An Appeal to Illegality

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Abstract—This article discusses the illegality aspect of the decision of the Supreme Court in *Singularis*. It assesses the decision, arguing that the Court of Appeal was right to suggest that first-instance applications of *Patel v Mirza* should be open to appeal only on limited grounds because of the discretionary nature of the *Patel v Mirza* approach and the need to ration judicial resources.

Introduction

There is a policy that no court will help a claimant who founds their claim on an immoral or illegal act.[1] It is less clear in what circumstances an appellate court will help a claimant who thinks that the policy was wrongly applied at first instance to bar their claim. In *Singularis Holdings Ltd v Daiwa Capital Markets Europe*

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[1] *Holman v Johnson* (1775) 98 ER 1120, 1121 (Lord Mansfield CJ).

Ltd,[2] an illegality case otherwise 'bristling with simplicity',[3] the Supreme Court unanimously declined to shed much light.

I say, with respect, that this was a regrettable aspect of the decision. First, I outline the position before *Singularis*, focusing especially on the approach to illegality developed in *Patel v Mirza*.[4] Secondly, I describe the decision in *Singularis*. Thirdly, I comment on *Singularis*, arguing that the Supreme Court should have taken the opportunity to clarify what approach an appellate court should take on the appeal of a first instance application of the illegality doctrine. Primarily, I argue that the Supreme Court should have endorsed the approach suggested by the Court of Appeal and held that an appellate court should only interfere where the primary judge has made an error of principle or reached a result that is plainly wrong.

Getting the appellate approach right is obviously important to litigants considering an appeal. More significantly, it also casts reflective light on the nature of the *Patel* approach to assessing illegality defences. In particular, the appellate approach is a useful point of departure for assessing the criticism that the *Patel* approach is 'akin to a discretion'. That is because, in mirror-image, the appellate approach is usually based on whether the legal rule is a discretion or close to it. The argument I make here is that the *Patel* approach *is* akin to a discretion and that it should therefore command a high degree of appellate restraint. Equally key to my argument, however, is the insistence that if others take the opposite view about the nature of the *Patel* approach, they should also take the opposite view about the appellate approach.

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[2] [2019] UKSC 50.

[3] *Singularis* (n 2) [1], [39] (Baroness Hale PSC). Baroness Hale PSC borrowed the expression from counsel for Singularis.

[4] [2016] UKSC 24.

1. *The Position Before Singularis*

A. The Illegality Doctrine

I. Background

The doctrine of illegality bars a claim that would otherwise be successful because the claimant has done something illegal. The doctrine is a policy of 'judicial abstention, by which the judicial power of the state is withheld where its exercise in accordance with ordinary rules of private law would give effect to advantages derived from an illegal act.'[5] In the law of obligations, the illegality doctrine has long been regarded as a mess.[6] It has oscillated between 'rules', which have been criticised as arbitrary and over-rigid, and 'discretions', which have been criticised as unprincipled and unpredictable. I will suggest that those criticisms have not been totally allayed.

II. The Decision in Patel

In *Patel*, the Supreme Court recast the illegality doctrine. They rejected the old, rule-based approach and adopted a less 'mechanistic' process.[7]

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[5] *Jetivia SA v Bilta (UK) (in liquidation)* [2015] UKSC 23 [60] (Lord Sumption JSC).

[6] Andrew Burrows, 'A New Dawn for the Law of Illegality' in Sarah Green and Alan Bogg (eds), *Illegality After* Patel v Mirza (Hart 2018) 23, 35; *Patel* (n 4) [265] (Lord Sumption JSC).

[7] *ibid* [101] (Lord Toulson JSC).

The 'minority',[8] led by Lord Sumption JSC, preferred the old reliance rule.[9] The question under the reliance rule is whether the claimant is obliged to rely in support of the claim on something illegal they have done.[10] Lord Sumption JSC preferred it for two reasons. First, it 'accord[ed] with principle.'[11] The relevant principle was said to be that a person may not profit from his wrong. Therefore, the reliance rule rightly established a 'direct causal link between the illegality and the claim' and was the 'narrowest test of connection available.' Secondly, Lord Sumption JSC argued that the 'range of factors' test was unprincipled, uncertain, and likely to generate litigation.[12] That last prediction, at least from the perspective of the parties to *Singularis* - a costly piece of litigation turning (in part) on the correct application of the *Patel* approach - has proved correct.

