**Henderson and Illegality in Tort: A Needless Retreat into Opacity**

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**Abstract**—This article discusses the decision of *Henderson v Dorset Healthcare University NHS Foundation Trust*. It argues that the Court of Appeal was mistaken not to apply the decision in *Patel v Mirza* across the whole of tort law. This article advances the view that *Patel* represented a step forward for illegality in tort law because it forced public policy decisions to be addressed more explicitly in judgments. The test formulated in *Patel* is also asserted to be clearer and transparent, leading to greater predictability. It is for these reasons that the decision in *Henderson* is regrettable.

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1. **Introduction**

It is a great shame that the Court of Appeal in *Henderson v Dorset Healthcare University NHS Foundation Trust* ¹ made an unnecessary regression in choosing not to apply *Patel v Mirza* in a tort law

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context. Refusing to address policy concerns of consistency explicitly will have consequences not only for illegality in tort law but potentially English law as a whole. Yet again, judges refuse to transparently address public policy concerns.

In *Henderson* the claimant argued that the decision of the unjust enrichment case *Patel v Mirza* should apply to tort law. The *Patel* judgment included a new test to be applied to cases involving illegality. The issue in *Henderson* was whether the new test in *Patel* had replaced the previous rules for illegality in tort found in *Gray* and *Clunis*. The Court of Appeal held that *Patel* did not apply where there is previous authority. Thus, the claimant was held to be barred from compensation due to her illegality, using the test from *Gray*.

This article contends that *Patel* should be applied regardless of previous authority because the test formulated in *Patel* is preferable to previous formulations. The test proposed by Lord Toulson in *Patel* improves on the previous law, which was complex, uncertain and lacked transparency. The *Patel* test is more open and transparent, addressing the different underlying principles of illegality more explicitly, thus making it a predictable test.

The first part of this article will argue that *Patel* should be interpreted, as a matter of law, to apply across private law. The second part of this article will concern *Henderson* and the reasons given by the Court of Appeal for not applying *Patel*; this article will argue that the reasoning of the Court of Appeal demonstrates

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their misinterpretation of Patel. Key to this assertion is that in Patel, the Supreme Court used previous case law to influence the new test as proposed, meaning that the decision is rooted in the previous jurisprudence and is a development of it rather than a completely new invention. The third part of this article will demonstrate why Patel is preferred as an alternative test to the test employed in Henderson.

2. Patel v Mirza – Applicable across private law

It is better to start by determining what Patel decided, and then to evaluate the decision of Henderson, which necessarily concerned the decision of Patel. It is interesting here to analyse the academic predictions made prior to Henderson and evaluate whether these predictions are reflected in the decision.

A. What did Patel decide?

Mr Patel paid Mr Mirza a total of £620,000 following an agreement under which the defendant would use the money to bet on shares using inside information. Use of inside information for this purpose is a criminal offence under s. 52 of the Criminal Justice Act 1993. The agreement consequently could not be carried out since the inside information was not supplied and so the claimant sought repayment of the £620,000 through a claim for unjust enrichment.

The Supreme Court held that the claimant was entitled to restitution, despite the illegality involved. Lord Toulson, speaking for the majority of six (out of nine judges), rejected the
rule-based approach, namely the reliance rule found in *Tinsley v Milligan*. 4 Lord Toulson said:

‘[O]ne cannot judge whether allowing a claim which is in some way tainted by illegality would be contrary to the public interest, because it would be harmful to the integrity of the legal system, without (a) considering the underlying purpose of the prohibition which has been transgressed, (b) considering conversely any other relevant public policies which may be rendered ineffective or less effective by denial of the claim, and (c) keeping in mind the possibility of overkill unless the law is applied with a due sense of proportionality. […] That trio of necessary considerations can be found in the case law’. 5

The three rules found in Lord Toulson’s *dicta*, labelled (a), (b) and (c), are to be referred to as the new *Patel* ‘test’ for illegality. The three considerations can be summarised as (a) purposive evaluation of prohibition, (b) possible effect on relevant public policies and (c) proportionality.

