

Negligence and Illegality

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Overview of the Coherence Rationale

I. Introduction

It has been accepted at the highest judicial levels in Australia and Canada that the need to preserve the coherence of the law is the only valid conceptual justification for a doctrine of illegality. In her leading judgment in *Hall v Hebert*, McLachlin J (as she then was) held that a defence of illegality should apply only where it is necessary to preserve the integrity of the legal system.¹ In *Miller v Miller* the High Court of Australia, when deciding a claim for injuries sustained in the course of a joint illegal enterprise, stated that ‘the central policy consideration at stake is the coherence of the law’.² There is also recognition in England that legal coherence is an underlying rationale of the law of illegality, although it is generally not the only rationale thought to be relevant.³

The approach of contemporary courts to claims arising from an illegality has been informed, directly or indirectly, by Weinrib’s classic article ‘Illegality as a Tort Defence’, where Weinrib argued that the preservation of the integrity of the judicial system is the only convincing rationale for a doctrine of illegality.⁴ The principles he advanced there were adopted by McLachlin J writing for the majority in *Hall v Hebert*, and have in turn been recognised by courts in Australia and England.⁵ In a frequently quoted

¹ *Hall v Hebert* [1993] 2 SCR 159, 176–180 (McLachlin J, La Forest, L’Heureux-Dubé and Iacobucci JJ agreeing).

² *Miller v Miller* [2011] HCA 9, (2011) 242 CLR 446 [15], (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), [108] (Heydon J).

³ *Gray v Thames Trains Ltd* [2009] UKHL33, [2009] 1 AC 133 [39] (Lord Hoffmann); *Hewison v Meridian Shipping Services Pty Ltd* [2002] EWCA Civ 1821, [2003] ICR 766 [51] (Tuckey LJ), [82] (Ward LJ); *Safeway Stores Ltd v Twigger* [2010] EWCA Civ 1472, [2011] 2 All ER 841 [16] (Longmore J); *Les Laboratoires Servier v Apotex Inc* [2012] EWCA Civ 593, [2013] RPC 21, [67] (Etherton LJ), [92] (Laws LJ) (Kitchin LJ agreeing with both judgments). In *Patel v Mirza* [2016] UKSC 42 Lords Mance, Clarke and Sumption held that legal coherence is the proper basis of illegality doctrine: [192] (Lord Mance), [214] (Lord Clarke), [230]–[232] (Lord Sumption). However, a majority of the Court preferred a broad policy discretion. See also the discussion of the consistency rule in ch 8 as adopted in *Gray* (section III, The Consistency Rule). Other approaches adopted by the UK courts have been discussed in chs 4 and 5.

⁴ EJ Weinrib, ‘Illegality as a Tort Defence’ (1976) 26 *University of Toronto Law Journal* 28.

⁵ *Miller v Miller* (n 2) [15] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), 483 [108] (Heydon J); See the UK cases cited in n 3.

passage in *Hall v Hebert*, McLachlin J, citing Weinrib's article, explained the coherence rationale of the illegality principle:

[T]he law must aspire to be a unified institution, the parts of which—contract, tort, the criminal law—must be in essential harmony. For the courts to punish conduct with one hand while rewarding it with the other would be to 'create an intolerable fissure in the law's conceptually seamless web.'⁶

Later in her judgment her Honour confirmed that the 'fundamental rationale' for illegality doctrine is 'the need to maintain internal consistency in the law, in the interest of promoting the integrity of the justice system.'⁷

The need to apply illegality principles so as to preserve legal coherence is a major theme of Weinrib's article on illegality, and the need to preserve legal coherence a major theme of Weinrib's writings in corrective justice more generally (although admittedly his emphasis has been primarily on the need for internal coherence in private law actions). In section III I will explain that the goal of promoting coherence within the legal system is not a policy concern that applies independently of the parties relationship; rather, considerations of legal coherence are relational considerations. For this reason, the objective of promoting coherence within the law is best characterised as a *principle* of coherence rather than a *policy* of coherence.⁸

Weinrib explains in 'Illegality as a Tort Defence' that a principle of illegality comes into play only when it is needed to maintain the integrity of the legal system by preventing an inconsistency arising between the law of torts and the area of law proscribing the conduct.⁹ Weinrib identifies two situations where an award of compensation for harm caused by an illegal act could potentially give rise to an inconsistency of this nature: (a) where it would enable the claimant to escape the consequences of the criminal law (as in the sanction-shifting claims); and (b) where it would enable the claimant to profit from the illegal conduct (as in claims for illegal profits and earnings).¹⁰ I will argue that these are not independent categories, but rather are both manifestations of the underlying principle of legal coherence. It is my contention that these two categories can be collapsed into one: namely, that the claim must be rejected where the relevant branches of the law, operating as a whole, have the effect that the claimant has not suffered loss or damage that the law will recognise.

⁶ *Hall v Hebert* (n 1) 176 (citation omitted).

⁷ *ibid* 178.

⁸ B McLachlin, 'Weaving the Law's Seamless Web: Reflections on the Illegality Defence in Tort Law' in A Dyson, J Goudkamp and F Wilmot-Smith (eds), *Defences in Torts* (Oxford, Hart Publishing, 2015) 214.

⁹ Weinrib, 'Illegality as a Tort Defence' (n 4). See also A Beever, *Rediscovering the Law of Negligence* (Oxford, Hart Publishing, 2007) 380.

¹⁰ Weinrib, 'Illegality as a Tort Defence' *ibid*. Weinrib also includes exemplary damages in category (b).

