Insurance, Illegality and Legal Certainty: Reflections on the Legacy of Professor Malcolm Clarke

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Personal note

I would like to pay tribute to the legacy of Professor Malcolm Clarke. I first met him when a junior academic at one of his insurance conferences at St John's College, Cambridge. His warmth and generosity of spirit remain an example to me. In this paper I reflect on an area where his work was a considerable influence: the application of the law of illegality to insurance contracts. This paper revisits some of those long-standing issues in light of modern case law by reflecting on the work of Professor Clarke.

1. Introduction

The application of the common law rules on illegality to insurance contracts has been widely regarded as challenging.[1] There are several issues that can arise, but not least the insurance contract which is on its face lawful, but (as *Arnould* puts it):

> 'where one or both parties to it intended to commit an illegal act in performing it, or where an illegal act was in fact committed during its performance'.[2]

The precise state of English insurance law in that context remains uncertain, although the insurance texts broadly assume that the Supreme Court decision of *Patel* v *Mirza*[3] provides the current rule.[4] This is despite considerable disagreement amongst the seven justices on that panel as to the approach in contract law generally.[5] Nothing in that decision makes the insurance position abundantly clear.

1.1 The 'Illegality' Ecosystem

The legal consequences of one or both parties to an insurance contract engaging in illegal conduct is not determined by a single rule, but by many. If we leave to one side the special rules of insurance law (which are reviewed later in this article) we can identify two general rules of private law, which jointly provide the 'illegality' doctrine. The first (and the focus of this piece) is where private law liability is causally connected to an illegal act. For insurance, this is generally where the risk insured occurs but there is- within the wider causal chain- an illegal action, normally by the insured. We can find examples of this across insurance law. A common example is the loss of insured goods which were smuggled into a jurisdiction without the proper payment of import duties. There are more marginal cases, such as where an insured commits a regulatory offence and thereby attracts some fine or

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[1] M Templeman KC et al (eds) *Arnould: Law of Marine Insurance and Average* (21st ed, 2024), [21-05] (hereafter, *Arnould*) described the position prior to *Patel* v *Mirza* as (perhaps) one of the 'most intractable difficulties in the insurance context' but now assumes a settled position applying the three criteria identified in that case.

[2] *Arnould*, above n 1.

[3] [2016] UKSC 42, [2017] AC 467.

[4] See generally M Hemsworth (ed), *The Law of Insurance Contracts*, (Looseleaf, March 2025), Ch 24; R Merkin *Colinvaux's Law of Insurance,* (13th ed, updated, 2024), Ch 5 (esp [5-138] – [5-148]); J Birds, *et al MacGillivray on Insurance Law* (15th ed, updated, 2024), Ch 14. These are hereafter *Clarke*, *Colinvaux* and *MacGillivray*.

[5] A number of the key uncertainties in the application of the modern rule to contract enforcement are explored in J O'Sullivan 'Illegality and Contractual Enforcement after *Patel* v *Mirza'* in S Green & A Bogg (eds) *Illegality after Patel v Mirza* (Bloomsbury Publishing, 2018).

other sanction.[6] This could be an environmental harm or a data breach, but one which is nonetheless unlawful as well as tortious. A claim for payment under a liability insurance policy might be resisted on the basis of the illegality rule,[7] on the grounds that the liability incurred resulted from an illegal act of the insured. Across these cases, the standard contractual right to indemnification under an insurance contract is subject to the common law illegality rule. As Lord Sumption put it in more general terms:

> '… in general, although described as a defence, it is in reality a rule of judicial abstention. It means that rather than regulating the consequences of an illegal act (for example by restoring the parties to the *status quo ante*, in the same way as on the rescission of a contract) the courts withhold judicial remedies, leaving the loss to lie where it falls. This is so even in a contractual context, when the court is invited to determine the financial consequence of a contract's voidness for illegality. The *ex turpi causa* principle precludes the judge from performing his ordinary adjudicative function in a case where that would lend the authority of the state to the enforcement of an illegal transaction or to the determination of the legal consequences of an illegal act'.[8]

There are other insurance related disputes beyond the application of the common law illegality rule to contractual indemnification. In the liability insurance sphere (and motor insurance regularly tests these issues), the liability of the insured to the third party may be affected by illegality attributable to the third party, independently of any illegality of the insured.[9] This is not strictly 'insurance contract illegality', it is 'tort illegality' feeding into the insurance law process. That issue is interesting, and I have written on it elsewhere.[10] But this piece is focused on illegality within insurance contract law, rather than tort law. This is the first rule, the reluctance of the courts to enforce a private law claim tainted by illegality.

We can distinguish this specific example of the illegality doctrine from statutory illegality, whereby the legislation specifically criminalises the making of or performing certain forms of contract or other transaction. The illegality is not therefore in some act external to the contract, but in its very creation or performance in these circumstances. The effect of illegality on any contract or contract performance made in breach of the statute in question is best

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[6] This paper was written prior to the publication of P MacDonald Eggers KC 'The Insurability of Fines' in B Soyer & O Gurses (eds) *Insurability of Emerging Risks: Law, Theory and Practice* (Hart, 2025), which was only available to me at the proof stage. I agree entirely with his view that the effect of the illegality rule on the insurance of fines ought to operate on a more nuanced consideration of where deterrence is required.

[7] For the purposes of this paper, I will use the labels of the '*ex turpi causa* rule' and the 'common law illegality rule' interchangeably, although there appears to be a recent judicial preference for the latter. See *Dormer* v *Wilson*, below n 9, at [52], [54].

[8] *Les Laboratoires Servier* v *Apotex Inc* [2014] UKSC 55, [2015] AC 430, [23].

[9] See, for a recent example, *Dormer* v *Wilson* [2025] EWHC 523 (KB). The illegality doctrine applies in full force as between the insured and his third-party victim (as a tortious claim) but is seriously constrained by the Road Traffic Act 1988 as between the third-party and the insurer (as a contractual claim, or close statutory analogue). The statutory motor liability insurance regime generally only permits one defence: that the injured third-party knew that the vehicle was being driven uninsured.

[10] My work on the relationship between the defences to liability in tort and motor insurance is somewhat out of date following Brexit and related statutory changes. See J Davey 'A compulsory diet of chickens and eggs: The EU motor insurance directives as a shadow tort regime' in P Giliker (ed) *Research Handbook on EU Tort Law* (Edward Elgar, 2017). For an up-to-date source, see Philip Mead 'The Motor Insurance Directives 50 years on: a review of the case law of the Court of Justice of the European Union' (2024) J PI Law 288.

seen as a matter of statutory interpretation.[11] This also has genuine significance in insurance contract law but falls outside the scope of this piece. Examples would include a purported insurance contract made by an unlicensed 'insurer' in breach of financial services regulation,[12] or the payment of an insurance indemnity in breach of a sanctions regime.[13] We also put to one side the ambit of the marine insurance 'warranty of legality',[14] as no equivalent term is implied in non-marine insurance contracts.[15] The implied warranty also deserves further academic discussion, but space does not allow that here.[16] My target is the position in general insurance law.

The focus is therefore the occurrence of an insured event following (and normally, related to) an illegal act by the insured. The fundamental question is whether the insured is able to enforce its contractual claim to indemnity despite its illegal conduct in the circumstances surrounding the loss. What this paper establishes is that the needs of the insurance market in this regard are best served by a rule which allows 'localisation', that is, context specificity. A rule which seeks to provide a single rule across all contracts, all torts and all examples of restitution lacks the flexibility required for insurance markets. Moreover, that this need for fluidity overwhelms any competing demand for 'clear, simple rules'. On this basis, the gradual shift towards a rule which has a broadly discretionary basis favours insurance more than a closely structured model. In doing so, I seek to develop earlier work by Professor Malcom Clarke[17] and do so as a tribute to his contribution to insurance contract law.

1.2 The structure of this paper

Part 2 charts the changes to the *ex turpi causa* rules within private law generally, before turning in Part 3 to the insurance 'illegality' rule. Much of my contribution to this debate comes in Part 4, which establishes that the modern version of this rule allows for a nuanced position which meets the particular requirements of the insurance market, in a way which alternative versions of this rule do not. In short, the nuanced approach to illegality in *Patel* v *Mirza* is necessary for insurance contract law, even though it is one that comes at some cost. There is no frictionless rule, and the search is for the least disruptive.

2. Illegality in Private Law: A Brief Natural History

Putting a shape on the common law rules on illegality requires a degree of compression of both issues and time frames. As Lord Sumption put it: 'English law has a long-standing repugnance for claims which are founded on the claimant's own illegal or immoral acts'.[18] For the purposes of this piece, we focus on the long development of

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[11] Andrew Burrows, 'The Illegality Defence in the Courts Today' in E Peel and R Probert (eds) *Shaping the Law of Obligations: Essays in Honour of Professor Ewan McKendrick KC* (OUP, 2023), 63: 'Statutory Illegality and Common Law Illegality'.

[12] This specific example was described by the Law Commission *(Illegal Transactions: The Effect of Illegality on Contracts and Trusts*, (CP 154, 1999), [2.17]) as a notorious example of application of statutory illegality in contract law (in its criticism of *Phoenix General Insurance Co of Greece SA* v *Halvanon Insurance Co* Ltd [1988] QB 216).

[13] For example, *Aercap Ireland Ltd* v *AIG Europe SA* [2024] EWHC 144 (Comm), interpreting the Russia (Sanctions) (EU Exit) Regulations 2019, SI 2019/855, regulation 29A(1):
'A person must not directly or indirectly provide insurance or reinsurance services relating to aviation and space goods or aviation and space technology—
(a) to a person connected with Russia, or
(b) for use in Russia'.

