THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal: CA P338/2016

Civil Claim: CV2012-00062

Between

ADISA GOVIA

Appellant

And

KEVIN WILLIAMS

First Respondent

KAYODE KIRK

Second Respondent

NEW INDIA ASSURANCE COMPANY (T&T) LIMITED

Third Respondent

Panel:

P. Rajkumar JA

R. Boodoosingh JA

J. C. Aboud JA

Appearances:

Mr. Anand Singh instructed by Mrs. Natasha Baiju-Patrick for the Appellant

Mr. Jerome Maxime instructed by Mr. Jonathan Rattan for the Third Respondent

Date of Delivery: 30 June 2021

I have read the judgment of the Honourable Boodoosingh JA. I agree with it and have appended some observations on the application of the law relating to illegality which had assumed significance in the court below.

……..

Peter A Rajkumar

Justice of Appeal

I have read the judgments of my learned brothers P. A. Rajkumar JA and R. Boodoosingh JA. I agree with them and have nothing to add.

……

James C. Aboud

Justice of Appeal

JUDGMENT

1. The appellant, Adisa Govia (Mr Govia), appeals the decision of the trial judge, who dismissed the appellant's claim for personal injuries suffered in a vehicular accident. At the time of the accident he was a front seat passenger in a vehicle driven by the second respondent Kayode Kirk (Mr Kirk). Mr Govia pleaded he sustained injuries as a result of the negligence of Mr Kirk. The third respondent, New India Assurance Company (T&T) Limited (New India), insurer of the vehicle driven by Mr. Kirk, pleaded that Mr Kirk did not have the permission of the owner of the vehicle, the first respondent Mr Kevin Williams, to use the vehicle in the manner it was used on the day of the accident, and therefore declined to accept liability under the policy of insurance.

2. New India contended that Mr Kirk had received restricted permission to use the vehicle from Kevin William's brother, Mr Bernard Williams who had the vehicle in his possession with the permission of Mr Kevin Williams. New India asserted that Mr Kirk's restricted permission from Mr Bernard Williams was to use the vehicle to attend a class reunion at Movie Towne in Port of Spain between the hours of 6:00 pm and 11:00 pm on 2 May 2010. However, Mr Kirk used the vehicle to transport a friend to Siparia. The accident occurred in San Fernando at around 12:30 a.m. on 3 May 2010. Both of these locations are a considerable distance away from Port of Spain and in a different direction.

3. The trial judge found that permission given by the insured was exceeded by Mr Kirk. The trial judge also found that Mr Govia was not wearing his seatbelt at the time of the accident and ruled that this was in breach of **section 43 C** of the **Motor Vehicles and Road Traffic Chap. 48:50 (MVRT Act).** The court concluded

that this constituted an illegality sufficient to debar Mr Govia's claim for damages and dismissed his claim.

4. Two issues were raised on this appeal. These were:

    a. Whether the trial judge was wrong in finding that the insured's permission was exceeded by the driver of the car.

    b. Whether the trial judge was wrong in deciding that the insurance coverage was removed from the injured passenger by his failure to have his seatbelt fastened while he was a front seat passenger.

The Permission Issue

5. In summary, this is what the pleadings were. Mr Kevin Williams gave permission to Mr Bernard Williams to use the vehicle for private and pleasure purposes. He also gave him permission or authority to allow other persons to use the vehicle for private and pleasure purposes. Bernard Williams then gave permission to Mr Kirk, a relative, to use the vehicle on the night of the incident. The pleaded terms of that permission given by Mr Bernard Williams to Mr Kirk were more limited, and were for a journey to Movie Towne, Port of Spain to attend a class reunion within a five hour window, 6 pm to 11 pm. New India contends that the permission given by Mr Bernard Williams was exceeded by Mr Kirk, who was therefore not driving with the permission of the policyholder.

6. The trial judge addressed this issue at paragraph 13 of the judgment as follows:

> "In his pleadings, KW [Kevin Williams] sought to set up an implied permission Defence. To me, this was abandoned in his Witness Statement, where he categorically stated that at all material times, KK [Mr Kirk] was not his servant or agent, and that he loaned his brother (sic) the car for specific purposes of attending a class reunion at Movie Towne between the hours of 6pm and 11pm. This he confirmed vehemently under cross examination, and reiterated that his vehicle was to be used for no other purpose. He was adamant that the permission was given to attend the class reunion in Movie Towne between 6pm and 11pm."

7. In order to fully examine the judge's findings, it is necessary to identify the pleaded cases and the evidence led on this issue.

8. At paragraph 4 of the Amended Statement of Case, Mr Govia pleaded that by a policy of insurance, New India agreed to insure Kevin Williams in respect of any liability arising out of the use of motor vehicle PCE 6544. At paragraph 7, Mr Govia also detailed the day and place that the accident occurred. Mr Kirk was named as servant and/or agent of Kevin Williams and/or an authorized driver of Kevin Williams's vehicle which was being driven with Kevin Williams's "permission and/or consent." Mr Kirk lost control of the vehicle which flipped over on the road several times and Mr Govia was ejected from the vehicle. Paragraph 7 of the re-amended statement of case stated:

> "On or about the 3rd day of May, 2010, while the claimant was a lawful passenger in motor vehicle PCE – 6544 which was being driven south along the Uriah Butler Highway, at a fast rate of speed, in the Island of Trinidad by Kayode Kirk, the servant and / or agent of the First Named

Defendant and / or authorized driver of the First Named Defendant's vehicle driving with the First Named Defendant's permission and / or consent so negligently drove and / or managed and / or controlled motor vehicle PCE – 6544 south along the Uriah Butler Highway that his tyre blew out causing him to lost (sic) control of the said motor vehicle thereby permitting the same to skid and flip over on the road several times ejecting the Claimant from the said motor vehicle in consequence whereof the Claimant has suffered personal injuries, loss and damage."

9. Kevin Williams responded as follows at paragraphs 4.1 and 4.2 of his Defence:

"In answer to paragraph 7 of the Statement of Case this Defendant admits so much as alleged that one Kayode Kirk was the driver of the said motor vehicle on the said date but specifically denies that the said Kayode Kirk was his servant and or agent at the material time and or at any time or at all and ***says that he gave his brother Bernard Williams a general permission to use the said vehicle for his private and pleasure purposes and further allowed his said brother to give any other person permission to drive the said motor vehicle for their private and pleasure purposes only. The said Kayode Kirk would have had the Defendant's implied permission at all material time*****.** (Emphasis supplied)

The said Kayode Kirk was given permission by my said brother to use the said vehicle for his private and pleasure (sic) to attend a class reunion at Movie Town Port of Spain between the hours of 6:00pm to 11:00 pm and for no or any other purpose."

10. New India pleaded that there was a policy of insurance in effect but the terms of the policy included a Limitation of Use clause as well as the Class of Persons entitled to drive the vehicle. The clauses provided:

> 5) Persons or Classes of persons entitled to drive:
>
> (a) The Policyholder;
>
> (b) Any other person who is driving on the Policyholder's order or **with his/her permission**….
>
> 6) LIMITATIONS
>
> Use only for social, domestic and pleasure purposes and for the Policyholder's business.
>
> THIS POLICY DOES NOT COVER:
>
> (1) Use for hire or reward, racing competitions, rallies or trials the carriage of goods other than samples in connection with any trade or business or use for any purpose in connection with the Motor Trade.