The majority, led by Lord Toulson JSC and composed of Baroness Hale DPSC and Lords Kerr, Wilson and Hodge JJSC, based the new edition of the doctrine on 'two broadly discernible policy reasons'.[13] The first reason is that 'a person should not be allowed to profit from his own wrongdoing.'[14] The second reason 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.'[15] The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim

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[8] They were not technically the minority because the Supreme Court was unanimous in dismissing the appeal. The Supreme Court was not, however, unanimous in the approach it took to the question of on what basis the illegality question should be answered.
[9] *Patel* (n 4) [236] (Lord Sumption JSC).
[10] *ibid* (n 4) [234] (Lord Sumption JSC).
[11] *ibid* (n 4) [239] (Lord Sumption JSC).
[12] *ibid* (n 4) [262]-[265] (Lord Sumption JSC).
[13] *ibid* (n 4) [99] (Lord Toulson JSC).
[14] *ibid* (n 4) [99] (Lord Toulson JSC).
[15] *ibid* (n 4) [99] (Lord Toulson JSC).

if to do so would be harmful to the integrity of the legal system.[16] In assessing whether the public interest would be harmed in that way, it is necessary to consider:

i. The underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim;

ii. Any other relevant public policy on which the denial of the claim may have an impact; and

iii. 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. In considering whether it would be proportionate, potentially relevant factors include the seriousness of the conduct, its centrality to the contract,[17] whether it was intentional and whether there was marked disparity in the parties' respective culpability.[18]

Finally, the majority sought to emphasise that, even when considering a number of factors, the court is not free, on their approach, to decide a case in an undisciplined way, but should rather seek to identify transparently the considerations that guide its decision.[19]

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[16] *ibid* (n 4) [120] (Lord Toulson JSC).
[17] *Patel v Mirza* was a claim in unjust enrichment relating to an illegal contract, but in *Singularis* was agreed to govern claims in tort.
[18] *ibid* (n 4) [107] (Lord Toulson JSC).
[19] *ibid* (n 4) [120] (Lord Toulson JSC).

2. *The Decision in Singularis*

A. The Facts of Singularis

Singularis was, by the time it reached the Supreme Court,[20] a claim in negligence for breach of the duty owed by a bank to a customer to use reasonable care not to process suspicious payment instructions (the '***Quincecare*** **duty**').[21]

Singularis, the claimant company, was established to manage the personal assets of Maan Al Sanea, a Saudi Arabian businessman.[22] Daiwa, the defendant bank, held approximately US $204 million to its account.[23] Mr Al Sanea instructed Daiwa to transfer that money to other companies in his broader business group.[24] Singularis, acting through its liquidators, brought a claim against Daiwa in negligence for breach of the *Quincecare* duty by processing the payment instructions.[25]

B. Singularis at First Instance

Singularis was successful at first instance. Rose J had 'no hesitation' in finding that Daiwa was in breach of the *Quincecare* duty, holding that '[a]ny reasonable banker would have realised that there were many obvious, even glaring, signs that Mr Al Sanea was perpetrating a fraud on the company'.[26] Daiwa argued

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[20] An alternative claim in dishonest assistance of breach of fiduciary duty was dismissed at first instance: *Singularis Holdings Ltd v Daiwa Capital Markets Europe Ltd* [2017] EWHC 257 (Ch) [162] (Rose J). It was not taken on appeal: *Singularis* (n 2) [6], [8] (Baroness Hale PSC).
[21] This duty is known as the '*Quincecare*' duty because it was first posed by Steyn J in *Barclays Bank plc v Quincecare Ltd* [1992] 4 All ER 363.
[22] *Singularis* (n 2) [2] (Baroness Hale PSC).
[23] *ibid* (n 2) [3] (Baroness Hale PSC).
[24] *ibid* (n 2) [4] (Baroness Hale PSC).
[25] *ibid* (n 2) [6] (Baroness Hale PSC).
[26] *Singularis* (High Court) (n 20) [192] (Rose J).

that the claim was nevertheless barred by the doctrine of illegality.[27] This argument failed at a preliminary stage since Rose J held that the wrongdoing of Mr Al Sanea could not be attributed to Singularis for the purposes of the illegality doctrine.[28] The question of whether Singularis should be permitted to rely on its own illegal behaviour did not arise because the behaviour simply was not 'its *own*'.

