be applied" (Law Commission Consultation Paper No 189, 2009, at [3.140]). Instead in *Henderson* we have:

> The appellant has not shown that *Gray* should be departed from . . .. On the contrary, I consider that the decision in *Gray* should be affirmed as being "*Patel* compliant" – it is how *Patel* "plays out in that particular type of case". The clearly stated public policy based rules set out in *Gray* should be applied and followed in comparable cases. (At [145])

And *Stoffel* confirmed that *Patel* does not represent "year zero", such that in all future illegality cases only *Patel* would be considered and applied:

> That would be to disregard the value of precedent built up in various areas of the law to address particular factual situations giving rise to the illegality defence. Those decisions remain of precedential value unless it can be shown that they are not compatible with the approach set out in *Patel* in the sense that they cannot stand with the reasoning in *Patel* or were wrongly decided in the light of that reasoning. (At [77])

So presumably, as in negligence jurisprudence, in a novel case the court will move by incremental analogy from existing precedent, aided by *Patel*'s trio of considerations. But does listing considerations for and against, then somehow "weighing" them, actually provide much guidance in related but different fact patterns? Would the *Henderson* conclusion still apply if the defendant was not a negligent health authority, but a deliberate assailant, leaving the claimant with a head injury and severe personality change? What if the claimant's consequent illegal act resulted in injury to another, but not death?

The unreality of this weighing exercise is seen when we compare the discussion of deterrence in relation to the first consideration. In *Stoffel* D identified deterrence as an underlying policy of the criminal law against fraud, but the Supreme Court wisely doubted "that permitting a civil remedy [to potential fraudsters] would undermine that policy to any significant extent. The risk that they may be left without a remedy if their solicitor should prove negligent in registering the transaction is most unlikely to feature in their thinking" (at [29]). The comparison with *Henderson* is striking. C argued it was absurd to suppose that a person suffering from diminished responsibility will be deterred from killing by the prospect of not being able to recover compensation for any loss suffered as a result of committing the offence. But for the Supreme Court,

> the question should not be considered solely at the granular level of diminished responsibility manslaughter cases. Looking at the matter more broadly there may well be some deterrent effect in a clear rule that unlawful killing never pays and any such effect is important given the fundamental importance

> of the right to life. To have such a rule also supports the public interest in public condemnation and due punishment. (At [131])

Stoffel's scepticism about the deterrent effect of the illegality defence is, with respect, considerably more convincing than its embrace in *Henderson*, particularly given C's loss of control when psychotic. The Supreme Court's side-lining of the precise facts of *Henderson*, in favour of considering unlawful killing "more broadly", is difficult to reconcile with the nuanced invocation of public policy envisaged in *Patel*.

There is a more fundamental concern when comparing *Henderson* with *Patel*, namely an inconsistency between the treatment of unjust enrichment and tort claims. It was an important part of the reasoning in *Patel* that the illegality defence is far less likely to be a proportionate response to claims for unjust enrichment, where the claimant is merely asking to be set back to the *status quo*, compared to contractual actions, where claimants are asking the court to go further and enforce their expectation of profit from contracts tainted with illegality. As Lord Toulson said in *Patel*, approving Gloster L. J.'s rejection of the illegality defence in the Court of Appeal: "She said that such a result would not be a just and proportionate response to the illegality. I agree . . . Mr Patel is seeking to unwind the arrangement, not to profit from it" (*Patel*, at [115]). Like unjust enrichment, tort claims also aim at restorative justice. The Supreme Court in *Stoffel* recognised this, noting that Grondona's remedy merely compensated her losses from D's negligence: "This is not a case of the court assisting a wrongdoer to profit from her own wrongdoing" (at [45]).

Henderson, however, endorsed Lord Hoffmann's approach in *Gray*, including his wide ground denying all damages for losses resulting from unlawful killing. This is broader than a policy that "wrongdoers should not profit from their wrongdoing", justified instead on the basis of public confidence in the law, 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" (*Gray*, at [51] (Lord Hoffmann)). So the morally blameless Ms. Henderson received very different treatment from the criminally culpable Mr. Patel.

The law's treatment of serious mental illness regrettably lags years behind medical and societal understanding, from the exceptionally narrow insanity defence in criminal law to the suggestion in *Corr v IBC* [2008] UKHL 13 that a claimant, driven to suicide by a severe depression caused by the defendant, was lucky not to be treated as "at fault" under the contributory negligence legislation. As Sarah Green writes in "Illegality and Zero Sum Torts", (ch. 9 in Sarah Green and Alan Bogg (eds.), *Illegality after Patel v Mirza* (London 2018), 209), "for those treated in a heavy-handed way by the criminal law, the result [of applying the illegality defence] is even more disproportionate".

It is regrettable that the Supreme Court in *Henderson* did not adopt Lord Phillips's reservations about the defence where the perpetrator "bears no significant personal responsibility for his crime". To do so would not have brought uncertainty, it is a concept readily understood in criminal and sentencing law, and would bring the law closer to the treatment of unjust enrichment claimants. Closer, but not entirely consistent. Consider the Supreme Court's attitude to Ms. Henderson, "distressed beyond measure" by what she had done when seriously ill with psychosis, revealed in its invocation of the broad public interest "in the public condemnation of unlawful killing and the *punishment of those who behave in that way*" (emphasis added). And compare Lord Sumption in *Patel,* willing to countenance a restitution claim by the client of a contract killer who pockets the money but does not kill the putative victim.

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ONE STEP FORWARDS FOR EMPLOYMENT STATUS, STILL SOME WAY TO GO: THE SUPREME COURT'S DECISION IN *UBER v ASLAM* UNDER SCRUTINY

IN what was perhaps the most anticipated employment law decision of the past decade, the Supreme Court in *Uber v Aslam* [2021] UKSC 5 has confirmed that the claimant drivers for ride-hailing firm Uber are workers for the purposes of the Employment Rights Act (1999) (ERA), the Working Time Regulations (1998) (WTR), and the National Minimum Wage Regulations (1998) (NMWR). While the court also held that, for the purposes of calculating entitlements under the WTR and NMWR, those drivers are deemed to be working not only when actively engaged on a trip, but also, when they are in their cars with the app switched on, waiting to be offered a job by the app, this case note will focus its discussion on the decision as it relates to the question of employment status.

Employment law in the UK divides the category of "worker", those persons within the personal scope of statutory employment law, into two subcategories: the employee, hired under a contract of service or apprenticeship and entitled to the full scope of employment law protections, and the so-called "limb (b)" worker (s. 230(3)(b) ERA), entitled to a subset of such protections, including various working time, minimum wage, anti-discrimination, and health and safety entitlements. To claim limb (b) worker status, it is generally accepted that three requirements must be met: there must be a contract; by which the worker promises to perform personally work or services for the other contracting party; and that other party must not be a client/customer of any profession or business undertaking