11. New India contended that Mr Kirk drove the vehicle without the permission of the owner in breach of clause 5 of the policy. Additionally, New India was not obliged to pay the appellant pursuant to **section 10(1)** of the **Motor Vehicle Insurance (Third Party Risks) Chapter 48:51 (MVI)**. This section provides:

> "10. (1) If, after a certificate of insurance has been delivered under section 4(8) to the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under section 4(1)(b) (being a liability covered by the terms of the policy)

is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, in addition to any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgments."

12. Additionally, New India contended that **section 12(A)** of the said Act is of no assistance to the appellant as the vehicle was used without the knowledge or **permission** of Kevin Williams. This section provides:

> "12A. Where a certificate of insurance has been delivered under section 4(8) to the person by whom a policy has been effected, so much of the policy as purports to restrict the insurance of the persons insured by the policy as regards liability in respect of the death of or bodily injury to persons being carried in or upon the motor vehicle at the time of the occurrence of the event out of which the claims arise by reference to whether or not those persons are carried gratuitously or belong to any particular class of persons shall, as respects such liabilities as are required to be covered by a policy under section 4(1)(b), be of no effect."

13. Mr Govia did not give evidence on the matter of the relevant permissions. It seems reasonable to accept that he was unaware of the arrangements among the Williams' brothers and Mr Kirk. At the very least, there was no evidence that

he knew of the arrangements. Kevin Williams's witness statement was brief on this issue. He said at paragraph 5:

> "5. On or around 2nd May 2010 my brother informed me that a family friend, one Kayode Kirk, the 2nd Named Defendant needed to borrow the said vehicle to attend a class reunion at Movie Town between the hours of 6:00pm to 11:00pm.
>
> Upon my brother's request I loaned the said vehicle to the 2nd Defendant."

14. The other evidence on this issue came from hearsay statements and in cross examination. There was an unsigned statement which an investigator said he took from Bernard Williams. The material part stated:

> "Kayode Kirk, a relative of my wife, requested to borrow my vehicle PCE 6544 in order for him to attend a class reunion. On Sunday 2nd May while I was performing work related duties down south, Kayode Kirk went to my home and obtained the vehicle. On the following morning, 3rd May 2010, as I was on my way home, I received a telephone call from Kayode Kirk who informed me that he had gotten into an accident while driving vehicle PCE 6544 in San Fernando."

15. The relevant part of a hearsay statement taken by the investigator from Mr Kirk stated as follows:

"On Sunday 2nd May 2010 at around 2:30pm I rented motor vehicle PCE 6554, an orange-coloured Hyundai Matrix, for $100.00 T&T currency for the evening. I rented the vehicle from an acquaintance by the name of Bernard Williams."

16. Bernard Williams did not give a witness statement. In cross examination there was this exchange between attorney for New India, Mr Deonarine, and Kevin Williams:

V. Deonarine: … And when you see "purpose" in 4.2 what you're talking about is the permission you give to use or the permission which was given to use the car.
KW: Which was given not that I give. Which was given.

V. Deonarine: Correct. Alright?
KW: Mhmm.

V. Deonarine: So, the permission which was given if you'll agree with me to attend a class reunion yeah?
KW: Yes.

V. Deonarine: At Movie Towne.
KW: Correct.

V. Deonarine: We're going again. In Port of Spain.
KW: Correct.

V. Deonarine: Between 6pm and 11pm right?

KW: Correct. Mhmm.

V. Deonarine: At the time of the accident, now I know you don't know, but from what you understand and what the facts have established and so on, the car was not at Movie Towne.

KW: That is what I heard.

Court: That is what?

KW: That is what I heard. That they were in South not in Movie Towne.

V. Deonarine: That brings you to my next question. He was not even in Port of Spain? In fact, he's in a next side of the country.

KW: Correct.

V. Deonarine: And the driver wasn't going to a class reunion in Movie Towne, he was going to Siparia to pick up friends. Correct?

KW: Correct.

V. Deonarine: In fact, the police report you could take it from me nobody's disputing this says, that the accident happened half past twelve in the morning, nearly 1 o'clock in the morning. So, he wasn't even using the vehicle between 6pm and 11pm either, right?

KW: Correct.

17. The terms of the permission given by the insured were the relevant ones here for the purposes of liability. It allowed Bernard Williams or anyone else Bernard

Williams chose to give permission to, the use of the vehicle for private and pleasure purposes. The fact that New India asserted that there was no permission was not borne out by the evidence.

18. First, Kevin William's evidence in his witness statement was bare. There was no evidence of the limitation on use as pleaded at paragraph 4.2 of the Defence. Second, Bernard Williams did not give evidence. There was therefore no direct evidence of what Bernard Williams told Mr Kirk as far as limitation of use is concerned. Third, the evidence at best on this issue was hearsay. Kevin Williams did not speak to Mr Kirk. There was no direct evidence therefore of anything he told him to limit the use. There was no evidence of the communication between Bernard Williams and Mr Kirk. The hearsay evidence came from a source that would have had to be treated with caution. It was an unsigned statement allegedly made by Bernard Williams. The content of that statement itself did not place any limit. All that was said amounted to a request to use the vehicle to attend a reunion. Even the place of the reunion was not mentioned. Mr Kirk's statement spoke about him hiring the car for the evening for $100.00. The use that could realistically be made of this hearsay statement was therefore circumscribed. It carried little or no value or weight. This probably explains why the trial judge did not refer to it at all. Fourth, the cross-examination exchange did not reveal that there was any direct communication between Kevin Williams and Mr Kirk. It revealed the conversation between Kevin Williams and Bernard Williams. There was no evidence of any communication limiting the use of the car between Bernard Williams and Mr Kirk. It was also not specifically put by Counsel for New India to Kevin Williams that Mr Kirk did not have permission other than to go to Movie Towne.

19. At its highest therefore, the evidence in Kevin Williams's witness statement and that elicited in cross-examination fell short of establishing that a limit was placed on the use of the vehicle to a specific geographical location or route, or any time period, purpose, or event. In effect, it was academic whether Bernard Williams's alleged permission was trumped by that of Kevin Williams since the evidence did not establish any limit placed by Bernard Williams on Mr Kirk's use of the vehicle. To this extent, the evidence did not establish the pleaded facts.

20. Even the pleaded facts demonstrated a material inconsistency. Kevin Williams has specifically pleaded that Mr Kirk "would have had the Defendant's implied permission at all material time" even as it was asserted that permission was to go to the Movie Towne venue.

21. An analysis of "permission" or "consent" in a similar type of case was undertaken in the matter of **Singh v Rathour [1988] 2 All ER 16**. In that case, a member of an association borrowed a minibus from the association stating that the purpose for borrowing it was to conduct the association's business. However, the driver used the vehicle to escort persons to a wedding. Along the way, the vehicle was involved in an accident resulting in the death of one of the passengers. The crux of the case involved the issue of consent. The court held that while there was consent for the member to drive the bus, it was a limited form of consent, in this case, for the purposes of the association.

22. May LJ reasoned at **page 18g** regarding consent:

> "It is important to consider in this type of case whether the consent to which one's attention is drawn by the common clause in the motor

insurance policy was a general consent from the owner to the user, whether it was limited either in time or geographically, or for a particular purpose. If such consent is given and relied upon under the terms of such a policy, it is important to consider what effect on the facts of the particular case the condition or limitation imposed upon the consent by the owner may have."