II. The Principle of Coherence is not Dependent on Corrective Justice for its Validity

I have explained that Weinribian corrective justice proponents view legal coherence as the only legitimate rationale for an illegality defence. I should acknowledge at this point that it is not only corrective justice theorists who take this view. In a highly influential article, 'Recovering Value Transferred under an Illegal Contract', Peter Birks argued that it is the 'principle against self-stultification' that is the legal basis for the application of illegality doctrine in the context of restitutionary claims for the recovery of benefits conferred under an illegal contract.¹¹ The 'principle against self-stultification' is a reference to the need to ensure 'that the law as stated in one area should not make nonsense of the law as stated in another'.¹² This principle, when expressed in its positive form, reflects the objective of maintaining coherence in the law.¹³ Birks' legal coherence approach was adopted by the High Court of Australia in a case subsequent to *Miller v Miller*, which consolidated the coherence rationale in the Australian law of illegality, *Equuscorp Pty Ltd v Haxton*.¹⁴

James Goudkamp and Lorenz Mayr have pointed out that the legal coherence rationale stands on its own, and that its validity does not depend on whether it can be accommodated within Weinribian corrective justice.¹⁵ This is undoubtedly correct; in an extra-curial piece the Chief Justice of Canada, Beverley McLachlin, has argued persuasively that laws must be coherent in order to be authoritative and intelligible and to provide a sound basis for persons to order their affairs.¹⁶ Her Honour then argues that this norm of coherence:

'does not stop with specific subsets of the legal system: it extends to the law as a whole. In this way coherence reaches for the essential unity of the law. ... On this view, it is part

¹¹ P Birks, 'Recovering Value Transferred Under An Illegal Contract' (2000) 1 *Theoretical Inquiries in Law* 155, 160.

¹² *ibid.*

¹³ *Equuscorp Pty Ltd v Haxton* [2012] HCA 7, (2012) 246 CLR 498 [38] (French CJ, Crennan and Kiefel J).

¹⁴ *ibid* [37]–[38].

¹⁵ J Goudkamp and L Mayr, 'The Doctrine of Illegality and Interference with Chattels' in A Dyson, J Goudkamp and F Wilmot-Smith (eds), *Defences in Torts* (Oxford, Hart Publishing, 2015) 243. James Goudkamp has put forward convincing arguments for a coherence rationale: J Goudkamp, 'A Revival of the Doctrine of Attainder? The Statutory Illegality Defences to Liability in Tort' (2007) 29(3) *Sydney Law Review* 445, 451–55; J Goudkamp, 'The Defence of Joint Illegal Enterprise' (2010) 34 *Melbourne University Law Review* 425, 441–46. However, it appears that, while Goudkamp believes legal coherence has an important role to play in this area (see J Goudkamp, 'A Private Law Hydra' (2015) 6 *The UK Supreme Court Yearbook* 254, 269) he is not convinced that consistency should be the sole rationale for illegality doctrine: Goudkamp and Mayr at 243; J Goudkamp, 'A Long, Hard Look at Gray v Thames Trains Ltd' in PS Davies and J Pita (eds), *Jurisprudence of Lord Hoffmann: A Festschrift in Honour of Lord Leonard Hoffmann* (London, Bloomsbury Publishing, 2015) 54.

¹⁶ McLachlin, 'Weaving the Law's Seamless Web' (n 8) 219.

of a judge's task to seek to develop a coherent system of norms that aim to make sense of different branches of the law. ... The obligation extends to reconciling the subset of norms that make up tort law and the subset of norms that make up criminal law, at least where those two subsets of law intersect. The obligation arises ... from the requirements of justification and intelligibility'¹⁷

This explanation of the importance of legal coherence is not dependent on a corrective justice model of negligence law for its validity. Nevertheless, Weinrib's contributions to the illegality debate has informed and shaped the views of courts and theorists alike. The coherence rationale as formulated by Weinrib in his seminal article will have less authority if it cannot be reconciled with his later writings on corrective justice. I will explain in the next section that the principle of coherence is an instantiation of corrective justice principles.

III. Concerns about Legal Coherence are Relational Concerns

In *Hall v Hebert*, McLachlin J indicated that concerns about legal coherence are policy concerns independent of the parties' relationship that operate so as to 'trump' corrective justice.¹⁸ However, Weinrib explains that the principle of coherence applies relationally without invoking an independent policy. This is because it is the whole body of the law—including the criminal, statute and civil law—that must determine the claimant's entitlements against the defendant.¹⁹ Weinrib recognises that the relationship of the parties must be situated within the whole system of law that regulates that relationship:

[T]he parties to a tort suit are related to each other as legal persons—that is, as parties whose legal relationships are expressive of the systematic coherence of the entire law of obligations. Accordingly, they do not interact juridically apart from the whole ensemble of intertwined legal concepts and principles that governs their participation in the law's systematic nature.²⁰

Weinrib endorses the statements by the High Court of Australia in *Sullivan v Moody* that an assessment of a duty of care 'may concern the need to preserve the coherence of other legal principles, or of a statutory scheme which governs certain conduct and relationships'.²¹ In *Sullivan v Moody* it had been said that the tort of negligence should not operate so as to 'subvert ... other principles of law,

¹⁷ *ibid* 219–20.

¹⁸ *Hall v Hebert* (n 1) 181–82.

¹⁹ EJ Weinrib, *Corrective Justice* (Oxford, Oxford University Press, 2012) 76.

²⁰ *ibid* (footnote omitted).

²¹ *Sullivan v Moody* [2001] HCA 59, (2001) 207 CLR 562 [50] (the Court), endorsed in Weinrib *ibid* 75.

and statutory provisions, which strike a balance of rights and obligations, duties and freedoms'.²² Similarly, the Supreme Court of Canada in *Cooper v Hobart* held that a duty of care will not be recognised where it would be inconsistent with the statutory framework that created the defendant's powers and duties.²³ Weinrib has commended this aspect of the Court's determination on duty of care for its emphasis on relational reasoning.²⁴ The decisions of *Sullivan v Moody* and *Cooper v Hobart* were concerned with ensuring that negligence law does not impose obligations on the defendant that conflict with statutory duties or established principles from other areas of the law. However, the same principles apply when one is considering the rights the claimant has. Whether the defendant has infringed a right of the claimant, and the value of that right, must be determined by the entire body of legal principle, including the principles of the criminal law.²⁵