[14] S. 41, Marine Insurance Act 1906.

[15] *Euro-Diam Ltd* v *Bathurst* [1990] 1 QB 1.

[16] See generally F Wang, *Illegality in Marine Insurance Law* (Informa, 2017).

[17] M Clarke 'Insurance of Wilful Misconduct: the Court as Keeper of the Public Conscience' (1996) 7 Ins LJ 173.

[18] *Les Laboratoires Servier* v *Apotex Inc*, above n 8, [13].

the rule as it applies to contracts up to the House of Lords in *Tinsley* v *Milligan*,[19] and the reversal of that decision in *Patel* v *Mirza*.[20] Of course, the law does not only live in the apex courts, and there are numerous other significant decisions in that timeline. Moreover, many of these epochal decisions were not concerned with contract disputes and their broader application to those issues is somewhat contested. For reasons of space, what follows is necessarily a truncated account.[21]

There are three main elements to the rule, and each has troubled the courts:

(1) What types of conduct count as an 'illegal or immoral act' to trigger the rule?

(2) What factors determine whether the rule should be applied; and

(3) What is the consequence of the illegality rule being relied upon by the court.[22]

The first: what is a sufficiently 'illegal or immoral act' seems to have been settled, at least for now. The Supreme Court in *Les Laboratoires Servier* settled on a broad definition of 'acts which engage the interests of the state or, as we would put it today, the public interest'.[23] That was further explained as:

> 'The paradigm case is, as I have said, a criminal act. In addition, it is concerned with a limited category of acts which, while not necessarily criminal, can conveniently be described as "quasi-criminal" because they engage the public interest in the same way'.[24]

This definition was in need of further refinement as being potentially over-inclusive. An act which is criminal but one of 'of strict liability, generally arising under statute, where the claimant was not privy to the facts making his act unlawful'[25] has been treated as outside the illegality rule.[26]

The latter two areas have been much more resistant to the normal determination of principle by the operation of precedent. The review below is a description of the changing status of the formal law in that regard. But it should not be overlooked that this is a contest for the nature of the rules and not merely their content. It is evident that some judges favour a more formalist model, with (relatively) clear, simple rules used to determine whether the illegality rules were engaged, and their effect.[27] Others favour 'open textured' rules, which required greater use of context and situation sense.[28] Familiar arguments contrasting the need for legal certainty and the avoidance of

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[19] [1994] 1 AC 340.

[20] Above, n 3.

[21] The edited collection of essays published shortly after the decision in *Patel* v *Mirza* (S Green & A Bogg (eds) *Illegality after Patel v Mirza*, (Bloomsbury Publishing, 2018)), provides an excellent account and I would heartily recommend for an insurance audience the contributions in chapter 2 (A Burrows), chapter 7 (James Lee) and chapter 8 (Janet O'Sullivan). A version of the Burrows paper is also available as 'Illegality after *Patel* v *Mirza*' (2017) 70 Current Legal Problems 55.

[22] My structure here echoes that of Richard Aikens in his admirable essay comparing recent developments in English and French contract law, '"The Obscure, the Implied and the Illegal": English and French Approaches to the Interpretation of Written Contracts, Implication of Terms and Contracts Affected by Illegality' in C Mitchell and Stephen Watterson (eds) *The World of Maritime and Commercial Law: Essays in Honour of Francis Rose* (Hart Publishing, 2020).

[23] Above, n 8, at [25].

[24] Above, n 8, at [25].

[25] Above n 8, at [29].

[26] *Stone & Rolls Ltd* v *Moore Stephens* [2009] AC 1391.

[27] This formalist approach was traced back to Lord Mansfield in *Vallejo* v *Wheeler* (1774) 1 Cowp 143, 153; 98 ER 1012, 1017.

[28] See, for example, Burrows' opening statement (at that stage, as an academic commentator) in his response to

disproportionate outcomes were deployed. We have seen these tensions play out across large parts of commercial law in the past century, and this is emblematic of a wider struggle.

2.1 Illegality in Private Law: the Long View

The principles governing the illegal performance of contracts can be dated back to at least the time of Lord Mansfield and probably earlier. This is standard territory for insurance lawyers, given that much of insurance contract law was generated in this era. The general principle, often linked to the judgment of Mansfield in *Holman* v *Johnson* is broad in nature:

> 'If, from the plaintiffs own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the Court says he has no right to be assisted'.[29]

This account places the litigant's reliance on its illegality at the heart of the bar to recovery. From this root, a variety of subtly and radically different propositions have emerged.

A fundamental point that should be made at the outset is that the development of the illegality rule was not homogenous. As disputes arose in contract (and distinct markets within that), tort, property and restitution, these were resolved by the development of a variety of distinct rules, which coalesced and/or diverged as the accidents of litigation permitted. Attempts to create 'one rule to rule them all'[30] were not successful, at least not for any sustained period.

The Supreme Court decision in *Patel* v *Mirza*[31] is the current lead authority on the effect of illegality on the enforcement of private law rights. It arose out of a failed insider trading scheme, whereby the claimant paid the defendant a significant sum of money to be invested in shares. Ultimately no shares were bought because the privileged information was never obtained and so no insider trading occurred. The defendant did not repay the money provided. The claimant sought to recover it. This was a claim in unjust enrichment, rather than contract or tort. Nonetheless, it is viewed by many commentators[32] as setting a general principle applicable to all the different branches of private law. As the scheme was inherently illegal, the court had to ask whether it would order the return of the money (despite the illegality) or refuse to assist the claimant on the ground that his claim was tainted. The fact that this case considered mutual illegality is an aspect of the way in which the law responds to such issues, but it is not fundamental. The illegality issue would also arise where the only the claimant was privy to the illegality. In those cases, the court would still be considering whether the illegality acts as bar to the enforcement of private law rights.

Lord Toulson, who had relevant expertise as both Supreme Court Justice and Law Commissioner, reviewed three different formulations of the illegality rule in the process of giving judgment for the majority in *Patel* v *Mirza*.

Patel v *Mirza*: 'In general, I am a strong believer in legal rules. They help to ensure certainty, consistency and predictability, all important qualities for good law. In general, I do not like judicial discretions which, while leaving the judges with flexibility, tend to undermine those important qualities…' (from A Burrows 'A New Dawn for the Law of Illegality' in S Green & A Bogg (eds) *Illegality after Patel v Mirza*, (Bloomsbury Publishing, 2018), at p 23). Despite this, Andrew Burrows was one of the most influential voices in shifting the illegality rules from a formalist to a 'balancing of factors' approach.

[29] *Holman* v *Johnson* (1775) 1 Cowp 341, 343; 98 ER 1120, 1121.

[30] With apologies to JRR Tolkien.

[31] Above, n 3.

[32] Certainly, it has been treated as an authority for insurance contract law by the leading insurance texts. See above n 1.

What follows is a summary of his analysis of the way in which the illegality rule had been applied by the courts up to that point, and his determination of the way forward.

The first branch of the authorities stemmed directly from Mansfield's statement and treated it as a formal rule. Where the illegality must be pleaded as part of the claimant's case, the court will not resolve the issue, and losses will lie where they fall. This was highly influential in shaping the rule across many sectors of English private law:

> 'One possible version of a rule-based approach**,** which *Tinsley* v *Milligan* and *Les Laboratoires Servier* v *Apotex Inc* could be interpreted as supporting, would be a single master rule based on reliance: "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), a party cannot enforce the contract if it has to rely on that conduct to establish its claim".'[33]

A variant on this line of authority would treat that fact pattern as generating a more complex and nuanced position, but still generally applicable as a nested series of rules (rather than a discretion). The reliance principle from *Holman* v *Johnson* was 'only one of a number of rules and essentially confined to the creation of property rights'.[34] Again, the Supreme Court cited Andrew Burrows' academic account of this as instructive, with Rule 2 the most important for insurance markets:

> 'Rule 1. A contract which has as its purpose, or is intended to be performed in a manner that involves, conduct that is illegal (such as a crime) or contrary to public policy (such as a restraint of trade) is unenforceable-
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> (a) by either party if both parties knew of that purpose or intention; or
>
> (b) by one party if only that party knew of that purpose or intention.
>
> Rule 2. If rule 1 is inapplicable because it is only the performance of a contract that involves conduct that is illegal or contrary to public policy, the contract is unenforceable by the party who performed in that objectionable way but is enforceable by the other party unless that party knew of, and participated in, that objectionable performance . . .
>
> Rule 3. Proprietary rights created by a contract that involves conduct that is illegal or contrary to public policy will not be recognised unless the claimant can establish the proprietary rights without reliance on that conduct.'[35]

The final variant (for the purposes of this review) replaces the formal rule-based model with some form of structured discretion.[36] There was somewhat less evidence of this in the case law as an established position in law. There was (as *Chitty* notes) some decisions in the 1980s and 1990s promoting this approach, asking whether enforcement of the contract offended the 'public conscience'.[37] A wide variety of factors were considered in assessing that. Whether this achieved universality across private law, even temporarily, is doubtful. However, as we will see, one of the 'rogue' areas of law was insurance contract law, and this is significant for our review of the insurance case law in Part III.

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[33] A Burrows, *Restatement of the English Law of Contract* (2016), pp 224, cited in *Patel* v *Mirza*, above n 3, at [84]. Citations omitted.