23. He also said at **page 20j**

"In the course of argument various examples and queries were raised to show how difficult it may or may not be in particular circumstances to decide whether or not there was a consent within the terms of a motor policy, for instance in cases in which, unlike the present case, the owner of the vehicle on the one hand and the driver on the other hand honestly held different views about the extent to which the user had been given permission to use the vehicle by the owner. We also heard submissions on whether the approach to this particular problem of deciding factually whether there was consent or what the extent of the consent was in any given case should be an objective or a subjective approach. That is always a difficult field into which to venture. There are a number of potential obstacles when one does. I do not propose in the present appeal to go into any other cases or how they should be approached if and when they arise. I much prefer to leave them for decision when the occasion arises, not because one is unequal or unwilling to do so but because the facts and circumstances of any given case may vary so much and would so depend upon the findings by the trial judge that it is impossible to make

generalisations in a case such as this, save to say that one must investigate the nature and extent of the relevant consent relied on."

24. In the concurring judgment of Woolf LJ at **page 21j** he said that:

> "Whether an insured has the consent of the owner would normally be entirely a question of fact which will not create difficulty once the evidence has been heard. However, there can be cases where what otherwise would be consent is alleged not to be consent because it is submitted that the circumstances are such that the consent is vitiated by fraud."

25. He also went on to say at **page 22a**:

> "Clearly, in my view, there can be limitations placed upon a consent. For example, a consent can be for a limited period. In my view consent can also be limited as to the purpose for which a vehicle can be used."

26. Another helpful case is **Rickson Pancham v Kazuhiko Shioyama, Civil Appeal No. S073 of 2015, unreported, 3 December 2020, per Smith JA** in understanding the issue of permission. In that case, the first appellant was a passenger in the vehicle who sustained serious injuries when the vehicle collided with another vehicle. The first respondent was the owner of the vehicle and a director of a Japanese company based in Trinidad and Tobago. The owner authorised one Yasukazu Nishimura to permit workers of the company to drive the vehicle, PAZ 7051. The driver of the vehicle was authorized by Mr Nishimura to take workers home from work and keep the vehicle overnight. An accident occurred and a key issue was

whether the driver of the vehicle was acting within the instructions whilst using the vehicle. On the pleaded case and the evidence, the driver was asked to transport workers home. The workers asked the driver to drop them off at a bar and pick them up later. Upon the driver returning to the bar, the one worker who remained there, the others having already left, asked the driver to take two friends to their homes as they lived near to his home. Therefore, the worker and the two friends of the worker, one of which was the appellant, were in the vehicle. The driver then proceeded to take the worker home. Whilst en route to the worker's home the vehicle was involved in the accident. On appeal the court held that the driver was not acting outside the scope of the permission or consent granted to him as he was following instructions.

27. At **paragraph 36** the Honourable Smith JA after examining the evidence reasoned that:

> "… on the totality of the evidence of Mr. Nishimura, at the time of the collision, Nezam (the driver) was in the process of taking home an employee; he was not disobeying instructions. Framed in the positive, if, as is the undisputed evidence at the time of the collision, Nezam was dropping off a co-worker, he would have been within the instructions given to him for the use of PAZ 7051. There were no proven express or implied prohibitions against giving a lift to passengers on the way to dropping off co-workers to their homes."

28. What these cases demonstrate is that evidence is critical to establishing the permission issue. Each case must be examined on its own facts. The evidence must be closely analysed and assessed and findings of fact have to be made before the permission issue can be determined. In the absence of the required

evidence to limit the permission, the general permission given, as established by the evidence, had not been undermined. The trial judge therefore erred in the finding of fact that the insured or his brother had imposed limitations on the permission to the driver. The finding of fact was not borne out when considering the totality of evidence adduced. This case therefore falls within the narrow compass of cases where an appeal court is justified in overturning the trial judge's finding of fact on the evidence as that finding was plainly wrong.

Seatbelt Issue

29. I will briefly address this issue having regard to the concurring judgment of Rajkumar JA which has addressed this specific point in greater detail and with which I agree. As to Mr Govia not having his seatbelt fastened, the judge at first instance pointed to **section 43C** of the **MVRT Act** which provides that drivers and passengers "shall wear a seat belt while the motor vehicle is in motion" and which also makes it an offence for a person in breach "liable on summary conviction to a fine of two thousand dollars". By these provisions, the court went on to ask whether the violator should benefit from this violation.

30. The trial judge held at paragraph 8 of the judgment:

> "[8] Passengers like any other road users must observe the strictures of the Law. Failure to do so will have dire consequences on their ability to recover monies or derive any benefits. The well-known adage is that a man cannot benefit from his own wrong. That is clearly evident in this case."

Appellant's Submissions

31. The appellant submitted that the court applied the wrong principle and rather should have considered the principle of contributory negligence. The maxim that a man cannot benefit from his own wrong cannot be applied in tort claims of personal injury. The appellant cited the case of **Patel v Mirza [2016] UKSC 42** which involved a contract to carry out an illegal activity. However, the court also reasoned on principles regarding tort claims. Lord Mance cited the case of **Hall v Hebert [1993] 2 SCR 159** where McLachlin J stated that for personal injury, compensatory damages are "not properly awarded as compensation for an illegal act, but only as compensation for personal injury." The court in **Patel** acknowledged the helpful reasoning in **Hall** in examining such claims by establishing three considerations: a) the underlying purpose of the prohibition 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.

32. Additionally, the appellant in the instant case submitted that the provision of **MVRT Act** is a protective one and excluded the operation of the illegality principle. Therefore, the appropriate principle should be that of contributory negligence reducing the claim by 25%.

Third Respondent's Submissions

33. New India asserted that the appellant's reliance on **paragraph 102** of **Patel** was not reasoned correctly as the court in **Patel** also cited the case **Hardy v Motor Insurance Bureau [1964] 2 QB 745** to come to certain conclusions. A proper interpretation of that case is that the claim succeeded because the breach of the

statute would frustrate the purpose of England's version of Trinidad and Tobago's **Motor Vehicle Insurance Act**. But this is not the case in the instant matter as the seatbelt provision of the **MVRT Act** does not protect third party claims as the **MVI** does. A proper analysis, it argued, shows that the judge's reasons actually followed the reasons in **Patel** in that personal injury tort claims can be barred by illegality. New India agreed that if the court did not accept its submissions, a suitable contributory figure would be 25%.

Conclusion

34. Mr. Govia admitted to not wearing his seatbelt. Whilst it is contrary to the **MVRT Act** to have not had his seatbelt fastened as a front seat passenger, the consequence to be applied in a personal injuries claim would be a reduction in any award on the basis of the contributory negligence and not a complete denial of the claim on the purported basis of illegality. As per the reasoning in **Patel** and **Hall,** while breach of the seatbelt provision constitutes an illegal act, the purpose of a compensatory claim in civil law is that of compensation for personal injury. A further analysis of contributory negligence would see a reduction in the amount claimed since it was established that Mr. Govia was not wearing a seatbelt. The **MVRT Act** provides a protective provision a breach of which is an illegality. However, New India's analysis seeking to bar the claim does not find support in the reasoning above. While, as the appellant suggests, the seatbelt provision is protective neither party submitted on what public policy factors might be impacted if the claim is denied.

35. Finally, an argument can be made that denying the claim because the seatbelt was not used would be disproportionate. In any event, since the restricted permission as submitted by New India is not justifiable based on the evidence,

the coverage as provided under the clauses in the policy of insurance is applicable.