It was therefore unnecessary to consider, as Rose J did, whether the claim would have succeeded had she given the opposite answer on the attribution question. However, she concluded that the illegality doctrine clearly would not have barred the claim.[29] The purpose of the prohibitions transgressed would not be undermined by allowing Singularis to recover.[30] Allowing the claim would bring a public policy benefit by incentivising banks to reduce and uncover financial crime.[31] Denial of the claim would have been an unfair and disproportionate response to the wrongdoing on the part of Singularis, especially since 'the possibility of making a deduction to reflect any contributory negligence on the customer's part enables the court to make a more appropriate adjustment than the rather blunt instrument of the illegality defence.'[32]

Rose J made a deduction of 25% under the Law Reform (Contributory Negligence) Act 1925 s 1(1) to reflect the failures of Singularis's board of directors to investigate or deal with Mr Al Sanea's behaviour.[33] Daiwa appealed on five grounds, including

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[27] *Singularis* (High Court) (n 20) [206] (Rose J).
[28] *ibid* (High Court) (n 20) [215] (Rose J).
[29] *ibid* (High Court) (n 20) [216] (Rose J).
[30] *ibid* (High Court) (n 20) [218] (Rose J).
[31] *ibid* (High Court) (n 20) [219] (Rose J).
[32] *ibid* (High Court) (n 20) [220] (Rose J).
[33] *ibid* (High Court) (n 20) [250]-[251] (Rose J).

that the judge ought to have held that Singularis's claim was barred by the illegality defence.[34]

C. Singularis in the Court of Appeal

The Court of Appeal upheld the judge's finding that Mr Al Sanea's fraudulent conduct should not be attributed to Singularis.[35] As at first instance, it was therefore not strictly necessary to consider the illegality doctrine.[36] Nevertheless, as at first instance, the Court of Appeal dealt with it briefly. It came to the same conclusion.[37] But before doing so, Sir Geoffrey Vos C commented:

> '… the first question to ask is: in what circumstances should an appellate court interfere with a first instance application of the *Patel v Mirza* test? […] It seems to me quite clear that an appellate court should not interfere merely because it would have taken a different view had it been undertaking the evaluation. The test involves balancing multiple policy considerations and applying a proportionality approach. Accordingly, an appellate court should only interfere if the first instance judge has proceeded on an erroneous legal basis, taken into account matters that were legally irrelevant, or failed to take into account matters that were legally relevant. That would be the approach in any other situations where proportionality was in issue on an appeal and should, therefore, be the case here.'[38]

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[34] *Singularis Holdings Ltd v Daiwa Capital Markets Europe Ltd* [2018] EWCA Civ 84 [7] (Sir Geoffrey Vos C).
[35] *Singularis* (Court of Appeal) (n 34) [60] (Sir Geoffrey Vos C).
[36] *ibid* (Court of Appeal) (n 34) [61] (Sir Geoffrey Vos C).
[37] *ibid* (Court of Appeal) (n 34) [67] (Sir Geoffrey Vos C).
[38] *ibid* (Court of Appeal) (n 34) [64]-[65] (Sir Geoffrey Vos C).

Daiwa appealed again to the Supreme Court on the same question.

D. Singularis in the Supreme Court

The Supreme Court unanimously (Baroness Hale PSC, Lord Reed DPSC, Lord Lloyd-Jones, Lord Sales JJSC, and Lord Thomas) dismissed Daiwa's appeal in 'short order'.[39] Rose J was 'correct for the reasons she gave'.[40] Once more, Daiwa failed on attribution and it was therefore unnecessary to consider the illegality doctrine. But Baroness Hale PSC, giving the judgment of the court, picked up Sir Geoffrey Vos C's comment on the circumstances in which an appellate court should interfere with a first-instance application of *Patel*. Her Ladyship said:

> 'I should, however, record my reservations about the view expressed by the Court of Appeal as to the role of an appellate court in relation to the illegality defence […] Daiwa point out that applying the defence is "not akin to the exercise of discretion" and an appellate court is as well placed to evaluate the arguments as is the trial judge. It is not necessary to resolve this in order to resolve this appeal and there are cases concerning the illegality defence pending in the Supreme Court where *it should not be assumed* that *this Court will endorse the approach* of the Court of Appeal.'[41]

This last, rather ominous, sentence appears to be a reference to the decision of the Court of Appeal in *Henderson v Dorset Healthcare University NHS Foundation Trust*,[42] from which an

[39] *ibid* (n 2) [39]-[40].
[40] *ibid* (n 2) [21].
[41] *ibid* (n 2) [21] (emphasis added).
[42] [2018] EWCA Civ 1841.

appeal to the Supreme Court is, at the time of writing, outstanding.