[34] *Patel* v *Mirza*, above n 3, at [85] per Lord Toulson.

[35] Burrows, above n 33, p 225, as cited in *Patel* v *Mirza*, above n 3, at [85].

[36] The precise nature of this is contested, as Burrows himself recognises- above n 21, at 35.

[37] H Beale (ed), *Chitty on Contracts* (35th ed, updated 2024), [19-022].

The relative strength of the structured discretion was significantly improved following the Law Commission's sustained review of the area, even though it did not ultimately favour statutory intervention to this end across all of private law.[38] Returning to the Supreme Court's characterisation of the position in *Patel* v *Mirza*, Lord Toulson repeated Burrows' restatement of the discretion:

> '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'.[39]

The majority in *Patel* v *Mirza* agreed a position which looks closest to this third version, and so was a substantial change from many of the judicial authorities that preceded it. The least well-established version of the rule became the dominant position overnight. Lord Toulson, for the majority, asked how a judge should approach a case if not by the application of a mechanistic, rule-based model. He answered his own question:

> '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…'[40]

This is the rule applied in *Patel*.[41] It provides a three-factored test of a relatively broad nature. These three criteria capture, albeit more succinctly, the majority of the eight factors identified by Burrows in his *Restatement*. The Supreme Court chose not to commit to a fixed list. Lord Toulson, as part of the majority, acknowledged: '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'.[42] The Supreme Court held that the claimant could recover his money, despite the proven illegality.

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[38] Amongst a number of reports in the field, the most significant for present purposes are: Law Commission, *Illegal Transactions: The Effect of Illegality on Contracts and Trusts* (CP 154, 1999) and Law Commission, *The Illegality Defence* (LC320, 2010).
[39] Burrows, above n 33, p 229-30, as cited in *Patel* v *Mirza*, above n 3, at [93].
[40] *Patel* v *Mirza*, above n 3, at [101].
[41] Although as Richard Aikens noted (above, n 22, at 235), very little of the actual analysis in that case mapped directly on to Lord Toulson's suggested criteria.
[42] At [107].

Subsequent courts have been keen to stress that decisions predating *Patel* v *Mirza* are not necessarily (and indeed not normally) open for relitigating.[43] But the immediate reaction of the High Court was to treat the application of these factors to contemporaneous disputes in commercial contract law as unsettled.[44] The wider applicability of this approach to all aspects of contract law, let alone the rest of private law,[45] is the next step in our journey.

2.2 The Modern Position in Commercial Contract Law

As my aim is to identify the commercial needs of insurance contract law (the review of which follows in Part III, below), it is useful at this stage to establish what *Patel* does and does not resolve.[46] We have identified a newly established model for the recovery of money where the illegal scheme fails to be performed. Before moving to insurance, we need to consider how the *Patel* v *Mirza* model might work in commercial contract disputes more widely,[47] that having not been tested at any level of sophistication before the courts. As Norris J remarked in a case determining the appropriate forum for a trial on the purported illegality of so-called 'Zodiac Contracts':

> '*Patel* v *Mirza* does render relatively clear and certain the law on illegality where a claimant has paid money to a defendant to carry out an illegal activity, and the illegal activity is not proceeded with. But that is not relevant to the dispute about the Zodiac Contracts and the Supreme Court was clearly divided as to the extent to which the rule so articulated applied in other scenarios'.[48]

The application by the courts of the *Patel* v *Mirza* model to contract cases is likely to arise within specific markets in the medium term. Not every market generates illegality disputes with the same frequency and diversity of issues. These 'accidents of litigation' are likely to shape the doctrine. Judges will naturally react to the cases before them. The cases litigated since *Patel* reflect a broad trend. There is a smattering of commercial contract disputes, but more significant employment law decisions.[49] There have been no substantive insurance law decisions in recent years.

This might give the false impression that the law ought to be set according to the needs of parties to decided cases. That litigation provides the sum total of considerations for judges when shaping the way in which the discretion will be applied. But we should recognise at this stage that the insurance market is not only, and perhaps not even primarily, concerned with the application of this doctrine before the courts. A huge percentage of legal advice is involved in transactional work and not in litigation.[50] For insurance lawyers, the decision of what kinds of conduct to insure, and within what parameters of behaviour, is fundamental to product design. The *ex turpi causa* rule shapes what insurers may offer as products as much as it resolves the rare instances of unforeseen illegality in the causal chain. This is a point to which I return in more detail in my concluding section. But the application of the

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[43] See *Chitty*, above n 37, at [19-043] – [19-045].
[44] *Ronelp Marine Ltd* v *STX Offshore & Shipbuilding Ltd* [2016] EWHC 2228 (Ch), [36].
[45] For reasons of space, this paper will not review in detail the non-contract cases applying *Patel* v *Mirza*. A useful summary can be found in Burrows, above n 11.
[46] See O'Sullivan, above n 5.
[47] The extent to which insurance litigation is treated as within the contract law canon, and a separate line of authority varies considerably. For the purposes of this paper, I am generally treating insurance contract law as a sub-set of contract law.
[48] Above, n 44, [36].
[49] See for example, the discussion in A Bogg, '*Okedina* v *Chikale* and Contract Illegality: New Dawn or False Dawn?' (2020) 46 Ind LJ 258.
[50] D Howarth, *Law as Engineering* (Edward Elgar, 2013).

illegality rule will need to reflect the legitimate needs of those engaged in transactional planning, and not only respond to the immediate cases litigated. This makes building a rule for insurance even more complex than finding one for other markets.

3. Professor Malcom Clarke and Illegality in (Insurance) Contract Law: Then and Now

In 1996, (the then) Dr Malcom Clarke published 'Insurance of Wilful Misconduct; the Court as Keeper of the Public Conscience' in the Insurance Law Journal.[51] Beyond the immediate legacy of his paper on illegality, Clarke's paper provided an exemplar of how advanced insurance law research should be undertaken. He drew from sources across several legal systems[52] to tease out the difference between illegality as:

(1) an issue of contractual interpretation (in respect of positive cover and exclusions of criminal conduct),
(2) an issue related to fortuity, and
(3) one of public policy under *ex turpi causa*.

These underlying justifications and interactions matter, as they shape the nature of the rule then applied. Some are of much greater significance in the insurance sphere than in general contract law. They have cumulative effects, as the combined presence of criminality and fortuity concerns shape the process of contractual interpretation.

In assessing the role of illegality in interpreting insurance contracts, and prohibiting recoveries, Clarke drew a distinction between first-party property insurance, first-party accidental injury cover and third-party liability policies. His paper drew on examples from many jurisdictions, with considerable use of US case law. His quality as a comparative lawyer was an important part of his broader contribution to insurance contract law.[53] This aspect of Clarke's work provided a solid foundation for studying key aspects of insurance law and much of the statutory reform of English insurance law was improved by similar comparative efforts.[54]

Professor Clarke's paper on illegality and the insurance contract came shortly after the House of Lords decision in *Tinsley* v *Milligan*.[55] The leading authority at the time on the common law of illegality, that decision provided a formalist vision of the *ex turpi causa* rule. If the claimant had to rely on an unlawful act as part of its contractual claim, then it was barred from recovery (the 'reliance' test). If not, then the claim could be adjudicated. For advocates of this version of the rule, it provided legal certainty and a minimalist approach.[56] These, as will be shown, are contested claims.

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[51] M Clarke 'Insurance of Wilful Misconduct; the Court as Keeper of the Public Conscience' (1996) 7 Ins LJ 173.

[52] Typically for his work, he places the English rule in the broader context of the civil law codes of Germany, France, Japan and Switzerland. The English common law model is then considered alongside sources from Canada, Australia and the United States. Among his many talents, Professor Clarke's comparative law efforts deserve real praise.

[53] Professor Clarke played a significant role in the drafting of the Principles of European Insurance Contract Law.

[54] I have in mind here: R Merkin, *Reforming insurance law: is there a case for reverse transportation? A report for the English and Scottish Law Commissions on the Australian experience of insurance law reform* (2006).

[55] Above, n 19.

[56] The approach of Lord Sumption in *Jetivia SA* v *Bilta (UK) Ltd (in liquidation)* [2015] UKSC 23 provides a useful model for this. Whilst recognising that the original simple rule in *Holman* v *Johnson* 'had become encrusted with an incoherent mass of inconsistent authority' (at [61]), he took the view that the way forward was 'not a discretionary power on which the court is merely entitled to act, nor is it dependent upon a judicial value judgment about the balance of the equities in each case: In the light of the rejection of the public conscience test, it is incumbent on the courts to devise principled answers which are no wider than is necessary to give effect to the policy stated by Lord Mansfield and are certain enough to be predictable in their application' (at [62]).

This model was in stark contrast to what Clarke viewed as the prevailing insurance rule prior to *Tinsley*, that the effect of illegality was subject to a more nuanced 'public conscience' test. His immediate concern was the effect of the *Tinsley* decision on insurance contract law, his paper considered: '… the insurance cases and asks whether the public conscience test or any other form of reference to public policy should be rejected for insurance cases too'.[57] The ambit of *Tinsley*- a property case- on what appeared to be contradictory precedent in insurance contract law was contested. As Clarke noted:

> 'The question in *Tinsley* was a narrow one: the recovery of an interest in land in connection with an unlawful transaction that was over and done with. The case was not concerned with the enforcement of an illegal arrangement that was in part, at least, executory. This alone is enough to distinguish the insurance situation and may explain why, with one exception, the insurance cases were not examined in *Tinsley*'.[58]

The potential application of the *Tinsley* 'reliance' test beyond property law was uncertain at the time that Professor Clarke wrote his article. To that extent, *plus ça change, plus c'est le même chose*. The *Tinsley* approach remained somewhat uncertain in its application until the Supreme Court decision in *Patel* v *Mirza* in 2016.[59] Subsequent case law, and especially *Patel* v *Mirza*,[60] has seen a return to the 'public conscience' test, or at least, a variation on that theme. But Clarke's key issue remains: whether insurance law requires a rule distinct from the general position in private law. This might be a substantive difference- that the underlying rules are fundamentally different or a difference in application within the context of insurance law.