**B. How is this different to the law prior to Patel?**

Comparing the *Patel* test with previous authority is inherently difficult because of the uncertainty and complexity which riddled this area of law. The law prior to *Patel* was confused by a variety of different doctrines. Although the law was confused, the concerns beneath the doctrines were not conflicting and this is

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4 *Tinsley v Milligan* [1994] 1 AC 340 (HL), rejected in *Patel* (n 2) at [110].
5 *Patel* (n 2) [101].
what informed, and was crystallised, in the subsequent Patel test. Where Patel excels is that it is a test derived from a multitude of cases; it manifests the common threads from the cases in one test resulting in greater clarity in the law.  

In the decisions prior to Patel, two concerns arise as to the illegality defence: that the law remains consistent and is not self-defeating; and that the blameworthiness of the claimant is considered. Consistency is reiterated in a variety of forms but all demonstrate the desire of the courts to not undermine the criminal law through allowing private law recovery. Lord Hoffmann in Gray makes two arguments as to the justification behind the illegality defence, but this article argues they broadly demonstrate the same concern for consistency in the law. First, he says ‘it is offensive to public notions of the fair distribution of resources that a claimant should be compensated (usually out of public funds) for the consequences of his own criminal conduct.’

Second, he makes explicit reference to inconsistency: ‘The inconsistency is between the criminal law, which authorizes the damage suffered by the plaintiff in the form of loss of liberty because of his own personal responsibility for the crimes he committed, and the claim that the civil law should require someone else to compensate him for that loss of liberty.’

It may be argued that Lord Hoffmann’s two justifications do in fact portray different concerns, but this article notes that upon closer inspection, they both relay the need or desire for

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6 As argued by Andrew Burrows, ‘Illegality after Patel v Mirza’ (2017) 70 CLP 55; and Lord Toulson in Patel (n2) at [101]
7 Gray (n 3) [51].
8 Ibid [37].
consistency in the law. If one attempted to separate the two, one may argue the second point seems to be communicating a principle well known to the defence of illegality; namely, that criminals should not benefit from their own wrongdoing. But, in reality, the root of this principle is still consistency. How do we ensure that a criminal does not benefit from their own wrongdoing? By denying them the benefits of private law associated with the wrongdoing, that is to say, by promoting consistency in the law.

The first justification of fair distribution of public resource can similarly be reduced to a concern of consistency. Why are we concerned about fair distribution of resources? Should criminal and private law clash as a result of inconsistency, this would effectively result in a waste of public money. This demonstrates the practical necessity for consistency in the law, whereas the explicit reference to inconsistency demonstrates a more theoretical concern, namely, that it makes little sense to take liberty away for one reason and compensate for the loss of liberty for another.

This consistency concern is not just found in Gray. This policy motivation for the illegality defence is also found in National Coal Board v England where the court examined the legislation to see whether its policy was affected by the illegality. This is similarly advocating consistency in the law; it would be contrary to harmony in the law should the policy of the legislation be undermined through recovery in private law. There even seems to be a concern for the moral message which lack of the illegality defence could create: several cases (such as Cross v Kirkby) question whether allowing a claim would condone the claimant’s

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illegal act. 10 This is rooted in a reluctance to contradict the ‘ought-ness’ or the normative property of the criminal law.

Second, many of the cases, though contrasting in the means by which they achieve it, seek to address the blameworthiness of the claimant. Courts have taken notice of the seriousness of the claimant’s illegality: for example, Lord Rodger proposed in Gray v Thames Trains Ltd that the decision may vary if the offence for which the claimant was convicted was trivial. 11 Similarly, Lord Sumption in Les Laboratoires Servier v Apotex comments that ‘what constitutes turpitude for the purpose of the defence depends on the legal character of the acts relied on’. 12 Further, in Clunis, Lord Justice Beldam said that public policy only requires the court to deny assistance to the claimant if they were implicated in the illegality. 13 This particular concern has led to courts to balance interests. Lord Justice Ward said in Hewison v Meridian Shipping: ‘the disproportion is between the claimant’s conduct and the seriousness of the loss he will incur if his claim is not allowed.’ 14 The importance of the seriousness of the crime, implication in illegality and a need for proportionality all are veins of the same idea; namely, that the claimant should not be treated unfairly in comparison to their blameworthiness, hence leading to some cases adopting this proportionality approach.