3. Commentary on Singularis

A. Appeals from Illegality

I argue that the Supreme Court should have endorsed the approach suggested by the Court of Appeal and held that an appellate court should only interfere where the primary judge has made an error of principle or reached a result that is plainly wrong. I attempt to defend this conclusion in three stages. First, I propose that this position is a better interpretation of the existing law. I develop what I suggest are the three key characteristics of legal questions which, in general, make appellate courts reluctant to review them on appeal. Then I apply them to the *Patel* approach, arguing that an application of *Patel* is, classically, a decision which should be overturned only where the judge has made an error of principle or reached a result that is plainly wrong. Secondly, I show that the Court of Appeal's approach is more normatively desirable because it is consistent with the rationale of rationing judicial resources. Thirdly, I consider and reject a powerful objection to the Court of Appeal's approach: that it buttresses unprincipled and unpredictable judicial discretion.

B. The Patel Approach as Demanding Appellate Restraint

I. The Characteristics of Decisions that Demand Appellate Restraint

The reluctance with which an appellate court will overturn first instance decisions depends on the nature of the decision under review.[43] For our purposes,[44] I emphasise three aspects of the decision under review. These three characteristics are particularly important: (1) the precision of the legal rule that has been applied; (2) the number of factors involved in applying the legal rule and the element of proportionality involved in comparing and balancing those factors; and (3) the importance of evaluations of fact to applying the legal rule, particularly evaluations of oral evidence. Later, I argue that this approach is desirable, but for now confine myself to describing the law.

First, where the legal rule is imprecise rather than precise, it demands a higher degree of appellate restraint. That a rule is imprecise is usually expressed by saying that it admits of more than one answer[45] or that the limits of reasonable disagreement are generous.[46] Hoffmann LJ (as he then was) said explicitly in *Re Grayan Building Services*:[47] 'the *vaguer* the standard … the more reluctant an appellate court will be to interfere with the trial

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[43] James Goudkamp, 'The End of an Era? Illegality in Private Law in the Supreme Court' (2017) 133 LQR 14, 19.
[44] There is also a strong argument that the expertise (or otherwise) of the first instance tribunal is relevant to the level of appellate restraint, but since it is not relevant here I do not consider it in any detail: *South Cone v Bessant* [2002] EWCA Civ 763 [26] (Robert Walker LJ).
[45] *Jackson v Murray* [2015] UKSC 5 [28] (Lord Reed JSC).
[46] *Jackson* (n 45) [46] (Lord Hodge JSC); *George Mitchell (Chesterhall) v Finney Lock Seeds* [1983] 2 AC 803, 815-816 (Lord Bridge of Harwich).
[47] [1995] Ch 241.

judge's decision.'[48] Again, in *Designers Guild*,[49] he justified his conclusion that the appellate court should interfere by saying that the legal rule being applied was 'not altogether precise'.[50]

Secondly, where the legal rule involves the assessment of a number of factors and an element of proportionality in comparing and balancing those factors, the decision demands a higher degree of appellate restraint. The Court of Appeal has repeatedly held that where the test is 'multifactorial' or involves a 'combination of features of varying importance',[51] the appellate tribunal should be 'slow to interfere'[52] or 'show a real reluctance' to interfere.[53] It has also confirmed that the greater the number of factors involved, the greater the reluctance the appellate court should show.[54] In particular, where the factors involved are incommensurable (they do not compare like with like), the Supreme Court has confirmed that the appellate court should show particular restraint.[55]

Thirdly, where evaluations of fact are important in applying the legal rule, particularly evaluations of oral evidence, the decision demands a higher degree of appellate restraint. The reason is that 'specific findings of fact, even by the most meticulous judge, are inherently an incomplete state of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of