3.1 Illegality, Contract Law and Insurance Contract Law

A survey of the classic 'insurance illegality' case law in English law shows a mixture of techniques used to define the limits of insurer liability. These authorities are drawn from non-marine insurance cases, as marine insurance has an additional set of rules governing contractual illegality.[61]

The review is reflective of Clarke's work to establish the position in insurance law and of five English cases- *Hardy* v *Motor Insurers' Bureau*[62] (and its application by the House of Lords in *Gardner* v *Moore*[63]); *Gray* v *Barr*;[64] *Euro-Diam* v *Bathurst;*[65] *Geismar v Sun Alliance*[66] and *Marcel Beller* v *Hayden*[67]. There has been no significant insurance authority in the intervening years. That is a period of some thirty five years (1990-2025), more or less the same time frame in which all of those major insurance cases were brought before the English courts (1964-1990). Something strange is happening here. The leading insurance cases are drawn (respectively)

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[57] Above, n 17, 1.
[58] At 20-21.
[59] There was judicial division on the position in contract between the decision of the House of Lords in *Tinsley* (1994) and the seven panel decision of the Supreme Court in *Patel* v *Mirza* (2016). In *Jetivia SA* v *Bilta* [2015] UKSC 23, [14] Lord Neuberger identified a clear split between Lord Sumption (who favoured the *Tinsley* approach) and Lord Toulson who preferred the 'balance of factors' approach.
[60] Above, n 3.
[61] First, 'wilful misconduct' is a mandatory and universal exclusion in marine insurance. Any loss for which it is the proximate cause of loss is barred from recovery by operation of s. 55(2)(c) MIA 1906. Secondly, there is a specific warranty of legality in s. 41 of the Marine Insurance Act 1906.
[62] [1964] 2 QB 745.
[63] [1984] AC 548.
[64] [1971] 2 QB 554.
[65] [1990] 1 QB 1.
[66] [1978] QB 383.
[67] [1978] QB 694.

from motor insurance, liability insurance, personal injury insurance and property cover. The first three cases are decisions of the Court of Appeal, with the latter two decided at first instance.

3.1.1. Illegality and Express and Implicit Limits on Recovery in Insurance

The *ex turpi causa* rule operates differently in insurance than in other areas of commercial contract law. Much of the difference stems from contractual and market context. We can see two immediate differences in insurance contract law in the assessment of the express and implied limits on insurance coverage for wilful and/or criminal conduct. These overlap.

First, there are express contractual wordings that vary the common law rule, potentially denying cover in circumstances in which the common law rule would not necessarily do so. These were subject to similar discussions of appropriateness of outcome when subject to the standard processes of contractual interpretation. Clauses of this type can be seen in *Marcel Beller* v *Hayden*,[68] whereby positive cover for accidental bodily injury was limited by exclusions for '... deliberate exposure to exceptional danger ... or the insured person's own criminal act'. The deceased in *Marcel Beller* had driven whilst more than three times over the legal blood alcohol limit of the time, and more than five times over the current limit.[69] This is not compulsory third-party motor insurance,[70] and so lacking any of the 'protection of third party' elements of the motor insurance cases. Counsel for the underwriter was Roger Toulson, later Lord Toulson. He framed the limits of the 'criminal act' exclusion somewhat narrowly: 'If the words "criminal act" require some implied limitation, they should be limited to exclude offences of mere inadvertence or momentary inattention'.[71]

Counsel for the claimant sought a similar limitation on the criminal acts exclusion but suggested that it required offences of moral culpability or wickedness. In this regard, the express contractual clause and the underlying *ex turpi causa* rule raise similar concerns.[72] Insurance is often concerned with providing cover even though the insured was in some part responsible for their own losses.[73] In some contexts, and driving is a classic example, much of that errant behaviour is criminalised.

The trial judge preferred the position of Toulson- adopting an implied term excluding 'acts of inadvertence or negligence'.[74] This makes sense. Otherwise, much of the cover for accidental death by driving might be erased. On the facts of *Marcel Beller*, the acts of the deceased were found to be criminal (and excluded) as deliberate and serious.[75] What is crucial for our review is that the mere fact of criminality was not enough to satisfy the (*prima facie*) blanket contractual exclusion of criminal acts.

The second 'insurance' factor is the implicit boundary of fortuity that influences the interpretation of this form of contract. As a rule of construction, we might assume that underwriters do not generally accept the risk of the

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[68] Above, n 67.

[69] The driver in *Marcel Beller* had a recorded blood alcohol level of 261mg per 100ml. The initial limit (under s. 7, Road Traffic Act 1967) was 80mg, the current limit under English law is 50mg per 100ml.

[70] This is best characterised as a corporate life insurance and accident policy over one of its employees.

[71] Above n 67, at 697B.

[72] See the discussion of the notion of turpitude as a general issue in the law of illegality, above n 26.

[73] An excellent account of this issue (albeit in the marine context) is found in M Mustill, 'Fault and marine losses' [1988] LMCLQ 310.

[74] Above n 67, at 707C.

[75] The evidence referred to by the trial judge suggested that this level of intoxication whilst driving would have received a custodial sentence.

insured's own deliberate actions, whether criminal or otherwise.[76] This is sometimes expressed more firmly (as a rule of law), that insurance does not deal with certainties, only risks. This would make deliberate acts uninsurable and overlaps significantly with the *ex turpi causa* rule. This is not a principle that the courts have found easy to apply.[77]

3.1.2. Insurance Illegality, Motor Insurance and the Third-Party Claimant

Our second insurance area for review exemplifies the *Patel* v *Mirza* rule and indeed was cited by Lord Toulson as indicative of the approach he favoured: the need to consider the purpose of the relevant prohibition. This can be seen in the early motor insurance cases, whereby a third party's claim for compensation is either made against an insurer,[78] or against a state fund acting as guarantor where no such insurance is in place. The position of the fund, the Motor Insurer's Bureau, was assumed to mirror the insurance rules, such that if a claim against an insurer would be unenforceable for illegality, then a claim against the MIB would be similarly barred. The illegality occurred as part of deliberate and often violent use of a motor vehicle against innocent third parties. This arose before the Court of Appeal in *Hardy* v *MIB*[79] and (in near identical terms) before the House of Lords in *Gardner* v *Moore*.[80]

In each case, an uninsured driver had driven in a manner which deliberately endangered an innocent pedestrian. In *Hardy*, when seeking to escape questioning by a security officer and in *Gardner* by deliberately driving a car at someone on the pavement. In both cases, the true claimant is the injured third party, the true defendant is the Motor Insurers' Bureau (MIB). The agreement which is subject to the 'illegality' is not then an insurance contract, but one between the MIB and the State to generate a public fund, to which the claimant is not a party, but only a beneficiary. To assess the MIB's liability, the court considered the hypothetical situation: what if these deliberate actions were undertaken by an insured driver in an action against its insurer. This is perhaps the archetypal insurance case, with cover purchased in good faith and subsequent illegality in the causal chain. This, indirectly, provided the insurance rule.

In *Gardner* v *Moore*, Lord Hailsham treated the insurance and contract law position as identical.[81] As a general rule: 'a person (or those that stand in the shoes of such a person) may not stand to gain an advantage arising from the consequences of his own iniquity.'[82] He continued:

> 'But the doctrine has its limits. The real contrast is really between *Cleaver* v *Mutual Reserve Fund Life Association* and *Beresford* v *Royal Insurance Co Ltd* where it seems to me that the limits of the public policy doctrine are fairly clearly defined. As Lord Esher M.R. said in

[76] The relationship between intentionality and insurability is considered in detail in Clarke, above n 17, at 1-3. Readers are also directed to H Bennett, 'Fortuity in the law of marine insurance' [2007] LMCLQ 315.

[77] See, for example, the discussion of deliberate actions, unforeseen consequences and criminality within the discussion of fortuity in *Delos Shipping SA* v *Allianz Globel Corporate and Speciality SE, The Win Win* [2024] EWHC 719 (Comm), [75] – [89].

[78] Direct rights of action by an injured third party against the liability insurer is complicated post-Brexit, but see generally s. 151, Road Traffic Act 1988.

[79] Above n 62.

[80] Above n 63.

[81] Above n 64, at 558F.

[82] At 558F.