The Patel test crystallises the substantive concerns of previous case law, but it does so by producing a different test. The Patel test broadly examines (a) the purpose behind the

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10 Cross v Kirkby [2000] EWCA Civ 426 (CA)
11 Gray (n 3) [83].
prohibition, (b) other public policies which may be affected and (c) proportionality. The Patel stages capture the two common threads of consistency and blameworthiness prevalent in the reasoning of the case law. In stages (a) and (b), the court is concerned about ensuring consistency in the law; requiring that the purpose is not undermined and allowing recovery that would not be contrary to other public policy. This captures the consistency concerns of Lord Hoffmann in Gray; purposive evaluation requires that the law does not, for example, take away liberty for one reason, and compensate it for another. One could also argue that stage (b) captures more precisely the practical motivation for consistency. Arguably, if an investigation costs a lot of money for public authorities, this may be a contrary to a general policy to have efficient public spending should recovery for an illegal act then be allowed. Proportionality in the third limb addresses the blameworthiness theme prevalent in the case law, regarding the seriousness of the offence, and how implicated the claimant was in the illegality.

This argument that case law was crystallised into the three limb Patel test is further exemplified by the Supreme Court’s decision to overrule Tinsley v Milligan. 15 Lord Toulson suggests that the reliance principle of Tinsley ‘could produce different results according to procedural technicality which had nothing to do with the underlying policies.’ 16 Namely, it did not address the two threads of consistency and blameworthiness prevalent in the case law; most significantly the concern about the blameworthiness of the claimant. The reliance principle did not involve the weighing-up predominant in various cases, as previously argued. It therefore led to unfair and arbitrary

15 Tinsley (n 4).
16 Patel (n 2) [87].
decisions. Thus, through the Patel test, the majority of the Supreme Court were interested in developing and furthering both the common threads within the case law; proportionality and consideration of blameworthiness.

This view that previous law is subsumed into the Patel test is supported by Patel itself; Lord Toulson in his judgment refers to a variety of existing tort case law, for example Gray, but does not opine that they are wrong, and thus, not to be applied. Instead, they are discussed prior to his introduction to the test, demonstrating that this case law has informed the test produced. Lord Toulson does not create the test; it is observed through accumulated case law. Lord Toulson, the author of the Patel test, says himself, ‘that trio of necessary considerations can be found in the case law.’\(^{17}\) That is not to say that nothing changed through the production of the Patel test; the existing law was morphed into another form. This form was a new clear and transparent test fusing the case law principles into one authority, instead of the blurred considerations before Patel. To assert that the Patel test is an invention is simply misguided; it is innovative unification of principles previously considered in the case law of illegality. It is a restructuring – but utilising the same resources as previously. This restructuring was the Supreme Court tailoring the law, to be greatly more clear, concise and more explicitly principled.

C. What predictions were made as to the application of Patel?

The applicability of the Patel decision was uncertain; the ratio of the decision involves unjust enrichment illegality, but Lord

\(^{17}\) Patel (n 2) [101].
Toulson, leading the majority, speaks widely as if the *Patel* test were to apply to the whole of private law. This article argues, in agreement with Burrows, that ‘it is clear […] that the majority saw itself as laying down a new approach to illegality across civil law. So, the new approach is applicable to the enforcement of a contract or a tort claim or a claim based on property law.’ 18

Goudkamp argues that there are three ‘clues’ in the judgment of *Patel* that the majority intended the test to be applied across private law: 19

(i) The claim in *Patel* was unjust enrichment, but nothing was suggested by the judges to be particular about this context so far as the illegality doctrine is concerned;

(ii) The justices of the Supreme Court drew on case law from other parts of private law; and

(iii) *Tinsley* is rejected, a trusts case (applied in tort) although the facts of *Patel* were unjust enrichment.

(i) One may attempt to rebut this contention by demonstrating that, in this case, Lord Toulson observes the doctrinal specificity of unjust enrichment. 20 But it would be misguided to regard this as a strong criticism; Lord Toulson is specific when applying the test to the area of unjust enrichment. By saying that there are additional applicative considerations unique to unjust enrichment is not to render the test inapplicable more widely, for example, in tort. It suggests there are additional

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18 Andrew Burrows (n 6)
20 See eg. *Patel* (n 2) [44].
considerations when using the test for unjust enrichment. In fact, it would be wrong for the law not to mould to the niches of the type of claim to which it has been applied. The Patel test, in its (a), (b) and (c) format is clearly general and not exclusive in these elements. Only upon application, does the exclusivity and specificity of the law in hand come into play.