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48 *Re Grayan Building Services* [1995] Ch 241, 254 (Hoffmann LJ) (emphasis added).
49 *Designers Guild Ltd v Russell Williams (Textiles) Ltd* [2000] 1 WLR 2416 (CA).
50 *ibid* (n 49) 2424 (Hoffmann LJ).
51 *ibid* (n 49) 2424 (Hoffmann LJ).
52 *Ardmore Construction Ltd v HMRC* [2018] EWCA Civ 1438 [39] (Arden LJ).
53 *South Cone* (n 44) [28] (Robert Walker LJ).
54 *Re Grayan Building Services* (n 48) 254 (Hoffmann LJ).
55 *Jackson* (n 45) [27] (Lord Reed JSC).

imprecision as to emphasis, relative weight, minor qualification and nuance […] of which time and language do not permit exact expression'.[56] That is particularly so where the judge has had to assess the quality of oral evidence, which is obviously unavailable to the appellate court.[57] There are nuances in evidence which properly influence the judge but which it would be unrealistic to expect to be completely available to the appellate court. The importance of evaluations of fact has recently been emphasised by the Court of Appeal.[58]

Contributory negligence is an apposite illustration of a legal rule that displays each of the three characteristics identified earlier, that call for appellate restraint.[59] It admits of a variety of reasonable answers.[60] It has been powerfully asserted that it involves the assessment of a number of factors which are difficult if not impossible successfully to weigh against each other.[61] It involves necessarily the nuanced evaluation of facts. Consequently, it is well established that a contributory negligence assessment can only be interfered with where the judge has made an error of principle or reached a result that is plainly wrong.[62]

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[56] *Biogen v Medeva* [1997] RPC 1, 45 (Hoffmann LJ).
[57] *South Cone* (n 44) [26] (Robert Walker LJ).
[58] *Ardmore Construction* (n 52) [39] (Arden LJ).
[59] Nicholas Strauss QC, in contrast, has asserted that the analogy between the *Patel v Mirza* approach and contributory negligence apportionment is 'hardly convincing': Nicholas Strauss QC, 'Illegality Decisions After *Patel v Mirza*' (2018) 213 LQR 538, 541.
[60] *Jackson* (n 45) [28] (Lord Reed JSC).
[61] Robert Stevens, 'Should Contributory Fault be Analogue or Digital?' in Andrew Dyson, James Goudkamp, and Frederick Wilmot-Smith, *Defences in Tort* (Bloomsbury 2015) 247, 259.
[62] *Jackson* (n 45) [28] (Lord Reed JSC).

II. Those Characteristics Applied to the Patel Approach

The *Patel* approach assesses in three stages whether a claim should be barred for illegality by reference primarily to arguments of legal policy. I argue that the approach displays each of the three characteristics I have just described clearly. Consequently, I argue the approach should demand a high degree of appellate restraint.

First, the *Patel* approach is necessarily imprecise in that its application in any one case admits of more than one answer. Judges may legitimately differ on the weight to be assigned to various factors and the direction in which they point in a particular case. In *Singularis*, counsel for Daiwa made a strong argument in the Court of Appeal and in the Supreme Court that Rose J should have put weight on the possibility that barring the claim could encourage non-executive directors to play an active role in the supervision of companies.[63] Although the point was not made to her,[64] that argument might quite conceivably have convinced a different judge to take a different view. The Supreme Court did not deal with it.[65]

Secondly, the *Patel* approach involves the assessment of a number of factors and an element of proportionality in comparing and balancing those factors. There is no hard limit on the number of factors that may potentially be relevant at the third stage of the *Patel* approach (whether denial of the claim would be a proportionate response to the claimant's illegal behaviour). The majority's judgment described three factors as 'potentially

[63] *Singularis* (Court of Appeal) (n 34) [62] (Sir Geoffrey Vos C).
[64] *ibid* (Court of Appeal) (n 34) (Sir Geoffrey Vos C).
[65] *Singularis* (n 2) [21] (Baroness Hale PSC). It is not clear whether or not the argument was maintained in the Supreme Court: *Singularis* (n 2) [20] (Baroness Hale PSC).

relevant' and a further eight factors[66] as 'helpful'.[67] More significantly, the approach requires these factors to be pitched against each other even though they represent fundamentally incommensurable interests, comparable to asking judges 'whether five litres is greater than two meters.'[68] This introduces a significant element of proportionality.