36. The appeal is therefore allowed. The orders of the trial judge are set aside. In keeping with the agreement of the parties on the extent of contribution, there is judgment for the claimant as to 75% of his claim for damages to be assessed. The matter is remitted to a Master of the High Court for the assessment of damages. We will hear the parties on costs.

……..

Ronnie Boodoosingh

Justice of Appeal

Judgment of P.A. Rajkumar JA

Illegality

37. I have read the judgment of the Honourable Boodoosingh JA. I agree with the reasoning and conclusions therein. I consider it necessary to also add a few words on one aspect of the judgment of the court below.

38. The trial judge considered that the fact that the appellant, (a front seat passenger in the vehicle), was not wearing a seat belt, disentitled him to any compensation for injury he sustained in the accident because his action in not

wearing a seatbelt was a criminal offence punishable under the Motor Vehicles and Road Traffic Act, Chapter 48:50 by a fine of $2000.[1] The trial judge reasoned that this fact distinguished the instant case from the situation in **Froom v Butcher [1976] 1 QB 286**, because the latter was decided in the UK at a time when failure to wear a seatbelt was not a criminal offence. The trial judge fell into error in coming to that conclusion. This is because i. the law of illegality required a careful assessment and balancing of a range of factors detailed hereunder before it could be applied to disentitle the claimant to any compensation whatsoever solely on the basis that he was not wearing a seatbelt. Had that analysis been conducted it would not have automatically led to that conclusion.

39. The parties had agreed in their submissions before the trial judge that, (though liability was not accepted), based upon **Froom v Butcher**, any damages awardable to the Appellant would be reduced by 25%. On appeal, counsel for the respondent quite commendably did not seek to uphold that part of the judgment below which concluded that the Appellant was disentitled to any compensation. He reverted to his initial position in the court below that contributory negligence would apply, reducing awardable damages by 25%. In so doing, he was clearly correct. Accordingly, the following observations would arguably be obiter as this analysis would not be necessary to determine the outcome of this appeal. However, given that the issue of illegality featured prominently in the decision of the court below, the opportunity must be taken to provide clarification on the issue of the proper approach to illegality lest the

[1] *43C. (1) The driver and every passenger seventeen years of age or more occupying a front seat in any motor vehicle referred to in subsection (1) of section 43A shall wear a seat belt while the motor vehicle is in motion. (1A) The driver of a motor vehicle referred to in section 43A(1) shall not without reasonable excuse drive a vehicle while there is in the front seat of the vehicle a person who is not wearing a seat belt. (2) Any person who contravenes the provisions of subsection (1) or subsection (1A) is guilty of an offence and liable on summary conviction to a fine of two thousand dollars.

judgment of the court below stand as an authority for the blanket proposition that a front seat passenger who is not wearing a seat belt at the time of an accident is disentitled to any compensation.

Patel v Mirza

40. The leading authority on this issue is the case of **Patel v Mirza [2016] UKSC 42**. Based upon the judgment of the House of Lords in that case the trial judge's judgment on this aspect could not be supported. There a nine member panel of the House of Lords revisited its own earlier decision in **Tinsley v Milligan [1994] 1 AC 340**. After careful and detailed analysis it declined to follow it, preferring instead a more nuanced approach as elaborated in further detail hereinafter. This preserved the discretion of the Courts to consider the specific circumstances of each matter and produce a result more applicable to the justice of each case before it, rather than attempting to apply **the reliance test** which was capable of producing arbitrary results based upon which party bore the burden of proof, and based upon uncertainties in what exactly was meant by reliance.

41. Although **Patel v Mirza** was a case on illegality in relation to contract it is quite clear from the leading judgment of Lord Toulson that he considered, in line with other commonwealth authorities that the same principles applied to both contractual and tortious claims.

42. It is necessary to set out at length in the Appendix hereto some of the relevant paragraphs of that judgment, which were essential to the explanation of that court's reconsideration of the position in **Tinsley v Milligan**. Lord Toulson examined recommendations from the Law Commission UK. (For example at paragraph 41 and paragraph 48 -all emphasis added). He considered also

developments in the law of Australia, Canada and the USA (for example at paragraph 53). Lord Toulson cited dicta from the High Court of Australia (for example that of McHugh J in the case of ***Nelson v Nelson*** 1995 HCA 25 at paragraph 53, 54). He, (together with other members of the court who also delivered separate judgments) considered the decision of McLachlin J in the case of ***Hall v Herbert (1993) 2 S.C.R 159*** from the Supreme Court of Canada. It should be noted that this case dealt with a claim in **tort** with some similarities to the instant claim under consideration. This case is also significant in that it addressed the consideration of a plaintiff profitting from his own wrong[2]. In fact the principles of illegality were considered by both the Law Commission and by Lord Toulson to be equally applicable and broadly similar in cases of unjust enrichment, **tort**, and enforcement of property rights. That case was applied, to a case dealing with employment under an illegal contract in the Canadian case of Still v Minister of National Revenue before the Federal Court of Appeal. Lord Toulson further dealt with the position in the USA[3]. At paragraph 69, he referred to his own judgment in **Parkingeye Limited v Somerfield Stores [2013] QB 840**. He also referred to the judgment of Lord Wilson in the case **Hounga v Allan [2014] 1 WLR 2889** (at paragraphs 76 -79). His further detailed analysis and reasoning is to be found inter alia at paragraphs 81, 86-88, 89-92, 93, 99-116 and summarised at paragraph 120 under the heading "*summary and disposal*". See also supporting reasoning for example, in the judgment of Lord Kerr at paragraphs 124 and 127, and Lord Neuberger at paragraph 162.

Profitting from own wrong

[2] (See paragraphs 55-57).
[3] (see for example paragraph 62 of his judgment).

43. The policy behind denial of compensation where a claimant has been guilty of an illegal act has sometimes been rationalised on the basis that such a claimant should not profit from his own wrong. The case of ***Hall v Hebert***[4] exposed the fallacy of characterising a victim of tort as **profitting** from his own wrong when in fact what he actually sought to do was seek **compensation** for an injury caused to him by the actions of the tortfeasor. He considered (at paragraph 100), that the better and more nuanced approach was "whether allowing recovery for something which was illegal would produce inconsistency and disharmony in the law, and so cause damage to the integrity of the legal system." The concept of **profit** was therefore inapplicable.

44. Lord Toulson summarized the effect of his analysis at paragraph 120 as follows:

> *120. The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system (or, possibly, certain aspects of public morality, the boundaries of which have never been made entirely clear and which do not arise for consideration in this case). In assessing whether the public interest would be harmed in that way, it is necessary a) to consider* ***the underlying purpose of the prohibition which has been transgressed*** *and whether that purpose will be enhanced by denial of the claim, b) to consider* ***any other relevant public policy*** *on which the denial of the claim may have an impact and c) to consider* ***whether denial of the claim would be a proportionate response to the illegality****, bearing in mind that punishment is a matter for the criminal courts. Within that framework, various factors may be relevant, but it would be a mistake to suggest that the court is free to decide a case in an undisciplined way. The public interest is best served by a principled and transparent* ***assessment of the considerations identified****, rather than by the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate.* **(**All emphasis added.)

[4] cited by inter alia Lord Toulson in Patel v Mirza

45. The trial judge was therefore required to consider a **trio of essential matters** before the concept of illegality could be utilised to debar a claim for compensation in tort. (See also paragraph 101). Given that **Patel v Mirza** had been available, having been decided on July 20 2016, these should have been considered by the trial judge in the decision which was dated 26 September 2016,.