(ii) Judges often draw on other areas of the law to inspire their decision, but do not intend for their decision to impact those areas of the law. What is important, therefore, is how the case law is used. This article argues that the case law is used not only to inspire the Patel test, but to form it. The case law is not merely inspiration from which the test is drawn; it is its root – this is a more direct and active use of the case law. The previous case law is utilised to propel the future law. This article contends that the majority judgment makes use of the current mismatch of case law across private law, in an attempt to find one common theme within it. This view of the judgment is particularly supported by Lord Toulson’s comment that:

‘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.’ 21

As noted, there are underlying concerns found in the case law which are then translated into the new Patel formulation. It

21 Ibid [99].
would be nonsensical to criticise the general law applicable to all private law, analyse the cases, propose a new formulation, and then have the new formulation only apply to unjust enrichment. It appears in *Patel* that the majority are trying to find a solution within the whole of private law, and this should therefore be applied across private law. Throughout Lord Toulson’s judgment he makes references to the criticism of the current state of the law of illegality in general, speaking of, for example, the four areas of critique by the Law Commission: ‘complexity, uncertainty, arbitrariness and lack of transparency’.  

(ii) Goudkamp observes that, as there is no obvious reason why the policy-based test should be extended to the law of trusts and stop there, the consequent inference should be that *Patel* applies across private law, including to the law of torts. Further, the fact that *Tinsley* is expressly rejected, whilst no other cases are, is further evidence of the *Patel* test being rooted in this case law and thus not expressly overruling it or being incompatible with it. This suggests, again, that *Patel* is a different form of test rather than one which completely replaces all of the prior case law.

In addition to Goudkamp’s clues, this article’s (and Burrows’) contention about the wide applicability of the *Patel* test can be observed from the language and theme of the judgment. This is most poignant in the judgment of Lord Toulson. As previously highlighted, Lord Toulson speaks generally about the criticism of the current state of the illegality principle through

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22 *Patel* (n 2) [23]; Law Commission, *The Illegality Defence* (n 1) [3.50]–[3.60].
23 E.g., *Gray* (n 3) is not explicitly rejected in *Patel* (n 2).
reference, for example, to Law Commission reports. Further, Lord Toulson outlines how his three considerations are ‘found in the case law’; \(^\text{24}\) it is clear that the ‘proportionate’ limb of considerations is found from \textit{ParkingEye Ltd v Somerfield Stores Ltd}, \(^\text{25}\) a contract law case, whereas a multi-factor, flexible approach is observed by Lord Toulson to be in \textit{Hounsa v Allen} (a tort case). \(^\text{26}\) Additionally, it is clear that Lord Toulson’s (a), (b) and (c) are in no way specific to unjust enrichment, and constructed to be compatible across private law. This combined with the context of the judgment following a call from Lord Neuberger for greater clarity in the whole area of unjust enrichment, leads to a fair assumption that the \textit{Patel} judgment would extend across private law. \(^\text{27}\)

The justification for the illegality defence given by Lord Toulson informing his consequent judgment is general to the whole of private law:

‘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.’ \(^\text{28}\)

\(^{24}\) \textit{Patel} (n 2) [101]


\(^{28}\) \textit{Patel} (n 2) [99]
This wide justification is promoting harmony in the law, which should be encouraged. Harmony is preferable because it makes the law clearer, simplified and consequently more predictable and easier to follow. Thus, in promoting harmony, we help to uphold a fundamental rule of law principle. That is not to say it would be contrary to the rule of law should there be different rules for tort and unjust enrichment, for example, but that the rule of law would be upheld to a greater extent should there be congruence through private law in the illegality doctrine.

If we think harmony is beneficial, we may think it strange to limit this harmony to unjust enrichment and other areas of law, and to not extend it to tort law. Lord Justice McCombe highlights in XX v Whittington Hospital Trust that to argue that Patel is limited and thus not applicable to tort is contrary to the theme of the decision of Patel: ‘the case itself emphasises the importance of cohesion and consistency in the law.’ 29 It may be asserted that Clunis and Gray meet this consistency concern better. This may be true, but the rules in those cases do not adequately address the second thread of the case law: blameworthiness and balancing of interests to produce a proportionate response.