> *Cleaver*: "this doctrine ought not to be stretched beyond what is necessary for the protection of the public".'[83]

It is the nature of these limits that is crucial. The court is engaged (at least in part) in a balancing exercise:

> 'The court has to weigh the gravity of the anti-social act and the extent to which it will be encouraged by enforcing the right sought to be asserted against the social harm which will be caused if the right is not enforced'.[84]

At least on this point- the need to weigh the underlying purpose of the illegality- the law has returned to the insurance model pre-*Tinsley* v *Milligan*. There is some early support for this approach post-*Patel*. *RO* v *Gray*[85] involved a claim between motorists in which a vehicle was deliberately driven into another, following a series of altercations. The MIB was represented as second defendant. Whilst formally a tort decision, it is evidently insurance adjacent.[86] The judge spoke in praise of the return to a factors-based approach:

> 'The cases will illustrate how early attempts to apply a general discretion (the public conscience test) were rejected and replaced by the application of strict fixed rules in tort (the "inextricable link" test) and in contract (the reliance principle). The cases will also illustrate how the application of fixed rules came to be regarded as unsatisfactory and how a gradual return to policy considerations and the development of an approach that allowed a range of factors to be taken into account has gone a long way to establishing certainty, consistency and predictability'.[87]

The security of compensation for personal injury was viewed as a key factor. This overlaps considerably with the compensatory elements identified in the compulsory insurance regime:

> 'It is difficult to imagine (ignoring joint enterprise cases) that the integrity of the law could ever be damaged by the courts coming to the aid of a seriously injured claimant if his injuries were caused by the negligence of the defendant'.[88]

We can conclude this section with a simple proposition. Compulsory motor insurance has a fundamental social purpose, the protection of third parties, and will be more likely to be enforced even where illegality has occurred. Much of this as an area of common law was overtaken by subsequent statutory developments, influenced by the United Kingdom's membership of the European Union. Nonetheless, these statutory protections of the injured third party continue to reflect the policy objectives evident in the earlier case law. Any reticence in enforcing insurance contracts in the face of unlawful driving is normally overwhelmed by the concern to ensure that third parties are compensated.

3.1.3. Insurance Illegality and the Construction of Policy Terms

We move away from the broader social policy interests that insurance can generate to the relationship between the process of contractual interpretation and the existence of illegality. Lord Hailsham in *Gardner* v *Moore*[89]

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[83] At 559B. Citations omitted.
[84] At 560G.
[85] [2021] EWHC 2770 (QB).
[86] See also, *Dormer* v *Wilson*, above n 9.
[87] At [69].
[88] At [179].
[89] Above n 63.

sought to distinguish the process of contractual interpretation from the effects of illegality on the enforcement of rights. He did so in a dogmatic fashion:

> 'How, then, does the [illegality] rule affect a contract of insurance to pay a sum of money, whether by way of indemnity or otherwise, on the occurrence of an event which may or may not be caused by the anti-social act of the assured? First, the rule has no effect on the construction of the contract. It deals with enforceability of rights arising out of the contract. One first construes the contract to see what the parties agreed... The rule does not alter that'.[90]

Whilst this might be formally correct, a study of the case law in this area suggests that judges struggled to maintain a neutral approach to contractual interpretation, uninfluenced by the (im)morality of the action that led to the loss. The case of *Gray* v *Barr*,[91] on which Professor Clarke spent some time, is an excellent example of the potential complexities inherent in relatively simple insurance wordings, when surrounded by illegality. The tragic facts which led to the litigation are thankfully rare. Gray had been having an affair with Barr's wife. Unable to locate his wife, Barr went to Gray's house with a loaded shotgun to see if she was there. Gray (accurately) stated that she was not at his house. Barr demanded entry to the upstairs of the house to check and deliberately fired a shot into the ceiling. In the ensuing struggle a second shot was fired involuntarily, which killed Gray. Barr was acquitted of murder and manslaughter by jury trial.

In subsequent civil proceedings, Barr sought to rely on a household liability insurance policy which covered him for liability for 'damages in respect of (a) bodily injury to any person ... caused by accidents...'. The insurer denied liability on the alternate grounds that it was not an accident, and in any case that recovery was barred by public policy.

In considering the evident difficulty of adopting a neutral approach to construction of the policy in light of illegal actions, Clarke wrote of the approach in *Gray*:

> 'First, the court construed the liability section of the homeowner's insurance contract, which covered liability for loss "caused by accident", and found that the death was not accidental and hence not covered. Then, the Court held that, anyway, it was contrary to public policy to enforce the indemnity. Although in law the issues are different, in practice the two avenues converge'.[92]

The merging of the interpretive and the public policy issues can be seen in the judgments of all three members of the Court of Appeal but are most apparent in that of Salmon LJ. As there was no agreed position on how to approach the policy, there is no definitive *ratio* in this case. Lord Justices Denning and Phillimore each found that the proximate cause of the fatality was not an accident, but on different grounds. Salmon LJ's decision is simply one of three that agree on the outcome on these facts, if not the route to that outcome.

Lord Justice Salmon interpreted 'accident' as connoting a purely subjective test of intention: 'as without intending to injure'.[93] The fatal gunshot fell within this category and primary cover would be engaged. However, Lord Justice Salmon went further. Going beyond the interpretation of the word 'accident', he viewed the policy as subject to an implied term denying liability:

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[90] At 561B.
[91] Above n 64.
[92] Above, n 17, at 3.
[93] Above, n 64, at 579D.

> 'No doubt, the language of the policy is wide enough to cover any kind of accident. I think, however, that it should be read as subject to an implied exception. The exception being that the policy does not apply to injuries caused by an accident occurring in the course of threatening unlawful violence with a loaded gun'.[94]

The English judiciary have expressed grave reservations as to the implication of terms, both where implied in fact (to reflect the particular circumstances of the parties) and in law (to reflect the category of contract).[95] The risk is of undue judicial interference; to rewrite the bargain as they think it ought to be. Salmon LJ' s intervention is an extreme example of the kind of judicial legislation that can arise. It is expressing policy concerns as contractual content. This is exactly the kind of cross-contamination of interpretation and application of public policy that Lord Hailsham cautioned against in *Gardner* v *Moore*.

Denning and Phillimore LJJ agreed that the nature of the act was such to deny recoverability on the policy, even if the act fell within cover. Given their decisions on cover, these comments were *obiter dicta*, but fully expressed. The policy factors identified here would fit readily within the *Patel* v *Mirza* test, but in a way that is potentially troubling. The return to a discretionary model allows judges to make direct reference to factors which they find particularly alarming, but which- judged objectively- may be less deserving of deterrence.

Denning LJ viewed public policy as barring claims resulting from 'deliberate, intentional and unlawful violence, or threats of violence'.[96] This has echoes of the interpretation of express clauses in *Marcel Beller*.[97] Distinctions are drawn between strict liability and acts of negligence (which are nonetheless criminal) and deliberate acts. This is a legitimate factor, both in whether the act engages the illegality rule, and how the court should respond.

Salmon LJ sought to distinguish different forms of homicide and viewed the response to manslaughter as dependent on its facts. However, there was, to his mind, something particularly objectionable about the nature of the events in *Gray* v *Barr*:

> 'Although public policy is rightly regarded as an unruly steed which should be cautiously ridden, I am confident that public policy undoubtedly requires that no one who threatens unlawful violence with a loaded gun should be allowed to enforce a claim for indemnity against any liability he may incur as a result of having so acted'.[98]

This vision of a society riven by the illegal use of firearms was echoed by Phillimore LJ:

> 'In an age of violence—an age where the use of firearms is all too frequent- it would I think be very odd if a man who had had in his hands a loaded shotgun from which a shot had been fired and had killed another at a time when he had just assaulted that other with the gun could

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[94] At 580E.

[95] For a recent and somewhat stern reminder of the limits of the implied term, see *Marks and Spencer plc* v *BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72; [2016] A.C. 742, [21] per Ld Neuberger: 'a term can only be implied if, without the term, the contract would lack commercial or practical coherence'. For an eminently thoughtful discussion of the operation of terms implied in fact, see J McCunn, '*Belize* It or Not: Implied Contract Terms in *Marks and Spencer* v *BNP Paribas'* (2016) 79 MLR 1090, 1094-95 on the assumptions commonly made about the drafting of commercial contracts.

[96] At 569.

[97] Above, n 67.

[98] At 581C.

> recover on an insurance policy which protected him from liability if he was negligent in the use of the shotgun'.[99]

We might be more troubled by judges, without reference to any statistical support, determining which forms of deliberate harm require greater deterrence. This is the risk within a discretionary system. Clarke's work here was exceptional. He showed (across jurisdictions) that the deliberate or reckless use of a firearm was treated differently by judges than the use of a vehicle as a weapon.[100] If we are interested in the protection of third parties, then the nature of the weapon should not matter without good empirical evidence as to relative harms. Clarke thought that judges responded emotively and was concerned by this direction of travel: 'it appears that the courts have always responded as if mayhem by motor vehicle were quite different from other kinds of violence'.[101]

This is a further example of the breadth of Clarke's legacy. He was deeply interested in the extent to which judicial decisions in this area were the product of formal rules, or subtler applications of the nature of markets, society, and harms. His paper can be properly viewed as a legal realist piece,[102] mapping what the judiciary do by factors not formally recognised by the law. Clarke showed that the subtler issues within illegality mattered (with the use of guns and sexual violence as notable aggravating factors),[103] and not only the formal rules of law, when determining whether illegality deprived an insured of cover. In some cases, this is revealing what was hidden, and in others (such as Salmon's use of an implied term) it is showing judicial practice to be in direct contradiction of the approach stated by the apex courts.

3.1.4. Illegality and Indemnity: Euro-Diam and Geismar

What we have seen so far is that the operation of the illegality rule in insurance has utilised a range of factors to assess recoverability. Many of these are objectively rational. We have observed the courts considering: (1) the wider role of insurance in compensating third parties, especially in respect of compulsory insurance; (2) the distinction between criminal acts that are committed on a strict liability or negligence basis, and deliberate criminality. Some are less obviously rational and reflect an emotive response, such as the use of guns in violent deaths.[104] We have cases from which we can establish some degree of weighting of these factors. The non-deliberate use of a gun (at the moment of death) was viewed as more worthy of deterrence than the deliberate use of a car as a weapon.