Lord Neuberger PSC, endorsing the majority's approach in *Patel*, commented: 'Once a judge is required to take into account a significant number of relevant factors, and the question of how much weight to give each of them is a matter for the judge, the difference between judgment and discretion is, I think, in practice pretty slight.'[69] The 'minority' in *Patel* argued against the majority's approach by saying that 'it converts a legal principle into an exercise of judicial discretion.'[70] It is tolerably clear, then, that the approach gives, in practice, a degree of latitude to the judge and consequently to the appellate court. It is significant that the proposition that *Patel* is either close or equivalent to a discretion is accepted both by its supporters and by its critics.

Thirdly, the *Patel* approach is dependent on evaluations of fact, and often on evaluations of oral evidence. In *Singularis*, Rose J based her application of the *Patel* approach, in particular her finding that Daiwa's breaches of the *Quincecare* duty were 'extensive' and 'obvious', on detailed evaluation of Daiwa's wrongdoing. She found that the precarious financial state of Singularis was 'obvious'[71] and that Daiwa was aware of its

[66] *Patel* (n 4) [93] (Lord Toulson JSC).
[67] *ibid* (n 4) [107] (Lord Toulson JSC).
[68] James Goudkamp, 'The End of an Era? Illegality in Private Law in the Supreme Court' (2017) 133 LQR 14, 18.
[69] *Patel* (n 4) [173] (Lord Neuberger PSC).
[70] *ibid* (n 4) [217] (Lord Clarke JSC).
[71] *Singularis* (High Court) (n 20) [193] (Rose J).

substantial debts.[72] She found that Mr Al Sanea's dishonesty was obvious[73] and that the bogus documents he produced to perpetrate the fraud were clearly shams.[74] It is impossible to avoid the conclusion that these findings were based on detailed evaluation of the oral evidence.[75] It is difficult to square this with Daiwa's argument in the Supreme Court that 'an appellate court is as well placed to evaluate the arguments as is the trial judge.'[76] Evaluating the arguments requires applying the facts as found at first instance. There is a strong argument that the judge's findings were based on nuances in the evidence that the judge properly took into account but that simply were not available to the Supreme Court or the Court of Appeal.

Therefore, I argue that the *Patel* approach to assessing illegality defences should demand a high degree of appellate restraint. James Goudkamp was, before *Singularis*, quite right, with respect, in asserting that: 'appeals regarding the illegality doctrine are now extremely unpromising […] Since the policy-based test gives trial judges considerable freedom to decide which factors are material and the weight that they carry, the test is highly discretionary. Consequently, decisions regarding the illegality doctrine will be largely impervious to appellate review.'[77]

C. The Rationing Rationale

I also make a normative argument in favour of the Court of Appeal's approach: that it better rations judicial resources. First, I adopt Frederick Wilmot-Smith's powerful argument that judicial

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[72] *Singularis* (High Court) (n 20) [196] (Rose J).
[73] *ibid* (High Court) (n 20) [199] (Rose J).
[74] *ibid* (High Court) (n 20) [204] (Rose J).
[75] *ibid* (High Court) (n 20) [202]-[203] (Rose J).
[76] *ibid* (n 2) [21] (Baroness Hale PSC).
[77] James Goudkamp, 'The End of an Era? Illegality in Private Law in the Supreme Court' (2017) 133 LQR 14, 19.

resources are scarce and should be allocated with care. Secondly, I apply that argument to appellate review of first instance applications of the *Patel* approach.

Frederick Wilmot-Smith has argued that 'a question of distributive justice lies at the heart of most of private law: the question of who should be allocated scarce legal resources.'[78] Tertiary rights (rights to call upon the state to enforce primary or secondary rights) are themselves a distribuendum.[79] They are a scarce distribuendum because: 'Judges are busy. They have nowhere near enough time to think about their cases, let alone to hear all the cases they possibly could. This makes court time scarce.'[80] Therefore: the 'allocation of tertiary rights … is one way in which we ration individuals' entitlement to the scarce resource of judicial resources.'[81] Wilmot-Smith develops a framework for assessing (and comparing) claims to judicial resources.[82] Applying this framework to the illegality doctrine, he concludes with force that: 'It is very hard to justify [the doctrine] as a rationing rule.'[83]

I argue that Wilmot-Smith's 'rationing rationale' is a much better fit for the rules relating to appellate review of illegality decisions than for the rules governing how those decisions are made in the first place. Errors of law are stronger claims on judicial resources than sub-optimal applications of law to specific facts. This is for two reasons.