Underlying Purpose of the Prohibition against not wearing seatbelts

46. It has been recognised for example in ***Froom v Butcher*** that a claimant, being a front seat passenger who failed to wear a seatbelt, could be held potentially responsible for his own damage/injury. The purpose behind the statutory requirement for a front seat passenger to wear a seatbelt is therefore to protect him from or minimize injury in the event of accident. Per Lord Denning in ***Froom v Butcher*** at page 292G-293A.

> *I do not think that is the correct approach. The question is not what was the cause of the accident. It is rather what was the cause of the damage. In most accidents on the road the bad driving, which causes the accident, also causes the ensuing damage. But in seat belt cases the cause of the accident is one thing. The cause of the damage is another. The accident is caused by the bad driving. The damage is caused in part by the bad driving of the defendant, and in part by the failure of the plaintiff to wear a seat belt. If the plaintiff was to blame in not wearing a seat belt, the damage is in part the result of his own fault. He must bear some share in the responsibility for the damage: and his damages fall to be reduced to such extent as the court thinks just and equitable. In Admiralty the courts used to look to the causes of the damage: see The Margaret (1881) 6 P.D. 76. In a leading case in this court, under the Act of 1945, we looked to the cause of the damage: see Davies v. Swan Motor Co. (Swansea) Ltd. [1949] 2 K.B. 291, 326. In the crash helmet cases this court also looked at the causes of the damage:*

see O'Connell v. Jackson [1972] 1 Q.B. 270. So also we should in seat belt cases.

47. The purpose of the statutory requirement for a front seat passenger to wear a seatbelt would be to provide an incentive to wear it, and a deterrent against not wearing it. These would both be adequately addressed by the existing concept of contributory negligence, which could produce a reduction of any compensation for damage he sustained to which he would otherwise be entitled. That statutory purpose could hardly be advanced or enhanced by denying him **all** compensation when he is injured in an accident and has not been wearing a seatbelt. There is therefore no necessity demonstrated for the invocation of the additional doctrine of illegality to **completely debar all compensation,** and in effect ignore the role of negligent part played by negligent action on the part of the driver or drivers of the vehicles involved.

48. In ***Froom v Butcher*** Lord Denning recognised the respective roles played by a negligent driver and a negligent non-seat belt wearing front seat passenger as follows at page 295 H-296D:

> ***The share of responsibility***
> *Whenever there is an accident, the negligent driver must bear by far the greater share of responsibility. It was his negligence which caused the accident. It also was a prime cause of the whole of the damage. But in so far as the damage might have been avoided or lessened by wearing a seat belt, the injured person must bear some share. But how much should this be? Is it proper to inquire whether the driver was grossly negligent or only slightly negligent? or whether the failure to wear a seat belt was entirely inexcusable or almost forgivable? If such an inquiry could easily be undertaken, it might be as well to do it. In Davies v. Swan Motor Co. (Swansea) Ltd. [1949] 2 K.B. 291, 326, the court said that consideration should be given not only to the causative potency of a particular factor, but also its blameworthiness. But we live in a practical world. In most of these cases the liability of the driver is admitted, the failure to wear a seat belt is admitted, the only question*

is: what damages should be payable? This question should not be prolonged by an expensive inquiry into the degree of blameworthiness on either side, which would be hotly disputed. Suffice it to assess a share of responsibility which will be just and equitable in the great majority of cases.

Sometimes the evidence will show that the failure made no difference. The damage would have been the same, even if a seat belt had been worn. In such case the damages should not be reduced at all. ***At other times the evidence will show that the failure made all the difference. The damage would have been prevented altogether if a seat belt had been worn. In such cases I would suggest that the damages should be reduced by 25 per cent.*** *But often enough the evidence will only show that the failure made a considerable difference. Some injuries to the head, for instance, would have been a good deal less severe if a seat belt had been worn, but there would still have been some injury to the head. In such case I would suggest that the damages attributable to the failure to wear a seat belt should be reduced by 15 per cent.*

49. In ***Froom v Butcher*** the practical effect of having a starting default position for contributory negligence on the part of the non-seat belt wearing front seat passenger was recognised. Such a default position would provide a valuable guide to insurers in deciding whether the cost of contesting the proportion of liability that could be attributed to such a passenger would be worth any potential savings on the claim. In the instant case counsel commendably utilised that guidance and were accordingly able to save time and costs in removing the quantum of contribution as an issue both in this court and below.

Any Other Relevant Public Policy

50. The trial judge therefore erred in not considering:

i. that the issue of illegality is based upon **policy** considerations;

ii. that the policy relating to the necessity of wearing seat belts had to also be considered in the context of the policy underlying any other applicable statute.

51. The trial judge failed to consider any countervailing policy under any other Act. One example would any policy embodied in or discernible from the Motor Vehicle Insurance (Third Party Risks) Act 48:51 and subsequent amendments which were intended to reduce the categories of persons not entitled to compensation for injury occasioned by vehicular accidents.

52. In **Presidential Insurance Company Ltd v Resha St. Hill [2012] UKPC 33** it was revealed that amendments to the Act were not effective to impose any blanket liability on insurers if this would be contrary to the express terms of the particular policy of insurance itself. The policy of insurance remained determinative of the issue of insurer's liability. However intimations of such a policy can be gleaned from the Appendix to that case and certain statements made in Parliament referred to by the Privy Council as an aid to ascertaining the mischief of the amendments. While those statements were ultimately not of assistance as to the purpose of section 4(7) in 1996, at page 13 of the judgment it was noted that the statement was made in Parliament that the "*The purpose of this bill is to seek to redress the difficulties and injustices which are suffered by persons who are injured, or suffered damage, as a result of motor vehicular accidents*".

53. See also **Presidential Insurance Company Limited v Mohammed [2015] UKPC 4,** paragraphs 9-11.

*[9] The MVIA seeks to ensure that people who drive motor vehicles have third party insurance in order to provide **adequate compensation** to people who are injured in or suffer property damage as a result of motor vehicle accidents. Section 3 makes it unlawful for any person to use, or cause or permit any other person to use, a motor vehicle unless there is in force a valid third party insurance policy that covers that person's use of the vehicle. Contravention of that section is a criminal offence. Section 4(1) provides that the insurance policy must insure "such person, persons or classes of persons as may be specified in the policy" against death, bodily injury or damage to property arising out of the use of the motor vehicle (s 4(1)(b)). Section 4(7) provides:*
"Notwithstanding anything in any written law, rule of law or the Common Law, a person issuing a policy of insurance under this section shall be liable to indemnify the person insured or persons driving or using the vehicle or licensed trailer with the consent of the person insured specified in the policy in respect of any liability which the policy purports to cover in the case of those persons."

[10] In response to concerns about the indemnification of third parties in accidents involving taxis, Parliament in 1996 amended the MVIA by the insertion of a new section 4A which provides: "Notwithstanding any other law, the owner of a motor vehicle licensed to ply for hire and insured under this Act is deemed to be the employer of any person driving the motor vehicle at the time of an accident as a result of which a person has suffered death, bodily injury or damage to property unless it is shown that at the time of the accident that the vehicle was the subject of larceny."

[11] In The Presidential Insurance Company Ltd v Resha St. Hill (above) the Board held that section 4(7) did not impose on an insurer a liability that the policy did not purport to cover in respect of the person insured or the persons driving or using the vehicle with his or her consent. The Board also addressed section 4A, holding that its primary application was to situations where a taxi was being driven with the owner's consent but arguments could arise whether the driver was an employee of the owner or an independent contractor.