We move at this stage to a distinct issue in insurance.[105] It is the way in which illegality does not provide a binary response to cover (off/on) but may reduce the sum recoverable. We can contrast here a pair of cases. The decision

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[99] At 587H.

[100] I have used only one of his many examples here.

[101] Above n 4, at [24-7B]. This reflects his earlier work, above n 17, at 248-9.

[102] Space prevents a fuller discussion of this concept, but see for example, Oliver Wendell Holmes' classic opening description of law-making in *The Common Law* (Litle, Brown & Co, 1881), 1: 'The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, and even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics'.

[103] For his review of this latter factor, see above n 17, at 10.

[104] As Clarke, above n 4, [24-7B] fn 257 records, there were 30 cases of homicide by gun in 1970 (the date of the case) but 685 cases of causing death by reckless or dangerous driving. Modern data suggest a similar disparity.

[105] There is some functional overlap here with the operation of the contributory negligence rules in cases of tort illegality. For a recent example, see *Dormer* v *Wilson*, above n 9.

in *Euro-Diam* v *Bathurst*[106] reflects the opposite end of the illegality spectrum from *Gray* v *Barr*, at least from the perspective of the judiciary. It has been hailed as a clear judicial expression of the nuanced 'balancing factors' approach, rather than the formal 'reliance' test.[107] It was viewed by Clarke as an important example of the insurance approach prior to *Tinsley*.[108] As with *Hardy* and *Gardner* above, *Euro-Diam* is best seen part of a pair of authorities- alongside *Geismar* v *Sun Alliance*.[109]

The goods insured in *Euro-Diam*- a consignment of diamonds- were recorded in the claimant's register at their true value prior to their shipment to Germany on a sale-or-return basis. The insurer therefore received the correct premium for the cargo cover provided. However, the invoice requested by their buyer under-recorded their value, presumably to defraud the German tax authorities. This was illegal under German law. The false invoice did not benefit the insured directly. The Court of Appeal rejected two distinct grounds on which the insurer denied liability: that an implied term (presumably an insurance warranty) denied recovery, and that the common law rule of illegality applied.

Kerr LJ refused to imply a term warranting legality. Such a term exists (in somewhat more limited fashion)[110] in marine insurance, but this was distinguished as a non-marine policy, and insurance over goods rather than a 'marine adventure'. Applying the orthodox test for a term implied in fact, he stated: 'I can see no basis for holding that any such Draconian implication is necessary from the point of view of business efficacy'.[111] Moreover, the parties had included an express term requiring legality in respect of the peril of confiscation (by the State) of the goods, but it only provided the insurer with a defence where the illegality was a contributing cause of the loss. This operated against the implication of a wider implied term.

As to illegality, Kerr LJ recognised a 'public conscience' test, and this statement is the closest we have to a specific insurance rule:

> '(1) The *ex turpi causa* defence ultimately rests on a principle of public policy that the courts will not assist a plaintiff who has been guilty of illegal (or immoral) conduct of which the courts should take notice. It applies if in all the circumstances it would be an affront to the public conscience to grant the plaintiff the relief which he seeks because the court would thereby appear to assist or encourage the plaintiff in his illegal conduct or to encourage others in similar acts…
>
> (2) The authorities show that in a number of situations the *ex turpi causa* defence will *prima facie* succeed. The main ones are:
>
> (i) where the plaintiff seeks to, or is forced to, found his claim on an illegal contract or to plead its illegality in order to support his claim…
>
> (ii) Where the grant of relief to the plaintiff would enable him to benefit from his criminal conduct…

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[106] Above n 65.
[107] *Chitty*, above n 37, at [19-022].
[108] Above n 17, at 21.
[109] Above n 66.
[110] As Kerr LJ considered, the extent to which legality with English law is warranted, as opposed to legality on the basis of 'foreign' law, was unsettled. For the modern position, see *Arnould*, above n 1, at [21-16].
[111] At 40H - 41A.

(iii) Where, even though neither (i) nor (ii) is applicable to the plaintiff's claim, the situation is nevertheless residually covered by the general principle summarised in (1) above…

3) However, the *ex turpi causa* defence must be approached pragmatically and with caution, depending on the circumstances…'[112]

Alongside this, he recognised some established positions drawn from the application of the public conscience test. These are, presumably, indicative rather than determinative of the outcome in insurance. Following *Patel* v *Mirza*, it is likely that these factors are- once again- legitimate considerations. Relying on *Geismar*, he treated rule 2(ii) as indicating that 'where there is a deliberate breach of the law I do not think the court ought to assist the plaintiff to derive a profit from it, even though it is sought indirectly through an indemnity under an insurance policy.'[113] On this basis, the claim for the diamonds was not barred by illegality. The invoice was unrelated to the insured's proof of loss, and the insured's participation in the smuggling was limited:

'The [insured] did not smuggle the diamonds into Germany and did not themselves make use of the understated invoice; they were not liable for the underpaid tax; and they did not have the goods in their possession at any relevant time'.[114]

The *Euro-Diam* test was viewed by the Supreme Court in *Les Laboratoires Servier* v *Apotex Inc*[115] as a classic restatement of the 'public conscience' approach in contract law generally, rather than an insurance specific rule.[116] To the extent to which it provided a general rule, that panel of the Supreme Court was clear: '…it was decisively rejected by the House of Lords in *Tinsley* v *Milligan*'.[117] Following *Patel* v *Mirza*, it is likely to have been reinstated.

The outcome on the facts was reversed in *Geismar*. In that case, personal jewellery (among other items) was stolen in a burglary. It had been insured by Sun Alliance, which denied liability on the basis that the jewellery had been imported without paying duty, contrary to the Customs and Excise Act 1952. The insurer expressed concern that to indemnify would also expose it to criminal liability.[118] Expert advice to the court stated that the goods were liable to forfeiture, even after transfer to a third-party, eg by sale. In *Geismar*, we have both immediate involvement in and benefit from the illegality, and concern of over-indemnification. This latter issue deserves some further attention.

The insured had, prior to the loss, goods that were subject to confiscation. If the insurer paid out and then took possession of the goods after recovery,[119] then the goods would (on the expert evidence provided) remain subject to confiscation. If a full indemnity were recovered, counsel for the insurer contended that there was a risk that the insured 'would rid himself of the disadvantages that he suffered when in possession of the goods and he would be burdening the defendant insurers with the disadvantages to which he had referred'.[120]

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[112] At 36.
[113] At 39H, citing *Geismar*, above n 66, at 395F.
[114] At 40B.
[115] [2014] UKSC 55.
[116] At [14].
[117] At [15].
[118] This was not established at first instance on the facts.
[119] Under the doctrine of subrogation. This is not likely for goods which were stolen and not recovered by the time that litigation commenced.
[120] At 387G.

The basis for refusing to enforce the insurance contract in this case is not so much the immediate nature of the criminality but the sanction that applied to the goods insured: the risk of confiscation. The operation of an insurance indemnity might cleanse the goods of the potential application of the sanction and improve the position of the insured. The possibility of 'betterment' is used here as a basis to refuse enforcement of the contract. Moreover, the deliberate nature of the criminality in *Geismar* was a factor in denying recovery under the public policy rule.[121]

The issue has been developed in recent cases. Even where the illegality defence does not operate, a similar argument can be used to limit recovery. Two recent tort cases arising in the context of motor insurance provide a useful example. We can compare *Ali* v *HSF Logistics Polska SP*[122] and *Agbalaya* v *London Ambulance Service*.[123] In both cases, a vehicle was being driven routinely without a valid MOT certificate.[124] In *Ali*, the vehicle was parked when it was struck by a lorry. In *Agbalaya*, it was being driven. In *Ali*, the vehicle was roadworthy and would presumably have passed an MOT. In *Agbalaya*, it would have failed an MOT and the claimant lacked the funds to repair it. Both cases post-date *Patel* v *Mirza* and so apply the modern law of illegality.

On the recovery point, the court considered that the claimants had not been deprived of the normal use of a vehicle which could be lawfully driven. On that basis, they were not entitled to the full cost of a replacement vehicle. This is not an *ex turpi causa* issue, but the measure of loss. In each case, the court would need to determine the extent to which the accident deprived the claimant of the lawful use of a vehicle:

> 'This then delimits the period of compensation and distinguishes between the meritorious claimant (perhaps deprived of only a few days of car hire charges) and the unmeritorious claimant (who fails to recover his credit hire charges at all)'.[125]

It can be seen from these authorities that the operation of the illegality rule is only part of the private law ecosystem which would determine recovery under an insurance claim. If the purpose of an insurance contract is to indemnify against loss, then the mere existence of unlawfulness might limit the level of indemnity, irrespective of the application of the *ex turpi causa* rule. In a case like *Geismar*, as with the tort cases, there is a causal question to be resolved, as to what has been lost. If the goods could not be lawfully used (as in the MOT cases) or were subject to confiscation (as in *Geismar*) then the indemnity is limited to reflect the insured's relationship to the property insured. *Geismar* treats this as an application of a rule of public policy, the tort cases as the standard process of calculating the indemnity.

There is some sense of an evolution in the approach of the courts. In *Geismar*, goods subject to possible confiscation were assumed to have no insured value. In the later tort cases, there is an assumption that these goods would have a reduced value, but not zero. The extent to which the claimant could have restored the goods to lawful use was considered. As with the convergent processes of public policy and construction of an insurance policy (despite the admonitions form the House of Lords), there is a further convergence of illegality and indemnification.