The result is that, as Weinrib further explains, the concern about the coherence of the claim within the law as a whole is a relational, not an extra-relational, policy concern. In corrective justice terms, it is the whole body of the law, including the criminal law, which will determine whether the defendant has infringed a right of the claimant that correlated with a duty not to infringe, and whether the claimant is entitled to a remedy to rectify that infringement.²⁶ Beever makes this same point when discussing illegality doctrine in *Rediscovering the Law of Negligence*.²⁷ Beever identifies situations where the claim must fail because the combined operation of tort law and criminal law has the result that there is no infringement of a right, or no infringement of a right that has a legal value. (I refer to this as the 'no loss or damage explanation').²⁸ Beever points out that this conclusion is reached by an analysis of the correlative position of the parties in the context of the whole legal system.²⁹ He emphasises that this approach does not involve an appeal to external policy but is merely the result of the principles of the two areas of law working in tandem.³⁰ It 'reflects the interrelatedness of tort law and criminal law' and 'is witness to the fact that the common law is a seamless web'.³¹ Beever's insightful analysis in this area has influenced the views of McLachlin CJ. Her Honour in extra-curial writings now recognises that it was wrong to view illegality doctrine when based on the principle of coherence as 'trumping' normal corrective justice entitlements.³² She is now persuaded to the view that where the principle of

²² *Sullivan v Moody* *ibid* [42].

²³ *Cooper v Hobart* [2001] SCC 79, [2001] 3 SCR 537.

²⁴ Weinrib, *Corrective Justice* (n 19) 66–71.

²⁵ Beever, *Rediscovering the Law of Negligence* (n 9) 379–83.

²⁶ Weinrib, *Corrective Justice* (n 19) 77.

²⁷ Beever, *Rediscovering the Law of Negligence* (n 9) 379–383.

²⁸ James Goudkamp and Lorenz Mayr have identified support for the no loss or damage explanation in German law: Goudkamp and Mayr (n 15) 236.

²⁹ Beever, *Rediscovering the Law of Negligence* (n 9) 379–83.

³⁰ *ibid* 383.

³¹ *ibid* 381.

³² McLachlin, 'Weaving the Law's Seamless Web' (n 8), in particular 220–22.

coherence applies to reject a claim based on an illegality it does so on the basis of the principles of tort and crime acting as a coherent whole.³³

In essence, then, the coherence approach requires that the claim must fail when, on an assessment of the rights and duties of the parties in the light of the legal system as a whole, an essential requirement for establishing the claim for damages is not met. It is important to emphasise this point; the central question is whether negligence and the governing area of the criminal law intersect so as to negate a requirement of the claim. The statutory purpose explanation (discussed in chapter 7) operates generally³⁴ to negate duty of care, and thus establishes that there has been no violation of a right of the claimant. The no loss or damage explanation (discussed in chapters 8 and 9) operates to negate the gist damage element of the claim, or to disvalue a specific head of loss, and thus establishes that there has been no violation of a right of the claimant, or that the right that is violated has no value in law.

The general point is that it is the intersection of the *principles* of tort with the *principles* of the area of law proscribing the conduct (usually the criminal law) that negates a requirement for establishing a claim in negligence. It is an important point, and one which the High Court of Australia emphasised in *Miller v Miller*:

[T]he issue that is presented by observing that a claimant was acting illegally when injured as a result of the defendant's negligence is whether there is some *relevant intersection* between the law that made the claimant's conduct unlawful *and the legal principles that determine whether the claimant should have a cause of action for negligence against the defendant*.³⁵ (emphasis added)

When the principle of coherence is understood in its correct sense, it can be understood that it does not operate so as to 'trump' the claimant's corrective justice entitlements. To the contrary, it is integral to the conclusion that no such entitlements ever arose.

IV. Categories of Claims Where a Legal Incoherence Might Arise

Weinrib has identified two situations where an award of compensation for harm connected to an illegal act could potentially give rise to an inconsistency in the law: (a) where it would enable the claimant to escape the consequences of the criminal law; and (b) where it would enable the claimant to profit from illegal conduct.³⁶

³³ *ibid.*

³⁴ Although, as I will discuss in ch 7, there might be circumstances where recognition of a legal loss would be incompatible with the purposes of the statute: see, ch 7, section V, Evaluation of the Statutory Purpose Explanation: Sanction-shifting Claims and Claims for Illegal Profits and Earnings.

³⁵ *Miller v Miller* (n 2) [16] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) [108] (Heydon J).

³⁶ Weinrib, 'Illegality as a Tort Defence' (n 4). These categories have also been endorsed by Beever: Beever, *Rediscovering the Law of Negligence* (n 9) 380.

Justice McLachlin, in her majority judgment in *Hall v Hebert*, accepted these as the only justifications for the application of a defence of illegality, explaining that ‘The idea common to these instances is that the law refuses to give by its right hand what it takes away by its left hand’.³⁷ The principles from *Hall v Hebert* were applied subsequently by the Supreme Court of Canada in *British Columbia v Zastowny*³⁸ and by the House of Lords in *Gray v Thames Trains Ltd.*³⁹

I will discuss Weinrib’s two categories briefly now, while keeping in mind that (as I will explain) these are both examples of the one overarching principle of coherence; further, that they are both manifestations of the principle that a claim should be rejected where the claimant has not suffered loss or damage that is recognisable by the law.

A. Allowing Recovery would Enable the Claimant to Escape the Effects of the Law Proscribing the Conduct

In Chapter 8 I will explain that some sanction-shifting claims must be rejected on the ground that they will permit the claimant to escape the consequences of a sanction imposed by criminal or statutory law. I identify in Chapter 8 two situations where a claim must be rejected on the basis that it would have the effect of deflecting a sanction prescribed by law: (i) a claim to recover a lawfully imposed pecuniary penalty; and (ii) a claim for non-pecuniary losses arising out of a lawfully imposed detention. These claims must be rejected because the effect of the operation of the whole body of the law—including the criminal and regulatory law—is that the claimant has not suffered loss or damage that the law will recognise. This point will be developed further in Chapter 8, with reference to Beever’s insightful analysis in this area.