54. The trial judge therefore failed to appreciate that i. there were competing policy considerations under other Acts, ii. that another such policy was providing adequate compensation, subject to the terms of policy coverage, to third parties, and iii. that a balancing exercise weighing the importance of each had to be conducted before determining that the policy behind only one would be determinative.

Proportionality – Seriousness of the Conduct

55. The trial judge also erred in not considering that the criminal law already provided the penalty for failing to wear a seatbelt. The trial judge found as a fact that the claimant was a front seat passenger in the vehicle and was not wearing a seatbelt at the time of collision. The trial judge failed to consider the issue of proportionality and in particular the draconian nature of completely disentitling such a passenger from receiving **any compensation for injury**. The penalty prescribed by the criminal law for that offence was a maximum fine of $2000. The imposition of a further civil law penalty - the complete refusal of compensation for injuries sustained, needed to be weighed, explained, and justified. This is especially so as that approach carried the potential to completely absolve a negligent driver from civil responsibility for injury to an injured front seat passenger, providing for him "*a very substantial unjust reward*". This could "*produce results which are arbitrary, unjust or disproportionate".*[5] Such failure to consider the question of proportionality would be an error of law.

[5] See paragraph 108 of Patel v Mirza.

Appendix

1. It is necessary to set out at length some of the relevant paragraphs of that judgment, which were essential to the explanation of that court's reconsideration of the position in Tinsley v Milligan. It examined recommendations from the Law Commission UK for example at paragraph 41 and paragraph 48.

> *41. If a contract involving prohibited conduct is not void as a matter of statutory construction, the Commission recommended that in deciding whether a claim arising from it should be disallowed by reason of illegality, the court should have regard to the* ***policies*** *that underlie the doctrine. It stressed that it was not advocating a general discretion, but a principled evaluation recognising (as Lord Walker put it in the Bakewell case, at para 60) that the maxim ex turpi causa must be applied as an instrument of public policy and* ***not*** *in circumstances where it would not serve the public interest. The Commission identified a number of potentially relevant factors: most importantly, whether allowing the claim would undermine the purpose of the rule which made the relevant conduct unlawful, and, linked to that question, the* ***causal connection*** *between the* ***illegality*** *and the* ***claim*** *(including how central the illegality was to the contract),* ***the gravity of the conduct of the respective parties*** *and the* ***proportionality*** *of denying the claim. (LCCP 189, para 3.142) The Commission recommended a* ***broadly similar approach*** *to the* ***maxim ex turpi causa*** *in cases of unjust enrichment,* ***tort*** *and* ***enforcement of property rights.***
>
> *48. The Commission considered that the policies which underlie the illegality defence are less likely to come into play where parties are attempting to undo, rather than carry out, an illegal* ***contract****. As in the case of contractual enforcement, it recommended that a decision on disallowing a particular restitutionary claim for illegality should be based openly on the* ***policies*** *underlying the defence, taking into account the same sort of factors (such as the* ***relative conduct of the parties*** *and the* ***proportionality of denying the claim****).*

2. He considered also developments in the law of Australia, Canada and the USA. For example at paragraph 53 he cited dicta from the High Court of Australia of McHugh J in the case of **Nelson v Nelson** 1995 HCA 25.

*53. McHugh J went on to suggest that except in a case where a statute made rights arising out of a particular type of transaction unenforceable in all circumstances**, a court should not refuse to enforce legal or equitable rights on the ground of illegality if to do so would be disproportionate to the seriousness of the conduct or if it would not further the purpose of the statute**. He said at 612-613:*
"It is not in accord with contemporaneous notions of justice that the penalty for breaching a law or frustrating its policy should be disproportionate to the seriousness of the breach. The seriousness of the illegality must be judged by reference to the statute whose terms or policy is contravened. It cannot be assessed in a vacuum. The statute must always be the reference point for determining the seriousness of the illegality."
McHugh J's approach was cited with approval by a majority of the High Court in Fitzgerald v F J Leonhardt Pty Ltd [1997] HCA 17; (1997) 189 CLR 215.

*54. Noting the **criminal sanctions** which were **available** under the Act (imprisonment for up to two years) and the ability of the Commonwealth to recover any payments wrongly obtained by Mrs Nelson, **the court did not consider that it should impose a further sanction by refusing to enforce her equitable rights, particularly when such a refusal would result in a penalty out of all proportion to the seriousness of her conduct** (pp 570-571 per Deane and Gummow JJ, 590-591 per Toohey J and 616-617 per McHugh J).*

3. It considered further the decision of McLachlin J in a case from the Supreme Court of Canada **Hall v Hebert (1993) 2 SCR 159**.

55. In Hall v Hebert [1993] 2 SCR 159 the owner of a car allowed a passenger to drive it in the knowledge that he had drunk a large amount of beer during the course of the evening. The car overturned and the driver suffered head injuries. The Supreme Court held that the driver's claim against the owner in negligence was not barred by illegality, but that there should be a reduction in damages for contributory negligence. The judgment of the majority was given by McLachlin J.

*56. She held that the courts should be allowed to bar recovery in tort on the ground of the plaintiff's illegal or immoral conduct only in very limited circumstances. **The basis of the power lay in the duty of the courts to preserve the integrity of the legal system and it was exercisable only where that concern was in issue. It was in issue where a damage award in a civil suit would allow a person to profit from illegal or wrongful conduct**, or would*

permit an evasion or rebate of a penalty prescribed by the criminal law. In such instances the law refused to give by its right hand what it took away by its left hand.

57. McLachlin J emphasised the importance of ***defining what was meant by profit when speaking of the plaintiff profiting from his or her own wrong****.* ***It meant profit in the narrow sense of a direct pecuniary award for an act of wrongdoing****.* ***Compensation for something other than wrongdoing, such as for personal injury, would not amount to profit in that sense****.* ***Compensation for the plaintiff's injuries arose not from the illegal character of his conduct, but from the damage caused to him by the negligent act of the owner in letting him drive. It represented only the value of****, or substitute for,* ***the injuries he had suffered by the fault of another****.* ***He would get nothing for being engaged in illegal conduct****. McLachlin J accepted that there might be cases where a claim should be barred from tort recovery which did not fall within the category of profit, in order to prevent stultification of the criminal law or the evasion of a criminal penalty, but the underlying principle was that the use of the power to deny recovery on the ground of illegality was justified only where the claim would introduce inconsistency into the fabric of the law.*

4. The case of Hounga v Allan [2014] 1 WLR 2889 as follows:

76. Lord Wilson did not consider that the solution of the case lay either in asking whether Miss Allen needed to rely on an illegal contract or in asking whether there was an inextricable link between the illegality to which she was a party and her claim. At the heart of the judgment Lord Wilson set out his approach in para 42:

*"****The defence of illegality rests on the foundation of public policy****. 'The principle of public policy is this …' said Lord Mansfield by way of preface to his classic exposition of the defence in Holman v Johnson (1775) 1 Cowp 341, 343. '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': Maxim Nordenfelt Guns and Ammunition Co v Nordenfelt [1893] 1 Ch 630, 661 (Bowen LJ). So* ***it is necessary, first, to ask 'What is the aspect of public policy*** *which founds the defence?' and, second, to ask 'But is there* ***another aspect of public policy to which the application of the defence would run counter****?'"*

78. Hounga v Allen was a case in tort, but Lord Wilson's approach to the illegality defence was applied by the Court of Appeal in R (Best) v Chief Land Registrar [2016] QB 23,…

79. Sales LJ (with whom McCombe LJ agreed) expressed the view, at para 51, that the best guidance on the relevant analytical framework was to be found in Lord Wilson's judgment (from which he quoted para 42 and the passage which followed it). Applying that guidance, he examined the public policy considerations underlying the provisions of the LRA governing acquisition of title to land and the public policy considerations underlying section 144 of LASPOA. He concluded that the mischief at which section 144 was aimed was far removed from the intended operation of the law of adverse possession and that public policy did not preclude the claim for registration.