Goudkamp comes to a slightly different but not necessarily incompatible forecast:

‘The policy-based test that was endorsed by Patel now applies throughout private law, but that test does not supersede (although it may perhaps operate as a cross-check on) more specific tests that have been developed in relation to particular types of claim. If this analysis is

29 XX v Whittington Hospital NHS Trust [2018] EWCA Civ 2832 [65]
correct, cases concerned with the law of illegality decided in the law of torts remain relevant in the wake of Patel, including Gray, save for any cases that embrace the discredited reliance test.’

What Goudkamp seems to suggest is that the courts are bound to apply Patel but that the court may be informed by previous judgments in application of the Patel considerations. This does not mean that Patel would not apply to the whole of private law; it means that in addition to the Patel test the courts should be bound by previous decisions in that part of illegality, where there are more specific tests. This is not incompatible with the idea that the Patel test merely clarifies existing law – it just means past law is still relevant. So, for example, Gray would still be binding if the specific claim was familiar to that case. Goudkamp says that Patel does not supersede existing law; it is argued in agreement with him to the extent that Patel does not overrule previous law and thus does not supersede it in this way.

But this article would disagree with Goudkamp should he have meant that the Patel test does not take the place of previous law; rather it is argued that this was the very intention of the majority in the Patel case. This article wishes to emphasise that Goudkamp suggests that the Patel test could function as a ‘cross-check’ on the previous law. This seems to suggest that previous authority, such as Gray would be used in tandem with the Patel test. In itself, this observation appears to indicate that Patel offers something that the prior tests do not; this article argues that the Patel test offers clarity, structure and explicit principle which previous tests such as that used in Gray cannot provide.

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30 Goudkamp (n 17)
3. Henderson v Dorset Healthcare - A misinterpretation of Patel

A. What did Henderson decide?

Following an alleged negligent release from mental health care, the claimant killed her mother during a serious psychotic episode as a result of her schizophrenia. The claimant was convicted of manslaughter by reason of diminished responsibility. The question was therefore whether the claimant was barred from recovering her claim for compensation in negligence from the Health Board because of her consequent manslaughter conviction.

One of the arguments made by the claimant was that the precedent set in Patel applied to all cases of illegality. This was rejected by the Court of Appeal; it was held that Patel had not changed the precedent set in Gray and Clunis. Although mentioned previously, it is worth acknowledging the tests of those cases and how they were applied for comparison purposes.

In Gray, a proximity test was used – it was held by the House of Lords that Gray was not entitled to compensation for loss of earnings as this resulted from his own criminal act, notwithstanding that the tortious act of the defendant had led the claimant to commit that offence. In Clunis it was held that considerations of public policy prevented the claimant from relying on his own criminal act unless it could be said that he did not know that the nature or quality of his act was wrong. The court followed these decisions in their judgment that the claimant was barred from recovery of damages due to the doctrine of illegality.
Looking back upon academic observations following Patel, Burrows’ prediction was that Patel would apply to all private law, whilst Goudkamp added a gloss to this: previous cases with specific tests would remain binding should they be applicable. Since Gray was binding in Henderson, and there was no mention of Patel in the application of illegality in finding the outcome, the academic prediction of Burrows is contrasted. Goudkamp, without his suggestion of Patel as a ‘cross-check’, seems to have been accurate in his prediction.

B. Were the judges right in Henderson not to apply Patel?

This article argues that the judges were mistaken not to apply Patel; this mistake is founded on the assumption implicated from the reasoning of the Court of Appeal that the Patel test is incompatible with the other case law such as Gray. This article has observed that the test is in fact based on previous case law. This view is echoed by Burrows, who argues that the approach by the High Court judge, Jay J, (which was upheld by the Court of Appeal) was wrong: ‘What [the judge] should have done was to apply the ‘trio of considerations’ approach in Patel v Mirza in a way that, so far as possible, was consistent with the results in Clunis and Gray. That would have led him, by different reasoning, to the same result that he reached, namely that illegality was a defence on the facts of that case.’ 31 This echoes the idea that it is not necessary to depart from Gray in order to apply Patel.

This article will now demonstrate how the misinterpretation of the function of the Patel test is evident from the reasoning of the Court of Appeal. The principal reasons given

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31 Burrows (n 6) fn 28
in the joint judgments of Sir Terence Etherton MR, Ryder and Macur LJJ as to why Patel did not apply can be condensed into two justifications.