B. Allowing Recovery would Enable the Claimant to Profit from Wrongdoing

A pervasive concern in this area is that claimants will derive a benefit from their illegal act. Ronald Dworkin recognised that it is an underlying principle of the legal system that claimants should not be allowed to benefit from their own wrongdoing.⁴⁰ As McLachlin J recognised in *Hall v Hebert*, this ‘underlying principle’ is best viewed as a particular manifestation of the need to preserve legal coherence.⁴¹ It would create an inconsistency in the law if the profits derived (or expected to be

³⁷ *Hall v Hebert* (n 1) 169.

³⁸ *British Columbia v Zastowny* [2008] SCC 4, [2008] 1 SCR 27.

³⁹ *Gray v Thames Trains Ltd* (n 3) [39] (Lord Hoffmann).

⁴⁰ R Dworkin, *Taking Rights Seriously* (London, Duckworth, 1977) 23–28.

⁴¹ *Hall v Hebert* (n 1) 174–76.

derived) from illegal conduct were awarded in a negligence action: ‘It would put the courts in the position of saying that the same conduct is both legal, in the sense of being capable of rectification by the court, and illegal.’⁴² Beever likewise views instances of wrongful profiting as instances of an incoherence in the law.⁴³

That having been said, the potential for a wrongful profiting to occur is limited in torts claims because an award of compensation in tort law is not profit.⁴⁴ As Alan Bogg and Tonia Novitz point out, while the principle of no wrongful profiting has ‘strong salience’ in contract law, it is a ‘relatively peripheral’ concern in torts.⁴⁵ Unlike contract law, where damages are awarded on the expectation measure, damages in tort are awarded to restore the claimant to the pre-tort position. Thus, an award of damages in tort for harm resulting from an illegal act is not ‘profit.’⁴⁶ It is only in the case of claims for illegal profits or earnings that the line between compensation and profit can become blurred in torts law.

The concern that claimants might use the legal process to enforce their illegal bargains and/or obtain the profits of their illegal conduct does not therefore have the same potency in torts as in contract. Nevertheless, there might be limited situations where the principle of coherence will require a claim to be rejected on the ground that an award of compensation would permit the claimant to obtain or retain the profits of the wrongdoing. Weinrib gives two examples. The first example is an award of exemplary damages to a claimant injured while engaged in an illegal act.⁴⁷ The second is an award of illegal profits or earnings.⁴⁸ Beever and McLachlin J in *Hall v Hebert* likewise endorse these as situations where recovery would allow the claimant to profit from wrongdoing and thus create an incoherence in the law.⁴⁹ In my view, there is a strong basis for arguing that an award of illegal profits or earnings can potentially create a lack of coherence between negligence law and the area of law proscribing the conduct. The same strong argument cannot, however, be made in respect of an award of exemplary damages. I will deal with exemplary damages first.

i. Exemplary Damages

Weinrib argues that an award of exemplary damages to a wrongdoing claimant should not be permitted as this would entitle the claimant to profit from the wrongdoing. A relevant example is where a trespassing claimant is awarded exemplary

⁴² *ibid* 176.

⁴³ See also Beever, *Rediscovering the Law of Negligence* (n 9) 380.

⁴⁴ *Hall v Hebert* (n 1) 174–77; *Hunter Area Health Service v Presland* [2005] NSWCA 33, (2005) 63 NSWLR 22, 40 [94] (Spigelman CJ); Weinrib, ‘Illegality as a Tort Defence’ (n 4) 40–41.

⁴⁵ AL Bogg and T Novitz, ‘Race Discrimination and the Doctrine of Illegality’ (2013) 129 *Law Quarterly Review* 12, 16.

⁴⁶ M McInnes, ‘Ex Turpi Causa and Tort—A Canadian Perspective’ [1993] *Cambridge Law Journal* 379, 381; Beever, *Rediscovering the Law of Negligence* (n 9) 374; James Goudkamp, ‘The illegality defence in the law of negligence after *Miller v Miller*’ (2011) 7(10) *Australian Civil Liability* 130, 131.

⁴⁷ Weinrib, ‘Illegality as a Tort Defence’ (n 4) 41–42.

⁴⁸ *ibid* 42–43.

⁴⁹ *Hall v Hebert* (n 1) 174–76, 179–80; McLachlin, ‘Weaving the Law’s Seamless Web’ (n 8) 213; Beever, *Rediscovering the Law of Negligence* (n 9) 380–81.

damages for injuries deliberately inflicted by the occupant.⁵⁰ Weinrib's reasoning is that the claimant should be entitled to claim compensatory damages for the injuries so as to ensure the claimant is no worse off as a result of the defendant's negligence, but not exemplary damages as this would confer a windfall on the claimant and enable the claimant to profit from the illegal act.⁵¹ This is also the view of both Beever and McLachlin J (in *Hall v Hebert*), who justify their objections to an award of exemplary damages on the ground that such an award would create an inconsistency in the law.

It is clear that an award of exemplary damages is a windfall to the claimant; as James Goudkamp explains, such an award places the claimant 'in an economically superior position to that which he or she would have occupied but for the defendant's tort'.⁵² That much is conceded; however, the principle of legal coherence cannot be used as the justification for denying that windfall. There is no conflict with the criminal law in this situation: it is not as if the claimant is attempting to escape the consequences of a criminal sanction nor (unlike the illegal profits and earnings cases) to obtain the *benefits expected* from the illegal act, such as the income that would have been earned from an illegal activity. An award of exemplary damages is not made to a claimant in order to reward them for that criminal conduct; it is made because the defendant has acted in contumelious and callous disregard of the claimant's rights.⁵³ If exemplary damages are awarded to a wrongdoing claimant, it is because the wrongfulness of the defendant's conduct in deliberately injuring the claimant has far outstripped the wrongfulness of the claimant's act.