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[121] At 395F: 'I am not concerned with cases of unintentional importation or of innocent possession of uncustomed goods. I would think that different considerations would apply in those cases. But where there is a deliberate breach of the law I do not think the court ought to assist the plaintiff to derive a profit from it, even though it is sought indirectly through an indemnity under an insurance policy'.

[122] [2023] EWHC 2159 (KB), [2024] Lloyd's Rep IR 1.

[123] [2022] 2 WLUK 545.

[124] For international readers, this is the statutory roadworthiness certificate in the United Kingdom and normally tested annually.

[125] At [17].

In both areas, a more nuanced illegality rule can be made to fit the specific demands of insurance law and practice, rather than providing dogmatic outcomes.

4. Insurance, Illegality and Legal Certainty

In this section, my aim is to show that insurance should embrace the return to a form of structured discretion over the competing claims for a formal rule. In doing so, I start with the recent work of Lord Sales, who has provided excellent insights into the common law process.[126] His work overlaps in this area with an interest of mine: the nature of default and mandatory rules in commercial law.[127] This is normally discussed according to the extent to which the parties are free to displace the default rule with a rule of their own choosing, and the role of 'party autonomy'. In the *ex turpi causa* space, it is not possible for the contract to exclude these rules, although express contract terms can lower the threshold required, such that contractual rights are lost even where the public policy rule is not engaged.[128]

Lord Sales' work is more concerned with the way in which legal rules constrain the future choices of judges deciding cases ('judicial autonomy'). He begins with the broad range of legal rules:

> 'There is a rule design spectrum. At one end of the spectrum, bright-line rules may be required, giving a clear but inflexible rule to determine the dispute; at the other, there may be broad and open-textured standards, requiring something closer to *de novo* decision making in each particular case'.[129]

As he notes, this choice reflects a considerable potential variation in the judicial application of principle. This is at the heart of the long running discussion of an optimal *ex turpi causa* rule:

> 'The latter end of the spectrum leads to rule of law concerns. If judges have the power to do what they like in applying the law, the law does not govern; the judge does. The rule of law therefore demands that legal rules exert sufficient control over a judge's decision. The former end of the spectrum best alleviates those rule of law concerns. However, it purchases clarity at the expense of flexibility and a lack of responsiveness to what may be significant shifts in the balance between the competing values which the rule in question seeks to accommodate'.[130]

What Lord Sales assumes in his analysis (and does so explicitly) is that judges will conform to the limits of the rule before them, and that the doctrine of precedent reinforces this.[131] The limits on judicial autonomy to not consider extraneous factors are reinforced by the appeal process and judicial politics. Judges are not homogenous in this regard. Contrast Lord Denning with the standard judicial deference to existing precedent.[132]

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[126] Lord Sales, Default Rules in the Common Law: Substantive Rules and Precedent, (Oxford, 24/03/23).
[127] J Davey, 'Claims notification clauses and the design of default rules in insurance contract law' (2012) 23 Ins LJ 245 and J Davey, 'The reform of insurance warranties: a behavioural economics perspective' [2013] JBL 118.
[128] As discussed above in respect of *Marcel Beller* v *Hayden*, above n 67. On the potential for mandatory rules to be restrictive of party autonomy in one direction only, see E Zamir & I Ayres, 'A Theory of Mandatory Rules: Typology, Policy, and Design' (2020) 99 Tex L Rev 283.
[129] At 1.
[130] At 1.
[131] See his discussion of the nature of precedent, at 8-11.
[132] Hazel Carty, 'Precedent and the Court of Appeal: Lord Denning's Views Explored' (1981) 1 Legal Stud 68.

In describing the *ex turpi causa* case law, many judicial accounts doubted that formal legal rules were capable- in practice- of sufficiently constraining judicial decision-making. The pressure to seek an appropriate outcome overcame- on notable occasions- the bulwark of precedents describing clear, inflexible rules.[133] There were at least two problems with the clear, simple rules approach in illegality. The first is that they were not actually that clear or simple in application.[134] That is a separate issue. The second is that the clear, simple rules were often not applied in a mechanical fashion by the courts. This was described by Lord Toulson as 'uncertainty how a court will in practice steer its way in order to reach what appears to be a just and reasonable result'.[135] This requires us to acknowledge that clear, simple rules do not always generate clear, predictable outcomes. This is not a new claim and certainly not restricted to illegality. Carol Rose, in a highly influential paper on the nature of property law, described the tendency for clear, simple rules to become opaque and fuzzy in application.[136] This is visible in commercial contract law. Many a bright line rule on consideration generated a promissory estoppel counterpart.

We can see this discussion playing out in the Supreme Court analysis in *Patel* v *Mirza*. It arises in the consideration of the relative importance of 'legal certainty' as a factor in the design of the *ex turpi causa* rules. Lord Toulson (for the majority) was not persuaded that the 'reliance' rule (or its variants) was more certain than the range of factors model, either doctrinally, or in application by the courts. He also doubted whether legal certainty had, in any event, the same weight in these kinds of disputes:

> '… 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… The same considerations do not apply in the same way to people contemplating unlawful activity'.[137]

Lord Kerr was of broadly the same view:

> 'Certainty or predictability of outcome may be a laudable aim for those who seek the law's resolution of genuine, honest disputes. It is not a premium to which those engaged in disreputable conduct can claim automatic entitlement'.[138]

To return this to the discussion led by Lord Sales in his academic work, the sense is that 'rule of law' concerns have less traction when one or both litigants are transacting illegally. This is an issue that divided the Supreme Court, as the judgment of Lord Neuberger shows:

> 'There is, I acknowledge, some attraction in the point that the need for certainty in this area is diminished by the fact that parties to an arrangement which is illegal have less cause for complaint if the law is uncertain. However, criminals are entitled to certainty in the law just as much as anyone else. In any event, third parties are often affected by the enforceability of rights acquired or lost under contracts, and innocent third parties, it could be said with force, are in a particularly strong position to expect certainty and clarity from the law. Quite apart

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[133] See Burrows, above n 21, at 33: 'the point being made is a simple one. Lord Sumption's approach does not stand up to scrutiny. If it were the law, it would produce, on the face of it, results that no legal system would tolerate. By buying in to a rigid rule-based approach, there is no room for manoeuvre'.

[134] *Patel* v *Mirza*, above n 3, at [113]: 'one of the principal criticisms of the law has been its uncertainty and unpredictability'.

[135] At [113].

[136] Carol M. Rose 'Crystals and Mud in Property Law' (1997-98) 40 Stan L Rev 577.

[137] At [113].

[138] At [137].

> from this, there is a general public interest in certainty and clarity in all areas of law, not merely because it is a fundamental aspect of the rule of law, but also because the less clear and certain the law on any particular topic, the more demands there are on the services of the courts'.[139]

Andrew Burrows, writing extra judicially, shared this view.[140] Here the 'rule of law' concerns spill beyond the immediate parties to the transaction and embraces the interests of third parties, and the demands on the legal system that uncertainty creates. But even without those, Lord Neuberger suggests that the claim to legal certainty applies to criminals 'just as much as anyone else'.[141]

To move from the abstract demands of markets to some insurance specifics, I deploy here two real world examples each shown by a simple set of facts. One is deliberately an *ex post* litigation issue, in which an insurer might contest coverage (strictly speaking, the enforceability of the promise to indemnify). The other is an *ex ante* transactional decision, taken at the product design stage. This divergence is meant to test some of the doctrinal and policy reasoning evident in the decisions considered above. In particular, I am interested in the need for legal certainty as a 'rule of law' concern for the design of the *ex turpi causa* doctrine.

Problem A

A claim in respect of property insurance cover over commercial goods in transit reveals that the value of the goods was falsely declared to a foreign authority, leading to the underpayment of import duties (or some equivalent form of taxation). There is no dishonesty in the declaration of the value of goods to the insurer, or in the presentation of the claim.

Problem B

An insurer wishes to provide insurance cover in respect of regulatory fines which are payable on a strict liability basis. These relate to some form of market conduct, but which could arise despite the reasonable efforts of the insured to prevent them, or in part because of a lack of due care, or as a result of cynical behaviour by the insured. There is no need to particularise the precise kind of offence here, but it could be for environmental harms, consumer data breaches, or breach of regulatory codes of conduct.

4.1 Problem A: Applying the Ex Turpi Causa *Rule*

When we consider the 'rule of law' assumption of predictability in the law, there is no reasonable contention that an insurer facing such a claim is not entitled to the normal commercial standards of legal certainty. In the illegality space, it is the enforceability of the contract that is at issue, and not the existence of the right to indemnity. This matters. Insurers (generally) can pay such claims, the legal question is whether the court will compel them to do so.[142] This is significant. The commercial decision to pay (or not) the claim is untouched by the rule. Its only effect is to potentially change the outcome of litigation. It is therefore only engaged formally if the insurer is prepared

[139] At [158].
[140] Above n 21, at 29.
[141] Above, n 139.
[142] I recognise that legal regimes exist that prevent the payment of an insurance indemnity (often related to sanctions against certain States or prescribed organisations). The *ex turpi causa* rule is not of this nature.

to deny the claim in litigation. Any uncertainty in the application of the *Patel* v *Mirza* rule relates to the extent to which comparable cases have been litigated, and whether there are grounds for disputing those decisions. The leading texts- for example *Chitty*- have substantial sections reviewing the emerging case law which suggests that *Patel* v *Mirza* does not wipe the slate clean for illegality cases.[143] We are likely to see considerable judicial restraint in smoothing the outcomes of the discretionary and formalist approaches.