86. Professor Burrows identified six criticisms of those rules and, more generally, of a "rule-based" approach to illegality.

*87. First, the difficulty with the Tinsley v Milligan reliance rule, whether as a master rule or as a rule restricted to cases involving the assertion of proprietary rights, was that **it could produce different results according to procedural technicality** which had nothing to do with the underlying policies. The decision of the Court of Appeal in Collier v Collier [2002] EWCA 1095; [2002] BPIR 1057 provides a good illustration...*

*88. Second, the difficulties with rule 1 were illustrated by the ParkingEye case. The illegality in that case went to the contract as formed, because from the outset it was intended to send out to customers a form of letter of demand which contained some deliberate inaccuracies. The rule as stated **did not permit differentiation between minor and serious illegality** or **between peripheral and central illegality**. …*

*89. Third, as with the criticism of rule 1, the reference in rule 2 to performance that involved illegal conduct **drew no distinction between serious criminality and relatively minor breach of a statutory regulation**.*

90. Fourth, although a purported advantage of firm rules is greater certainty, the cases do not always fit the rules because courts have often sought ways around them when they do not like the consequence. ***The flexible approach*** *would not only produce more acceptable results, but would in practice be* ***no less certain than the rule-based approach****.*

91. Fifth, although Lord Mansfield made it clear in Holman v Johnson that the illegality defence operates as a rule of public policy and is not designed to achieve justice between the parties, ***that does not mean that any result, however arbitrary, is acceptable****….*

92. Sixth, although it may be argued that if there are deficiencies in the traditional rules, the way forward is to refine the rules to remove the deficiencies by appropriate exceptions, that task is one which has never been satisfactorily accomplished. The reason is that there are so many variables, for example, in ***seriousness of the illegality****, the* ***knowledge and intentions of the parties****,* ***the centrality of the illegality****, the* ***effect of denying the defence*** *and* ***the sanctions which the law already imposes****. To reach the best result in terms of policy, the judges need to have the* ***flexibility to consider and weigh a range of factors*** *in the light of the facts of the particular case before them.*

93. If a "range of factors" approach were preferred, Professor Burrows suggested, at pp 229-230, that a possible formulation would read as follows:

"If the formation, purpose or performance of a contract involves conduct that is illegal (such as a crime) or contrary to public policy (such as a restraint of trade), the contract is unenforceable by one or either party if to deny enforcement would be an appropriate response to that conduct, taking into account where relevant -

(a) ***how seriously illegal*** *or contrary to public policy the conduct was;*

(b) whether the party seeking enforcement knew of, or intended, the conduct;

(c) how central to the contract or its performance the conduct was;

(d) ***how serious a sanction the denial of enforcement is*** *for the party seeking enforcement;*

(e) ***whether denying enforcement will further the purpose of the rule which the conduct has infringed****;*

(f) ***whether denying enforcement will act as a deterrent to conduct that is illegal or contrary to public policy****;*

(g) whether denying enforcement will ensure that the party seeking enforcement does not profit from the conduct;

(h) whether denying enforcement will avoid inconsistency in the law thereby maintaining the integrity of the legal system."

Professor Burrows noted that the final factor is capable of a wider or narrower approach, depending on what one understands by inconsistency.

99. Looking behind the maxims, there are two broad discernible policy reasons for the common law doctrine of illegality as a defence to a civil claim. One is that ***a person should not be allowed to profit from his own wrongdoing****. The other, linked, consideration is that the law should be coherent and not self-defeating, condoning illegality by giving with the left hand what it takes with the right hand.*

100. Lord Goff observed in the Spycatcher case, Attorney General v Guardian Newspapers Ltd (No 2) [1990] 1 AC 109, 286, that the "statement that a man shall not be allowed to profit from his own wrong is in very general terms, and does not of itself provide any sure guidance to the solution of a problem in any particular case". In Hall v Hebert [1993] 2 SCR 159 McLachlin J favoured giving a narrow meaning to profit but, more fundamentally, she expressed the view (at 175-176) that, as a

rationale, the statement that a plaintiff will not be allowed to profit from his or her own wrongdoing does not fully explain why particular claims have been rejected, and that it ***may have the undesirable effect of tempting judges to focus on whether the plaintiff is "getting something" out of the wrongdoing, rather than on the question whether allowing recovery for something which was illegal would produce inconsistency and disharmony in the law****, and so cause damage to the integrity of the legal system.*

101. That is a valuable insight, with which I agree. I agree also with Professor Burrows' observation that this expression leaves open what is meant by inconsistency (or disharmony) in a particular case, but I do not see this as a weakness. It is not a matter which can be determined mechanistically. So how is the court to determine the matter if not by some mechanistic process? In answer to that question I would say that ***one 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. <u>That trio of necessary considerations can be found in the case law.</u>***

102. The relevance of taking into account the purpose of the relevant prohibition is self-evident. The importance of taking account of the relevant statutory context is illustrated by Hardy v Motor Insurers' Bureau [1964] 2 QB 745. The Road Traffic Act 1960 required a motorist to be insured against the risk of causing death or personal injury through the use of a vehicle on a road, but a line of authorities established that a contract to indemnify a person against the consequences of a deliberate criminal act is unenforceable…

He observed that ***the purpose of the relevant statutory provision*** *was the protection of persons who suffered injury on the road by the wrongful acts*

of motorists. ***This purpose would have been defeated if the common law doctrine of illegality had been applied so as to bar the plaintiff's claim.***

103. Hounga v Allen and R (Best) v Chief Land Registrar are illustrations of cases in which there were countervailing public interest considerations, which needed to be balanced.

104. As to the dangers of overkill, Lord Wright gave a salutary warning in Vita Food Products Inc v Unus Shipping Co Ltd [1939] AC 277, 293:

"Nor must it be forgotten that the rule by which contracts not expressly forbidden by statute or declared to be void are in proper cases nullified for disobedience to a statute is a rule of public policy only, and public policy understood in a wider sense may at times be better served by refusing to nullify a bargain save on serious and sufficient grounds."

105. To similar effect Devlin J questioned "whether public policy is well served by driving from the seat of judgment everyone who has been guilty of a minor transgression" in St John Shipping Corpn v Joseph Rank Ltd [1957] 1 QB 267, 288-289.

106. In Saunders v Edwards [1987] 1 WLR 1116, 1134, Bingham LJ said

"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."