The notion of wrongful profiting should only be considered an acceptable application of illegality doctrine where an award of damages would create an incoherence with the law proscribing the illegal conduct in the sense described in this chapter; that is, where the combined operation of the two areas of law negate an essential requirement of the claim for damages. To use the notion of wrongful profiting to deny the claim in any other way is to use it in a way that undermines corrective justice.

The *real* challenge posed by an award of exemplary damages to corrective justice theory is not that an award of these damages creates a conflict with the criminal law, but rather that it is inconsistent with the *corrective justice structure of negligence law*. Weinrib and Beever argue that exemplary damages are inconsistent with corrective justice as they are directed to punishing the defendant rather than rectifying the wrong.⁵⁴ An award of exemplary damages provides a windfall to the claimant 'because they do not represent anything that the claimant has been

⁵⁰ The case usually cited in this respect is *Katko v Briney* 183 NW 2d 657 (1971).

⁵¹ Weinrib, 'Illegality as a Tort Defence' (n 4) 41–42.

⁵² Goudkamp, 'A Revival of the Doctrine of Attainder?' (n 15) 458–9.

⁵³ *Lamb v Cotogno* [1987] HCA 47, (1987) 164 CLR 1.

⁵⁴ Weinrib, *Corrective Justice* (n 19) 97; Ernest J Weinrib, 'Punishment and Disgorgement as Contract Remedies' (2003) 78 *Chicago-Kent Law Review* 55; Allan Beever, 'The Structure of Aggravated and Exemplary Damages' (2003) 23 *Oxford Journal of Legal Studies* 87; Allan Beever, 'Justice and Punishment in Tort: A Comparative Theoretical Analysis' in Charles Rickett (ed), *Justifying Private Law Remedies* (Oxford, Hart Publishing, 2008) ch 11.

wrongly deprived of'.⁵⁵ That is, they go beyond what is necessary in order to rectify the injury to the claimant's right.⁵⁶ Thus, the remedies that are available should not include exemplary damages as they are inconsistent with the corrective justice structure of negligence law. The concern here is not, however, about preserving the coherence of the legal system, or preventing a clash with the criminal law; rather, it is about preserving the coherence of the negligence action as a manifestation of corrective justice.

I will argue in Chapter 9 that an award of compensation will only 'wrongfully profit' the claimant in circumstances where the claim is for lost profits or income from hypothetical illegal conduct that, if earned, the claimant would have been required to account for through the application of the legal process. That is not the case in respect of exemplary damages; they would not be liable to forfeiture under criminal legislation nor would they be able to be recovered on civil proceedings.

In summary, an award of exemplary damages should not be made because this remedy is inconsistent with a corrective justice explanation of negligence law, but not on the ground that it creates an incoherence with the criminal law.

ii. Illegal Profits and Earnings

The second situation given by Weinrib of a wrongful profiting is where the claimant seeks an award of damages for being prevented from carrying on an illegal activity. An example would be where a claimant who is incapacitated from pursuing an occupation as a bank robber because of injuries negligently inflicted by the defendant claims damages for loss of future earning capacity as a bank robber.⁵⁷ While Weinrib does not provide a detailed justification for this preclusion, Beever has put forward an explanation that substantiates the argument that these claims should generally not be permitted. Beever argues that, when the profits or earnings are proscribed by the criminal law, the claimant has not suffered a loss on which the law puts a value.⁵⁸ Beever does not, however, explain in detail the principles that should be used to determine whether, and in what circumstances, the loss should be regarded as not having a value in law. I will develop Beever's arguments in Chapter 9, by suggesting that the success of a claim for illegal profits or earnings depends on whether, if the hypothetical illegal activity had been a reality, the claimant would have been notionally required by the legal process to account for those profits or earnings. This is because in those circumstances the claimant has no legal entitlement to the subject matter of the 'loss' representing those profits or earnings.

In summary on this point, I suggest that the policy of the law that a person should not profit from their wrongdoing does not provide an independent justification for

⁵⁵ Weinrib, *Corrective Justice* (n 19) 172.

⁵⁶ *ibid* 341.

⁵⁷ Weinrib, 'Illegality as a Tort Defence' (n 4) 42–43.

⁵⁸ Beever, *Rediscovering the Law of Negligence* (n 9) 382.

a defence of illegality but is a particular manifestation of the relational policy of preserving legal coherence. Where the claim is for illegal profits or earnings this might in some circumstances point to the fact that the claimant has not suffered a loss that has a value in law.

V. The Limited Application of the Coherence Rationale to Personal Injury Claims

The principle of legal coherence has been used as the basis for applying an illegality principle in areas not contemplated by corrective justice theorists (or, for that matter, other commentators in this area). Of relevance to this book is that the coherence rationale has been extended beyond the sanction-shifting claims and claims for illegal profits and earnings to claims for compensation for injuries suffered during the course of an illegal act. In particular, it has been applied to reject claims against an accomplice with whom the claimant was jointly committing the illegal act (the joint illegality cases).

This over-extension of the coherence principle is illustrated by *Miller v Miller*.⁵⁹ Briefly, the claimant stole a car so she could get home after a night out in Perth, and allowed the defendant to drive it. The defendant drove the car recklessly and it struck a pole, seriously injuring the claimant. A majority of the Court (Heydon J dissenting on the withdrawal point) held that, had it not been for the fact that the claimant had withdrawn from the joint enterprise by her requests to be let out of the car, the claim would have had to be rejected on the basis that recognition of a duty of care would create an incongruity in the law.