First, errors of law, even at first instance, have a tendency to 'ripple'. Just as the public at large benefits from correctly

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[78] Frederick Wilmot-Smith, 'Illegality as a Rationing Rule' in Sarah Green and Alan Bogg (eds), *Illegality After Patel v Mirza* (Hart 2018) 107, 129.
[79] *ibid* (n 78) 108-110.
[80] *ibid* (n 78) 111.
[81] *ibid* (n 78) 111.
[82] *ibid* (n 78) 121-125.
[83] *ibid* (n 78) 129.

decided decisions because the 'names of people who brought cases in the past live on as shorthand for the legal rules and principles which their cases established',[84] the public at large suffers from incorrectly decided decisions because they detract from certainty and clarity as to what the law is. Secondly, limiting review on appeal to errors of law deters speculative appeals being brought on questions which can, within the limits of reasonable disagreement, be given different, mutually inconsistent answers. It prevents parties from going to an appellate court 'simply in the hope that the impression formed by the judges [there], or at least by two of them, will be different from that of the trial judge.'[85] Appellate courts need to reduce the number of appeals they hear. And only hearing cases where they are sure that they are going to 'correct an *error*', rather than cases where they risk giving another reasonable answer to a question which admits of more than one, is a sensible way of doing so.[86]

That is particularly so in the Supreme Court.[87] As the Court unanimously cautioned in *Vedanta*[88] (in a different context):

> 'Judicial restraint is of particular importance … where the Court of Appeal has already concurred with the fact-finding and evaluative analysis of the first instance judge. The essential business of this court is to deal with issues of law, rather than fact-finding or the re-exercise of

[84] R *(UNISON) v Lord Chancellor* [2017] UKSC 51 [70] (Lord Reed JSC).
[85] *Norowzian v Arks Ltd (No 2*) [2000] FSR 363, 370 (Buxton LJ).
[86] Whether it is possible to give a 'correct' answer to a legal question and, conversely, whether it is coherent to speak of giving a number of correct answers to legal questions is a controversial question of legal philosophy with which I do not have time to deal here.
[87] Although much of that work is done already since the Supreme Court will only grant leave to appeal where the permission to appeal application discloses a point of law of general public importance.
[88] *Vedanta Resources PLC v Lungowe* [2019] UKSC 20.

> discretion. The pursuit of detailed factual (or evaluative) analysis in this court is therefore inappropriate, both because it is likely to involve a needless and useless misapplication of the parties' time and resources, and because it distracts this court from its proper focus upon real issues of law.' [89]

Nicholas Strauss QC argues that 'whether to impose a duty of care in a negligence claim often involves evaluation of a number of conflicting factors, and questions of proportionality, but such decisions have never been treated on appeal as open to review only on limited grounds.'[90] I suggest that the way in which appeals from applications of *Caparo*[91] (the approach to assessing whether a duty in law should be imposed in a 'novel' negligence claim) are approached actually serves as a constructive comparison. The *Caparo* approach, while similar on its face to the *Patel* approach in its display of the three characteristics identified above, does not have strong rationing arguments in its favour and therefore correctly does not command much appellate restraint.

The English approach to the duty of care question in negligence is based on incremental analogy with established authorities.[92] It is only in a novel case that the judge need draw that analogy based on the *Caparo* ingredients and, inter alia, consider whether it is 'fair, just, and reasonable' to impose a duty of care.[93] Crucially, once a duty has been established, it is 'unnecessary and inappropriate' to reconsider whether the existence of the duty is fair, just and reasonable.[94] That is to say, it is only in a 'novel' case that the question involves 'evaluation of

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[89] *Vedanta* (n 88) [12] (Lord Briggs JSC).
[90] Strauss (n 59) 541.
[91] *Caparo Industries Plc v Dickman [1990] UKHL 2.*
[92] *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4 [21].
[93] *ibid* (n 92) [27].
[94] *ibid* (n 92) [26].

a number of conflicting factors, and questions of proportionality.' The consequence is that when judges 'get it wrong', the error 'ripples' in the same way because the evaluative, factor-based exercise can properly only be done once, before the imposition of a duty of care on those facts becomes an 'established principle'. In particular, where the defendant can frame their defence as a 'duty of care' issue, she can apply for the claim to be struck out without the inconvenience of a trial.[95] A first instance decision is persuasive for, albeit not binding on, other first instance judges.[96] A decision at the Court of Appeal level is binding on other first instance judges. Appeals on wider grounds are a sensible allocation of judicial resources because the question of whether a duty of care ought to exist ripples across to all cases on the same fact pattern. It is, in one sense, not properly called a 'case-by-case' question. As I have suggested above, the converse is true of illegality defences under the *Patel* approach.