Firstly, the judgment observes that there is absence of discussion of tort in the original Patel decision: ‘It is impossible to discern in the majority judgments in Patel any suggestion that Clunis or Gray were wrongly decided or to discern that they cannot stand with the reasoning of Patel’. This argument is that simply, tort is not mentioned in any detail. This observation ignores the general and obvious theme of the judgment. It is clear from the Patel judgment that the intention is widespread reform. This is particularly prevalent when Lord Toulson talks about the responsibility of the courts to reform when it is clear that the legislature will not, and that is the job of the courts to cure ‘defects in the common law’ which has occurred in other instances such as the infamous decision of Jogee.

Further, this contention seems to be missing the point of why illegality needed a Supreme Court judgment in the first place; the issue, as observed also by the Law Commission, is not with the results of the decisions but the means by which they are found. This probably also explains why cases such as Gray were not directly overruled. The previous methods before Patel were muddied and confusing, whereas Lord Toulson’s suggestion has been commended for its encouragement of transparent consideration of public policy. This is further developed by the fact that had Patel been applied, it is likely that the same outcome would have been met in Henderson, as noted by Burrows.  

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32 Henderson (n 1) [88]-[89]
34 Burrows (n 6), fn 28
The second justification for not applying Patel in Henderson is that Clunis and Gray are never said to be wrongly decided, and there is no implication that they cannot stand with the reasoning in the Patel case. This reasoning demonstrates where the Court of Appeal may have been mistaken: there is no evidence in the judgment of Patel saying Gray and Clunis are wrong because the judgment was exactly doing the opposite of this. The judgment endorses previous principles underlying the case law, but distils the case law and these principles into a clearer and more concise test. That is not to say it is consistent with all previous case law; that would be to deny the obvious change which Patel makes completely. That the judgment endorses previous principles of cases also explains why there is no suggestion that the test is incompatible with these previous decisions. This is because this case law is what the Patel test is borne out of; the judges are finding the ‘common denominators’ of previous law in an attempt to find unifying principles. These unifying principles are then crystallised into the Patel test.

The contention that the judges were influenced by previous case law is also supported by decisions subsequently applying the Patel test. In Tchenguiz & ors v Grant Thornton UK LLP & ors Judge Knowles comments that since a previous case ‘the law on illegality has been explained or developed’. This certainly suggests that Patel is a development of previous law, rather than a completely new and foreign invention. Later judgments are also consistent with the idea that the main difference between the Patel test and previous authority is the form of the test; in XX v

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35 Patel (n 2) [89]
36 Tchenguiz & ors v Grant Thornton UK LLP & ors [2016] EWHC 3727 (Comm) [39].
Whittington Hospital Trust Lord Justice McCombe talks of a ‘new formulation of the law of illegality.’

The arguments for restriction in Henderson are unconvincing and there are strong observations of wide-reaching reform intentions of the judges in Patel. This article therefore argues that the judges in Henderson were wrong not to apply Patel and misguided in their assumption that it was a black and white choice between previous law or the Patel test; they are in fact compatible. With application being made to appeal to the Supreme Court by the claimant in Henderson, it can only be hoped that the application will be granted and that the decision of the Court of Appeal will be overturned; it would not be a complete reversal of the decision because the same outcome would have been achieved, the means employed by the Court of Appeal, however, should be corrected.

The rest of this article will explore possible implications of the Court of Appeal choosing to apply Gray and Clunis in place of the Patel test. It will be argued that this is an undesirable step law, re-introducing a multitude of issues found with such tests: namely, lack of transparency and abundance of confusion. It is asserted Patel effectively resolves these issues. Thus, the Court of Appeal’s decision is regrettable.

37 XX (n 23) [57]
4. Henderson and its Implications: A Return to Confusion

A. Unnecessary Regression

The practical consequence of Henderson is that where there is pre-existing binding authority, which does not concern unjust enrichment, this will apply instead of the Patel test. This article argues that the decision of Henderson is a mistake for tort law because it means that the Patel test is not applied. The Patel test should be applied not only as a matter of interpretation from the judgment of Patel but because there are attractive reasons for preferring the Patel test over other existing case law such as Gray. If it is argued that the Patel test has its origins in case law such as Gray, one cannot argue that the principle behind Patel is better than that of Gray because they necessarily are the same. This aligns with previous arguments that the ‘threads’ of consistency and blameworthiness are found in previous case law, and reiterated in the Patel test. If the substance is not different, then it must be the form which makes the test better than the previous case law. This is because the form cures the defect otherwise produced by the case law: confusion and uncertainty.