There are two main emphases in the majority judgment in *Miller v Miller*. The first was a narrow principle that a duty of care will not be recognised where it would be incompatible with the purpose of the statute that the claimant contravened (in that case, the offence of unlawful taking and use of a motor vehicle). The second was a more abstract principle that a duty of care will not be recognised where it would create an incongruity in the law. I will explain in Chapter 7 that the evidence regarding statutory purpose in this case was thin and unconvincing, and the majority's purported adherence to statutory purpose dubious.⁶⁰ It seems that the incongruity found by the Court on those facts was of the second, more abstract, kind. An important element of the reasoning in *Miller v Miller* was that, by virtue of the governing criminal legislation, the claimant was complicit in, and hence criminally responsible for, the very conduct (the dangerous driving) that caused the harm. This ultimately led the majority to conclude that 'it would evidently be incongruous to decide that the offender who drove the vehicle owed that

⁵⁹ *Miller v Miller* (n 2).

⁶⁰ See ch 7, Section IV, Evaluation of the Statutory Purpose Explanation: Claims for Harm Sustained in the Course of Committing an Illegal Act.

passenger a duty to drive with reasonable care.’⁶¹ This was because ‘To conclude that the driver owed the passenger a duty to take reasonable care when driving would not be consistent with the purpose of the statute proscribing dangerous driving.’⁶² The Court referred to no extrinsic materials that could establish that it was part of the purpose of the dangerous driving offence to deprive the claimant of the benefit of the ordinary duty of care.

The reasoning of the majority should be rejected to the extent that it suggests that the existence of a duty of care would be incompatible with the purpose of the criminal statute proscribing dangerous driving *merely by virtue of the fact* that the claimant is found by the criminal law to have been complicit in the conduct that caused the injuries. It would not ‘evidently be incongruous’ to decide that the claimant is an accomplice to the driver’s dangerous driving for the purposes of attributing criminal responsibility and yet recognise that the claimant is nevertheless owed a duty of care by the driver to drive safely. To suggest that such an incongruity exists is to ignore the realities of the parties’ relationship, namely that the claimant was a passenger in a motor vehicle driven by the defendant. It involves the application of a fiction that the claimant was responsible for the negligent driving of the vehicle. While this might be true for criminal purposes, it is not true (in the absence of vicarious liability) for negligence purposes. In other words, the fact that the claimant is deemed to have committed the offence of dangerous driving for the purpose of imposing a criminal punishment does not mean that she should be treated *as if she was the driver* for the purpose of determining her claim for compensation in a negligence action.

It is unfortunate then that the English Court of Appeal in *McCracken v Smith* adopted reasoning similar to that in *Miller v Miller* as one of the grounds why a passenger should not be able to recover against a driver in circumstances where the passenger is found to be complicit in the dangerous driving.⁶³ One of the reasons given by Richards LJ in his leading speech as to why such a claim should be rejected was that:

[A]lthough as a matter of fact the negligent act was that of Damian [the driver], Daniel [the passenger] was jointly responsible in law for it and he cannot bring a claim in respect of his own negligent act.’⁶⁴

The application of the legal fiction that the negligent act was that of the claimant in turn manufactures a further fiction, namely that of an incoherence in the law.

In sum, a conclusion that the claimant is criminally complicit in the conduct that gave rise to the losses, yet is able to recover his or her losses in negligence, is not of itself evidence of an incoherence in the law. It is merely the consequence of

⁶¹ *Miller v Miller* (n 2) [93].

⁶² *ibid* [94].

⁶³ *McCracken v Smith* [2015] EWCA Civ 380.

⁶⁴ *ibid* [47] (Richards LJ, Underhill and Christopher Clarke LJJ agreeing). These statements were only in obiter as the claim by the passenger against the driver was not the subject of an appeal before the Court.

the two areas of law operating harmoniously together and pursuing their different aims. There is no convincing reason why principles of responsibility should operate in *precisely the same way* in the two areas of law as the differences can be justified by reference to the different principles underpinning them. The goal of *coherence* should not be confused with a goal of *sameness*; coherence requires that tort and crime ‘fit together’, but not that similar concepts or rules must operate identically in the two areas of law.⁶⁵ Any differences between the operation of principles of responsibility in criminal law and tort law simply (to adapt the words of Allan Beever from a different context) ‘reflect the focus of the former on the defendant’s wrongdoing and the latter on the connection between that wrongdoing and the claimant’s injuries’⁶⁶

In conclusion, the Court in *Miller v Miller* was wrong to suggest that the joint illegality cases raise a special risk of incoherence with the criminal law. The only occasion where legal coherence comes into issue in this category of claim is where the recognition of a duty of care would be incompatible with the purpose of the statute proscribing the illegal conduct; in that case, the duty of care must be rejected to preserve the coherence of that statutory scheme.

VI. Other Misappropriations of the Coherence Rationale

In the preceding section it was discussed that at least part of the reasoning in *Miller v Miller* misapplied the principle of coherence. The High Court is not the only court to have done so. In *Hounga v Allen* Lord Hughes suggested (correctly) that an important basis for the law of illegality is that ‘the law must act consistently’⁶⁷ However, the consistency principle his Lordship formulated is impermissibly wide. His Lordship framed the principle as being that ‘[the law] cannot give with one hand what it takes away with another, nor condone when facing right what it condemns when facing left’.⁶⁸ This formulation of the consistency principle is elegantly phrased and has considerable intuitive appeal, but is greatly oversimplified, and liable to result in the unjustified denial of claims on the incorrect assumption that this is necessary to prevent a legal incoherence. Indicative of this is Lord Hughes’ suggestion that his ‘consistency principle’ should be used to deny relief in joint criminal enterprise cases, because the law could not consistently condemn the criminal enterprise on the one hand, and give relief on the claim on the other.

⁶⁵ cf M Dyson, ‘Disentangling and Organising Tort and Crime’ in M Dyson (ed), *Unravelling Tort and Crime* (Cambridge, Cambridge University Press, 2014), 13–14.

⁶⁶ Beever, ‘The Structure of Aggravated and Exemplary Damages’ (n 54) 109.

⁶⁷ *Hounga v Allen* [2014] UKSC 47, [2014] 1 WLR 2889 [55] (Lord Carnwath agreeing).