The obvious qualification to this argument is that appellate courts properly substitute their own view where the judge has reached a result that is plainly wrong.[97] In those cases, there seems to be a strong argument that the demands of bilateral justice in those cases are so strong that it is impossible to justify refusing review.

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[95] Donal Nolan, 'Deconstructing the Duty of Care' (2013) 129 LQR 559, 568.

[96] For instance, the *Quincecare* duty itself has, to my knowledge, only ever been authoritatively confirmed in a first instance decision.

[97] There is a strong analogy in a different institutional context with the approach taken by the courts to judicial review claims brought against administrative decisions for illegality. In short, a decision is vulnerable if it is, inter alia, outside the range of reasonable responses or based on an error of law: Lord Woolf and others, *De Smith's Judicial Review* (8th edn, Thomson Reuters 2018) [11-022], [5-001].

D. The Return of Judicial Discretion

A powerful objection to the Court of Appeal's approach is that it increases the 'staying power' of unprincipled and unpredictable judicial discretion. The majority in *Patel* set its face against the illegality doctrine becoming a 'potentially arbitrary and unpredictable discretion'.[98] In particular, the majority stressed that the court was not free to decide a case 'in an undisciplined way'[99] and that what was required was 'a principled and transparent assessment of the considerations identified'.[100] They held that the test was a discretion neither in law nor in practice and should not be treated as akin to one.[101] The fear of arbitrary application was consistently invoked as a justification for changing the law on illegality.[102] Nicholas Strauss QC concludes that: 'To extend the ambit of judicial discretion in this way would, it is submitted, be undesirable.'[103]

This objection is, with respect, unpersuasive because it confuses the question of whether a test is 'discretionary' with the question of what level of appellate restraint it should be afforded. I have described above the ways in which these questions are linked by developing an argument that the more 'discretionary' a test is the higher the level of restraint it should be afforded. But asserting that the cure for undesirably 'discretionary' tests is to increase the availability of appeals against them is to let the tail wag the dog. It seems that Strauss's objection is to the strong role of 'discretion' in the *Patel* approach itself, and not actually to the way in which it is treated on appeal. It is no defence for an arbitrary rule of law that it can be easily appealed. Many parties

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[98] Strauss (n 59) 541.
[99] *Patel* (n 4) [109] (Lord Toulson JSC).
[100] *ibid* (n 4) [120] (Lord Toulson JSC).
[101] *ibid* (n 4) [170] (Lord Toulson JSC).
[102] *ibid* (n 4) [3] (Lord Toulson JSC).
[103] Strauss (n 59) 542.

cannot afford to, or would not rationally, appeal. Whatever the merits of the old reliance rule, it no longer represents the law after *Patel*.

Conclusion

The decision in *Singularis* was regrettable in that it did not clarify the approach that an appellate court should take to a first instance application of the illegality doctrine which is attacked on appeal, even though any statement on this point in *Singularis* would technically have been obiter. Clarity on the appellate approach is not only important because it guides litigants considering an appeal, but also more fundamentally relevant because answering the appellate question throws reflective light on the controversial question of the nature of the *Patel* approach. That reflective light reveals, I have suggested, that the *Patel* approach is, if not a discretion, something close to it, and therefore that it should be approached with a high degree of appellate restraint.

First, I described the law before *Singularis*, focusing in particular on the approach to illegality defences developed in *Patel*. Secondly, I explained the decision in *Singularis*. Thirdly, I commented on *Singularis*, developing an argument that the Supreme Court was wrong to record reservations about the approach suggested by the Court of Appeal. It should have held that an appellate court can only interfere where the primary judge has made an error of principle or reached a result that is plainly wrong. That, at the very least, would go some way to loosening the ever-tightening grip that illegality questions seem to have on the time and resources of appellate courts.