This article has further observed that Henderson represents an unnecessary regression. There is simply no need for this confusion and uncertainty, which Patel had cured. This was argued through highlighting the two common threads of consistency and blameworthiness in previous case law and demonstrating how they were translated into the Patel test. Patel changes the form, not the substance of the law.
B. Defects in previous law now reintroduced as a result of Henderson

The issue with the law prior to Patel is best explained by the Law Commission:

‘the conceptual basis on which the judges make their decisions is uncertain. Different judges have analysed the defence in different ways. A whole range of tests has been suggested as appropriate, in some cases to the exclusion of any other. As a result, it is difficult to predict an outcome or to explain the outcome in terms of the apparent rationales behind the illegality defence.’ 38

Notably, this was because of the variety of considerations at play, for example, seriousness of the offence, as opposed to the self-defeating danger for allowing the recovery for an illegal act. Consequently, the law is hard to predict. This is concerning since predictability of the law is an essential rule of law concept allowing true autonomy. This article contends this is because the common threads informing and influencing the Patel test are again masked behind these different headings in cases (such as Gray and Clunis), when, they were just derivatives or a species within the two main threads: consistency and blameworthiness.

C. How Patel cures these defects

The Patel test makes the law clear. The court is to apply the three strands, (a) (b) and (c) in reaching their outcome as to whether illegality should deny the claimant of a claim. This in turn makes

38 Law Commission, The Illegality Defence (n 1) 142.
the law more certain because it is obvious what factors are relevant to the outcome. It is may seem paradoxical to argue that Patel encourages predictability, when it is a discretionary test, and discretion is usually criticised for being unpredictable. It is argued that this is mitigated by three considerations.

First, the decision in Patel does not give no guidance to judges, or potential claimants; it is not full discretion. Lord Toulson highlights what can be considered, as noted above.

Second, Patel only seems to be uncertain because it the first test to use such policy concerns. More solid rules will be distilled through development in the common law, on a case by case basis. Just like established relationships giving a duty of care, there may eventually be crimes that can never result in compensation in tort.

Third, the law would be more predictable as a result of Patel because judges can show more openly and honestly which policy motivations are influencing their decision, rather than hiding behind the rules of Gray, for example. If judges face the real concerns of illegality – namely consistency in the law and blameworthiness of the claimant – then the law is much more transparent and predictable.

Addressing these concerns is enabled by the Patel test. This third contention is not a novel idea and has been argued in other areas of tort and private law. For example, discretion around policy has been advocated by Stapleton in relation to pure economic loss, 39 and Peden, in relation to implied terms in law

in contract law. This suggests that the *Henderson* decision may have been a digression for tort but also a restriction and pulling back on the law. The acceptance of the *Patel* test could symbolise a wider acknowledgment of the need for judges to address policy issues and discuss them more explicitly.

### 5. Conclusion

Burrows’ prediction of *Patel’s* applicability was not a niche interpretation of the judgment. This article has argued that it is in fact the most natural and obvious reading from the judgment that the *Patel* test should apply across private law. This article has highlighted that the *Patel* test was not an entirely novel concept; built upon case law it is a declaration of clarity, of quite simply, what was already there. It is not incompatible with the tort decisions of *Gray* or *Clunis*, nor does it seek to overrule them. In fact, it endorses them and the principles behind them. This article has argued that the Court of Appeal made a mistake in assuming that the *Patel* test and previous authority were choices of black and white; they are, in reality, the same shade.

Further, since *Patel* solved issues highlighted with the previous law – particularly as to clarity, and predictability of the law – *Henderson* represents a digression of tort law. Additionally, it represents a step back for the law as a whole; policy considerations are to remain in the shadows. The *Patel* test would have enabled judgments to be more open thus unmasking the true policy reasoning behind many cases of illegality. *Henderson*

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40 Elisabeth Peden, ‘Policy Concerns Behind Implication of Terms in Law’ (2001) 117 LQR 459
represents a missed opportunity for tort law, and perhaps for other areas of English law as a consequence.