⁶⁸ *ibid.*

However, an award of damages to a participant in a joint criminal enterprise cases will usually not result in a legal incoherence, as discussed in the preceding section.

Lord Wilson, who wrote for the majority in *Hounga v Allen*, also appeared to misunderstand the coherence principle as formulated in *Hall v Hebert*, using it to justify what was in fact extra-relational reasoning of public policy. This case involved a claim in the statutory tort of discrimination. The issue before the Court was whether the claim should be defeated by virtue of the fact the claimant was an illegal immigrant and the contract of employment that formed the basis of the discrimination complaint was an illegal contract. The Court held that the claim should be allowed. Lord Wilson (Lady Hale and Lord Kerr agreeing) identified (correctly) the proper rationale of the illegality principle as the need to preserve the integrity of the legal system, but considered (incorrectly) that this gave the court the licence to weigh up public policy considerations underlying the governing area of law.

Lord Wilson cited McLachlin J's judgment in *Hall v Hebert* and the two situations her Honour recognised where legal coherence will be in issue: where a claim would allow a person to evade or obtain a rebate of a penalty prescribed the criminal law; and where it would allow a person to profit from the illegal conduct. Lord Wilson considered, however, that these two situations 'may best be taken as an example of [the coherence principle] rather than as the only conceivable instance of it'.⁶⁹ His Lordship recognised that the award of compensation to the claimant in that case would not permit her to evade a criminal penalty, nor would it permit her to profit from her wrongful conduct in entering into the illegal contract. That conclusion should by itself have disposed of the arguments based on legal coherence. Of concern is the fact that his Lordship viewed the policy of preserving the 'integrity' of the legal system as encompassing a range of public policy considerations. For example, his Lordship went on to consider the policy question of the impact of allowing or disallowing the claim on illegal employment contracts, on the basis that these issues were relevant to maintaining the integrity of the legal system.⁷⁰ Public policy concerns, which weigh up the broader societal consequences of the claim, should not be admitted as part of a legal coherence analysis. Lord Wilson's approach results in a discrepancy between the legal basis of the principle and its application, a point recognised by James Fisher:

The majority position in *Hounga* is highly problematic. ... It declares the basis of the [illegality] principle to be the preservation of legal integrity yet adopts a test which focuses on something entirely different: the aspects of public policy each party's position highlights. This creates a gulf between the principle's theoretical basis and the test for its application.⁷¹

⁶⁹ *ibid* [44].

⁷⁰ *ibid*.

⁷¹ JC Fisher, 'The *Ex Turpi Causa* Principle in *Hounga* and *Servier* (2015) 78 *The Modern Law Review* 854, 869.

This statement succinctly identifies the fundamental objection to the use of the coherence principle to support reasoning of public policy.⁷²

In *Patel v Mirza* Lord Toulson asserted that the notion of avoiding an inconsistency in the legal system so as to maintain its integrity can be given a wide or narrow meaning.⁷³ Like Lord Wilson, Lord Toulson (writing for the majority) preferred a broad interpretation of this concept. His Lordship held that whether a claim based on an illegality is ‘contrary to the public interest, because it would be harmful to the integrity of the legal system’ depends upon a consideration of competing public policies and other factors that will determine the proportionality of denying relief.⁷⁴ This interpretation is inconsistent with McLachlin J’s narrow formulation of the coherence principle in *Hall v Hebert*, as explained in this chapter. Lord Toulson has misapplied this principle in order to support a conceptually foreign approach, effectively emptying this principle of meaning.

VII. Does an Exclusive Focus on Legal Coherence Result in an Unjustifiably Narrow Doctrine of Illegality?

It has been argued that if legal coherence is the only recognised rationale of illegality doctrine this will lead to an unacceptably narrow doctrine that would rarely be engaged.⁷⁵ The Law Commission of England and Wales (the Commission) noted that illegality doctrine would be ‘severely curtail[ed]’ if legal coherence was the only legal basis for its application.⁷⁶ The particular concern of the Commission was that the doctrine would have no application to personal injury claims.⁷⁷ It is, of course, correct to say that claims for personal injury will not usually be denied on the ground of legal coherence—this point was established in section V. The only circumstance where this would occur would be where an award of compensation would undermine or stultify the purpose of the statute against which the

⁷² Lord Wilson did allude to the need to ensure adherence to international obligations to pay compensation to victims of human trafficking from the perpetrators. However, no issue of coherence with international obligations arose in that case. As emphasised by Lord Hughes, there had been no factual finding that the claimant was a victim of human trafficking, and the tort of statutory discrimination is not co-extensive with trafficking: (n 67) at [62], [65]. Hence, there was no obligation under international instruments to provide compensation to her as a victim of trafficking.

⁷³ *Patel v Mirza* (n 3) [93], [101] (Lord Toulson, Lady Hale and Lords Kerr, Wilson and Hodge agreeing).

⁷⁴ *ibid* [101].

⁷⁵ PS Davies ‘The Illegality Defence and Public Policy’ (2009) 125 *Law Quarterly Review* 556; See also G Virgo, ‘The Defence of Illegality in Unjust Enrichment’ in A Dyson, J Goudkamp and F Wilmot-Smith, *Defences in Unjust Enrichment* (London, Bloomsbury Publishing, 2016) 176, who argues that the principle of coherence must be supplemented by a flexible balancing approach.

⁷⁶ The Law Commission, *The Illegality Defence* (Law Comm No 189, 2009) para 7.4.

⁷⁷ *ibid* para 7.11.

claimant has offended. However, the Commission provides no convincing explanation as to why this should matter. As the preceding chapters demonstrate, those in the United Kingdom who support an extended public policy-based doctrine of illegality consistently have failed to put forward an alternative rationale that has secured widespread acceptance and that is capable of achieving stability and predictability in this area. This has left the law in an inferior position in that country, whereby judges have had no choice but to resort to weighing a range of policy and other factors to determine the claim.