107. In considering whether it would be disproportionate to refuse relief to which the claimant would otherwise be entitled, as a matter of public policy, various factors may be relevant. Professor Burrows' list is helpful but I would not attempt to lay down a prescriptive or definitive list because ***of the infinite possible variety of cases****.* ***Potentially relevant factors 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.***

108. The integrity and harmony of the law permit - and I would say require - such flexibility. Part of the harmony of the law is its division of responsibility between the criminal and civil courts and tribunals. ***Punishment for wrongdoing is the responsibility of the criminal courts and, in some instances, statutory regulators.*** *…* ***Punishment is not generally the function of the civil courts****, which are concerned with determining private rights and obligations. The broad principle is not in doubt that the public interest requires that the civil courts should not undermine the effectiveness of the criminal law; but* ***nor should they impose what would amount in substance to an additional penalty disproportionate to the nature and seriousness of any wrongdoing****. ParkingEye is a good example of a case where denial of claim would have been disproportionate. The claimant did not set out to break the law. If it had realised that the letters which it was proposing to send were legally objectionable, the text would have been changed. The illegality did not affect the main performance of the contract.* ***Denial of the claim would have given the defendant a very substantial unjust reward. Respect for the integrity of the justice system is not enhanced if it appears to produce results which are arbitrary, unjust or disproportionate****.*

109. The courts must obviously abide by the terms of any statute, but I conclude that it is right for a court which is considering the application of the common law doctrine of illegality to have regard to the policy factors involved and to the nature and circumstances of the illegal conduct in determining whether the public interest in preserving the integrity of the justice system should result in denial of the relief claimed. I put it in that way rather than whether the contract should be regarded as tainted by illegality, because ***the question is whether the relief claimed should be granted****.*

110. ***I agree with the criticisms made in Nelson v Nelson and by academic commentators of the reliance rule as laid down in Bowmakers and Tinsley v Milligan, and I would hold that it should no longer be followed****. Unless a statute provides otherwise (expressly or by necessary implication), property can pass under a transaction which is illegal as a contract: Singh v Ali [1960] AC 167, 176, and Sharma v Simposh Ltd [2013] Ch 23, paras 27-44. There may be circumstances in which a court will refuse to lend its assistance to an owner to enforce his title as, for example, where to do so would be to assist the claimant in a drug trafficking operation, but the outcome should not depend on a procedural question.*

112. In Tinsley v Milligan, even if Miss Milligan had not owned up and come to terms with the DSS, it would have been disproportionate to have prevented her from enforcing her equitable interest in the property and conversely to have left Miss Tinsley unjustly enriched.

113. Critics of the "range of factors" approach say that it would create unacceptable uncertainty. I would make three points in reply. First, one of the principal criticisms of the law has been its uncertainty and unpredictability. Doctrinally it is riven with uncertainties: see, for example, paras 4-8 above. There is also uncertainty how a court will in practice steer its way in order to reach what appears to be a just and reasonable result. Second, I am not aware of evidence that uncertainty has been a source of serious problems in those jurisdictions which have taken a relatively flexible approach. Third, there are areas in which certainty is particularly important. Ordinary citizens and businesses enter into all sorts of everyday lawful activities which are governed by well understood rules of law. Lord Mansfield said in Vallejo v Wheeler (1774) 1 Cowp 143, 153:

"In all mercantile transactions the great object should be certainty: and therefore, it is of more consequence that a rule should be certain, than whether the rule is established one way or the other. Because speculators in trade then know what ground to go upon."

The same considerations do not apply in the same way to people contemplating unlawful activity. When he came to decide cases involving

illegality, Lord Mansfield acted in accordance with his judgment about where the public interest lay: see paras 96-98.

115. In the present case I would endorse the approach and conclusion of Gloster LJ. She correctly asked herself whether the policy underlying the rule which made the contract between Mr Patel and Mr Mirza illegal would be stultified if Mr Patel's claim in unjust enrichment were allowed. After examining the policy underlying the statutory provisions about insider dealing, she concluded that there was no logical basis why considerations of public policy should require Mr Patel to forfeit the moneys which he paid into Mr Mirza's account, and which were never used for the purpose for which they were paid. She said that such a result would not be a just and proportionate response to the illegality. I agree. It seems likely that Lord Mansfield would also have agreed: see Walker v Chapman. Mr Patel is seeking to unwind the arrangement, not to profit from it.

116. ….. In place of the basic rule and limited exceptions to which I referred at para 44 above, I would hold that a person who satisfies the ordinary requirements of a claim in unjust enrichment will not prima facie be debarred from recovering money paid or property transferred by reason of the fact that the consideration which has failed was an unlawful consideration. I do not exclude the possibility that there may be particular reason for the court to refuse its assistance to the claimant, applying the kind of exercise which Gloster LJ applied in this case, just as there may be a particular reason for the court to refuse to assist an owner to enforce his title to property, but such cases are likely to be rare. (At para 110 I gave the example of a drug trafficker.) In Tappenden v Randall (1801) 2 Bos & Pul 467, 471, 126 ER 1388, 1390, a case of a successful claim for the repayment of money paid for an unenforceable consideration which failed, Heath J said obiter that there might be "cases where the contract may be of a nature too grossly immoral for the court to enter into any discussion of it: as where one man has paid money by way of hire to another to murder a third person"…

120. The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system (or, possibly, certain aspects of public morality, the boundaries of which have never been made entirely

clear and which do not arise for consideration in this case). In assessing whether the public interest would be harmed in that way, it is necessary a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, b) to consider any other relevant public policy on which the denial of the claim may have an impact and c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts. Within that framework, 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.

121. A claimant, such as Mr Patel, who satisfies the ordinary requirements of a claim for unjust enrichment, should not be debarred from enforcing his claim by reason only of the fact that the money which he seeks to recover was paid for an unlawful purpose. There may be rare cases where for some particular reason the enforcement of such a claim might be regarded as undermining the integrity of the justice system, but there are no such circumstances in this case. I would dismiss the appeal.

Per Lord Kerr -

*124. Central to Lord Toulson's analysis is the "**trio of considerations**" which he identified in para 101 of his judgment. The first of these involves an examination of the underlying purpose of the "prohibition which has been transgressed". By this, I understand Lord Toulson to mean the reasons that a claimant's conduct should operate to bar him or her from a remedy which would otherwise be available. That such reasons should be subject to scrutiny is surely unexceptionable. Whether in order to preserve "the integrity of the legal system" (per McLachlin J in Hall v Hebert [1993] 2 SCR 159 at 169) or to allow a proper understanding of the true nature of the public policy imperative for recognising a defence of illegality, the purpose of the denial of a remedy to which the claimant would otherwise be entitled should be clearly understood.*

127. To take this case as an example, why should Mr Mirza's wrongful retention of Mr Patel's money not be weighed against the undoubted illegality on the part of Mr Patel in entering an agreement to wrongly benefit from Mr Mirza's claimed ability to obtain access to insider information? If one concentrates on the illegal nature of the contract to the exclusion of other considerations, an incongruous result in legal and moral terms may be produced. This can be avoided by taking into account and giving due weight to the second and third of Lord Toulson's considerations viz countervailing public policies which would be wrongly discounted by denial of the claim and the proportionality of refusing to acknowledge its legitimacy.

Per Lord Neuberger at paragraph 174.

174. I have come to the conclusion that the approach suggested by Lord Toulson in para 101 above provides as reliable and helpful guidance as it is possible to give in this difficult field. When faced with a claim based on a contract which involves illegal activity (whether or not the illegal activity has been wholly, partly or not at all undertaken), the court should, when deciding how to take into account the impact of the illegality on the claim, bear in mind the need for integrity and consistency in the justice system, and in particular (a) the policy behind the illegality, (b) any other public policy issues, and (c) the need for proportionality.