There is here some slight uncertainty for the insured. The insurer may have a defence, but the operation of this is likely to require litigation. There is a significant possibility that the insurer's commercial decision will not necessarily track the formal legal position. This would not- to my mind- be an unusual position for an insured. Insurers are keen to impress on me that they do not routinely enforce their remedies for non-disclosure, for breach of warranty, for late notification of claims, for lack of insurable interest (this list could continue for some time) except where commercially justified.[144] The illegality rule can be added to the list of insurance principles which provide a broad indication of likely commercial outcome, but not a perfect one. Legal certainty is not the same as outcome certainty.

In this, I would treat society as broadly ambivalent to the existence or enforcement of the insurance contract. The case law suggests that this insurance contract would routinely be enforced. Insurers can exercise a gatekeeping function and include specific limitations on cover, as indeed was the case in *Euro-Diam*. There may be reasons of international comity to treat forms of tax evasion, even of other systems, as requiring specific deterrence. Unless demonstrated- and this may be better done within tax law itself- insurance law should by default treat such claims as recoverable. The indemnity principle- as seen in recent case law in tort- may provide a more subtle mechanism for limiting recovery to the actual value of what was lost.

4.2 Problem B and the Ex Turpi Causa *Rule*

Where commercial parties are seeking to arrange indemnity cover in the shadow of potential corporate sanctions, I would treat both parties as holding a legitimate interest in commercial certainty. There are litigated examples of attempts to counter criminal sanctions by insurance-like products, such as *Department of Trade and Industry* v *St. Christopher Motorists' Association Ltd*.[145] Here, a club provided funds for a chauffeur for members that lost their right to lawfully drive, including by way of criminal sanction.

Modern products would be more subtle. As Clarke said in his monograph:

> 'Liability for acts which are torts or lesser crimes is a proper subject of insurance. Were it otherwise, professional negligence cover would be as restricted as the enthusiasm of the professional to take on all but the safest work'.[146]

For many of these situations, I presume that society has a direct interest in the existence of insurance in scenario B. It provides for pooling of risk. It also ensures a rational mechanism for the pricing of precautionary measures. Premia will reflect both the insured's risky conduct and the measures it takes to limit those risks. This is a useful market function and smoothes the costs of engaging in potentially risky market conduct. To be explicit: a

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[143] *Chitty*, above n 37, at [19-045].

[144] And indeed, the courts have been prepared to assume this when measuring damages in 'loss of a chance' situations. See, for a recent example, *Norman Hay PLC* v *Marsh Ltd* [2025] EWCA Civ 58 and the counterfactual analysis undertaken in an action against a broker as to what an insurer might have done (hypothetically) had a policy been purchased.

[145] [1974] 1 WLR 99.

[146] Above n 4, at [24-7B].

prospective corporate insured considering potential financial sanctions against either itself or its officers is exchanging the uncertain cost of enforcement measures taken against it for a certain loss by way of insurance. The insurance market will decide whether to insure, and at what price. It will also determine discounts for rational risk mitigating conduct. This should not offend the public conscience, as it generally furthers the interests of society.

The illegality rules as developed would generally permit this for minor infractions, and for those which are strict liability or negligence based. Gross negligence is a difficult category,[147] but insurance against future deliberate and cynical action is likely to be uninsurable in almost all circumstances.[148] This later category ought not to be a hard and fast rule but a presumption. It is perfectly possible to have rules of the criminal law that treat certain types of corporate liability as setting the price for misconduct, rather than seeking to deter any risky conduct. And insurance might have a proper place in helping to set that price. This is the appropriate response to the 'deterrence' arguments sometimes deployed: that insurance provides a mechanism for rational and effective deterrence in many circumstances through the pricing of risk.[149] It is not a complete solution, but it can be effective in many situations. On this basis, we should not design the *ex turpi causa* rule to solely meet the legal determination of problem A, which is likely to be visible to the courts through litigation, but to also consider the legitimate interests of insurer and insured in situation B, which is likely not to arise as frequently before the courts. In short, the transactional problem in situation B demands the fluidity and flexibility that only the *Patel* v *Mirza* rule provides. But how then to mitigate the uncertainty that it might generate?

The insurability of fines would start with a default position that the deliberateness of the conduct is a key factor, but not the only factor.[150] Where the nature of the regulatory offence is one where insurance is inappropriate, this can be determined (or signalled) by specific statutory or regulatory determination. But generally, the involvement of insurance in markets is a positive step. The equivalent of the protection of third parties is the social interest in the cost sharing nature of insurance. Rather than fines reflecting unlawful activity when detected and actioned, insurance will reflect the likely costs of engaging in this kind of activity, and the perceived carefulness of the insured to limit liability. This provides the potential for economically and socially efficient outcomes. As before, this does not rule out specific statutory measures being introduced to prevent the insurance of certain types of sanction. Where fines are intended to deter and not merely price risky conduct, this can be made clear in the statute itself, or associated documentation.

5. Conclusion

Professor Clarke's review of the illegality rule in insurance law prior to the decision in *Tinsley* v *Milligan* was sceptical of the ability of judges to create a coherent model for (non)intervention. The potential shift from a broadly discretionary model to a formalist set of rules was not something that he rejected: 'Clearly, courts do balance social and public policy factors but it is not clear at all that they should do so'.[151] He viewed the competing

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[147] There is useful discussion in *Clarke*, above n 4, [24-7A1] on the range of offences committed whilst driving, and their insurability, especially where the injured claimant was a participant (to some extent) in the illegality.

[148] Recall that the deliberate use of a motor vehicle as a weapon was held to be insurable where the true claimant was an innocent third party.

[149] See K Abraham XXXXXXXXXXXXXX (forthcoming, BILA paper).

[150] I am assuming that the conduct crosses the 'turpitude' threshold described above, n 18.

[151] Above, n 17, at 24.

demands of deterrence, personal responsibility for deliberate actions, and existing market practice as productive of uncertainty and variation in outcome. This is close to Professor (now Lord) Burrows' assessment of the 'rule of law' concerns surrounding discretionary rules, in that it may place too much power in the hands of the individual judge. As Burrows said:

> 'In general, I am a strong believer in legal rules. They help to ensure certainty, consistency and predictability, all important qualities for good law. In general, I do not like judicial discretions which, while leaving the judges with flexibility, tend to undermine those important qualities…'.[152]

What the subsequent years have shown is that the search for certainty, consistency and predictability in the law of illegality was not achieved by the adoption of formal legal rules. The creation of multiple 'threshold' tests (how serious the criminality, how deliberate the act, how central to the cause of action) generated uncertainty and unpredictability. Crystalised formal legal rules became clouded by exceptions and exceptions to those exceptions.[153]

The decision in *Patel* v *Mirza* allows for insurance to operate a weighted balancing exercise. Thresholds are removed as formal steps in the application of law but remain as highly influential factors to be balanced. This should reduce the tendency for judges to seek to reach the result that they desire through other means. Lord Justice Salmon's implication of a specific term to deny liability for the particular type of harm inflicted in *Gray* v *Barr* is the most egregious example of judicial intervention outside of the *ex turpi causa* rule but it is not alone.

'Hard cases make bad law' is sometimes invoked as a basis to ignore those cases when undertaking rule design. This is, in my view, an error. Rule design should consider the range of circumstances governed by the rule. In illegality almost all the cases that are litigated are hard cases. What is often ignored is the mass of transactional decisions which also rely on the *ex turpi causa* rule. The willingness of insurers to indemnify for the sanctions imposed following criminality or the wider private law consequences of such conduct is an important part of the liability insurance sector. The illegality rule should not seek to provide the ideal rule for those markets- insurance contracts can draft their own 'criminality' rule- but it should provide a minimal level below which insurers cannot go (in creating legally enforceable agreements).

What is needed is a recognition that party autonomy, judicial autonomy and legislative autonomy all play a part. Contracting parties have a role in designing products that reflect the specific concerns in that sector, judges can seek to balance both the needs of the wider market and just outcomes in individual cases, and regulatory offences (whether in the data protection, environmental or financial services sector) can include clear rules on the insurability of sanctions and civil liabilities flowing from these forms of prohibited conduct. There is no suggestion in this that criminal offences generally should address the issue of insurability, but offences which are specifically targeted at corporate behaviour should do so. This guidance might be formally included in the law, or within regulatory conversations (and the Financial Conduct Authority is an obvious vehicle for this) or in documents explaining the rule design (such as Law Commission or government reports). The role of providing *ex ante* legal certainty is not a task that must fall exclusively on common law judges in litigation.

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[152] Above n 21, at 23.

[153] As Burrows made plain (above n 21, at 33): 'the point being made is a simple one. Lord Sumption's approach does not stand up to scrutiny. If it were the law, it would produce, on the face of it, results that no legal system would tolerate. By buying in to a rigid rule-based approach, there is no room for manoeuvre'.

Professor Clarke in 1996 expressed genuine concerns that the creation of a dynamic rule for illegality in insurance contracts was beyond the common law. Rather than fall back on a formalist model, my view is that we do better to honour his legacy by creating a multi-agency approach.[154] This is a job for contractual wording, for judges, and for the legislature.

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[154] Burrows, above n 21, at 35: 'the present rules on illegality are so unsatisfactory that we should welcome their being wiped away in favour of a range of factors approach'.