Moreover, the negligence action has in-built safeguards to ensure that a personal injury claim will be denied to the extent the wrongdoing claimant has contributed to his or her own harm, or in circumstances where the claimant could not reasonably expect the defendant to comply with normal standards of safe behaviour. The most apparent of these safeguards is contributory negligence, which reduces damages to reflect the extent of the claimant's responsibility for the harm. In some Australian jurisdictions the reduction can be up to 100 per cent.⁷⁸ In the United Kingdom, reductions approaching 100 per cent are not unheard of.⁷⁹ In some cases, the defence of voluntary assumption of risk will be available.⁸⁰ The elements of the negligence action themselves also provide an additional safeguard. In appropriate circumstances the claim will be denied on the basis that there is no duty of care—I will explain in Chapter 10 that a duty of care will not arise in the joint illegal enterprise cases where the nature of the claimant's relationship with the defendant was such that the claimant could not reasonably expect the defendant to exercise the normal standard of care.⁸¹ There will be other cases also where a duty of care will not arise, or where breach or causation cannot be established.⁸² Accordingly, whatever the position might be in other areas of private law, in negligence law there are sufficient mechanisms independent of a specific doctrine of

⁷⁸ See, eg, Wrongs Act 1958 (Vic), s 63.

⁷⁹ J Goudkamp, 'Rethinking Contributory Negligence' in SGA Pitel, JW Neyers, E Chamberlain (eds), *Tort Law: Challenging Orthodoxy* (Oxford, Hart Publishing, 2013), 349. A reduction by 100% is not possible in the United Kingdom: *Pitts v Hunt* [1991] 2 QB 24 (CA); *Anderson v Newham College Further Education* [2002] EWCA Civ 505; [2003] ICR 212. It is the United Kingdom approach that is the most theoretically defensible: Goudkamp, at 344–46.

⁸⁰ Though a voluntary assumption of risk is notoriously difficult to establish, some Australian jurisdictions have introduced reforms intended to relax the requirements of the defence: See ch 10, section XIII, Interaction with Defences.

⁸¹ See ch 10 generally.

⁸² See, eg, *Vellino v Chief Constable of the Greater Manchester Police* [2001] EWCA Civ 1249, [2002] 1 WLR 218 (police owe no duty of care to a person seeking to evade arrest); *AB v Chief Constable of X Constabulary* [2015] EWHC 13 (QB) (police authority had not breached the duty to provide adequate support to an undercover police officer, and any breach would not have been causative of the psychiatric harm in any event). Where, eg, the claimant is an intruder on property the question of breach must be determined according to the standard of care to be expected of a defendant dealing with the situation of an intruding burglar: *Revill v Newbery* [1996] QB 567 (CA), 577 (Neill LJ, Evans and Millett LJ agreeing) (though in that case a breach of duty was found due to the use of excessive force). In ch 5 I argued that on principled reasoning of corrective justice there is an argument that the crime of the claimant will constitute an intervening act that will break the chain of causation between the negligence and the harm: see ch 5 text to notes 184–187.

illegality that ensure that the relief given (if any) will properly take into account the illegal conduct of the claimant.

VIII. Conclusion

An important theme of this book is that illegality is a legal doctrine embodying systemic concerns about the coherence of the legal system, not a rule of morality or public policy. Birks has argued that the ‘great advantage’ of an enquiry into legal coherence is that it ‘can be answered analytically’ and is divorced from judgments about the morality of the parties.⁸³ A legal coherence approach ‘strips the element of moral condemnation from illegality’⁸⁴ and makes questions of turpitude irrelevant: ‘The inquiry is constantly an inquiry into consistency and rationality, not into turpitude.’⁸⁵

This chapter has built upon work by Weinrib and Beever in order to answer analytically the question when an award of compensation to a wrongdoing claimant will undermine the coherence of the law. It has been identified that an award of damages to a wrongdoing claimant will only create an incoherence in the law where it would be incompatible with the purpose of the statute or rule against which the claimant offended, or where it would permit the claimant to escape the consequences of a legal sanction or to wrongfully profit from the conduct. These second two categories can be collapsed into one overarching principle: recovery will be denied because the claimed loss or damage was authorised by the law. There are thus two situations where a claim connected to an illegal act must be denied because of the combined operation of the different branches of the law working as a whole: (a) where one of the purposes of the statute infringed by the claimant was to prevent a civil claim (the statutory purpose explanation), and (b) where the loss or damage is one that is authorised by the law proscribing the conduct (the no loss or damage explanation). Where compensation is denied in these circumstances the courts are not ‘trumping’ corrective justice; rather, principles of corrective justice *demand* an illegality doctrine that denies relief where one of these grounds is established. Moreover, it is not an example of the policies of the criminal law ‘trumping’ the law of negligence; rather, it is an example of the development of negligence law in a way that, in the words of the Chief Justice of Canada Beverley McLachlin ‘consider[s] the principles of both domains as a coherent whole’ and that ‘respects the principles of each domain.’⁸⁶

⁸³ Birks (n 11) 158, 168.

⁸⁴ *ibid* 160.

⁸⁵ *ibid* 203. Though it should be noted that Birks does leave open the possibility that gross turpitude might have a role in a rare case, as a long-stop reason for denying the claim: see in particular 199–203.

⁸⁶ McLachlin, ‘Weaving the Law’s Seamless Web’ (n 8) 220.

There is a regrettable trend at the highest judicial level in the United Kingdom and Australia to expand legal coherence beyond these two limited circumstances. Some judges (particularly in the United Kingdom) have formulated a very broad consistency principle that would potentially extend to any claim that is founded on illegal conduct. Additionally, recent decisions have purported to rely upon a legal coherence rationale in circumstances where that rationale could have no application. These decisions demonstrate the importance of carefully defining the ambit of the principle of coherence to ensure that it is not misused by judges with a predisposition to reject the claim on public policy grounds. This chapter has begun that process by identifying the broad categories where a claim might fail on the ground of legal coherence; Chapters 7–9 will elaborate on the specific principles that apply to determine whether a particular case falls within one of those categories.