Neutral Citation Number: [2022] EWHC 1213 (QB)

Case No: GB90BS068

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
BRISTOL DISTRICT REGISTRY

Senate Court,
Southernhay Gardens
Exeter EX1 1UG

Date: 20/05/2022

Before:

MR JUSTICE GARNHAM

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Between:

Alexander Lewis-Ranwell	**Claimant**
- and -	
(1) G4S Health Services (UK) Limited	**Defendants**
(2) the Chief Constable of Devon and Cornwall Police	
(3) Devon Partnership NHS Trust	
(4) Devon County Council	

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Selena Plowden QC and Christopher Johnson (instructed by **Clarke Willmott**) for the **Claimant**
Gurion Taussig (instructed by **G4S Legal Department**) for the **First Defendant**
The **Second Defendant** did not appear and was not represented
Judith Ayling QC (instructed by **DAC Beachcroft LLP**) for the **Third Defendant**
Andrew Warnock QC (instructed by **DWF LLP**) for the **Fourth Defendant**

Hearing dates: 9-10 March 2022

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Mr Justice Garnham:

Introduction

1. On 10 February 2019 Alexander Lewis-Ranwell attacked and killed three elderly men in their homes in Exeter. In November 2019, following a trial before May J and a jury at Exeter Crown Court, he was acquitted of murder by reason of insanity. He was ordered to be detained at Broadmoor Hospital, pursuant to sections 37 and 41 of the Mental Health Act 1983 (the "MHA").

2. In February 2020, Mr. Lewis-Ranwell (hereafter "the Claimant") commenced civil proceedings against G4S Health Services (UK) Limited (the First Defendant), the Chief Constable of Devon and Cornwall Police (the Second Defendant), Devon Partnership NHS Trust (the Third Defendant) and Devon County Council (the Fourth Defendant) alleging against all four that they were negligent in their treatment of him in the period 8-10 February 2019 and that they acted in breach of his rights under Articles 3 and 8 of the ECHR as incorporated into domestic law by the Human Rights Act 1998. The Claimant sought damages for personal injury, loss of liberty, loss of reputation and loss of dignity, and indemnity in respect of any claim brought against him as a consequence of his violence towards others in the period 9-11 February 2019. The claim is opposed by all four Defendants.

3. The First, Third, and Fourth Defendants have applied for an order striking out the claim against them on the grounds of illegality, or, to use the Latin maxim, "*ex turpi causa non oritur actio*" (out of a dishonourable cause no action arises.) I heard arguments in support of, and in response to, those applications on 9 and 10 March 2022 and reserved my judgment. This is that judgment.

The Test

4. The application to strike out was brought by the three Defendants pursuant to CPR r3.4 (2)(a). The question is whether it appears to the court that, in whole or in part, the Particulars of Claim "*disclose no reasonable grounds for bringing the claim*".

5. It is to be noted that the Second Defendant made no such application and that, by the time of the hearing, the other three Defendants had conceded that the application could only be pursued in respect of the common law negligence claims, not in respect to the Human Rights Act claims. The issue for me therefore is whether the Particulars of Claim disclose any reasonable grounds for bringing the negligence action against the First, Third, and Fourth Defendants.

6. It was common ground that for the purpose of deciding these applications I should assume that the Claimant makes good all the allegations set out in the Particulars of Claim. Many of those allegations are vigorously disputed by the Defendants, but it is no part of my function on this application to give any indication about the strength or otherwise of the various defences.

The Facts

7. The Claimant's case can be shortly summarised. I repeat that what follows is taken from the Claimant's pleaded account of events only.

8. The Claimant was born on 17 March 1991 and was 27 years old in February 2019. He had developed mental health symptoms in early adulthood, in 2016 and 2017, and was detained under the MHA. He was diagnosed with schizophrenia and psychosis and required treatment in a psychiatric intensive care unit. His condition responded to anti-psychotic medication.

9. On the morning of 8 February 2019, the Claimant was arrested on suspicion of burglary and, at 10.04, was detained at Barnstaple police station. A risk assessment was conducted. It was recorded that the Claimant denied having any mental health problems but stated that he had been "*sectioned twice for psychosis, sectioned at North Devon District Hospital, Weston super Mare and Blackheath for 2-3 years*." He stated that he was "*given meds for his mental health but isn't currently medicated*." A police officer suggested that he needed to be seen by a Health Care Professional ("HCP") and a mental health practitioner ("MHP"). He was seen by staff of the First Defendant, and by the Third Defendant's Senior Mental Health Nurse, Ms Carren Dennis, during the morning. Ms Dennis noted that he had been referred for a "*mental health crisis*" and that he declined to engage.

10. On the afternoon of 8 February, it was recorded that the Claimant posed a risk of violent assault. During the afternoon he became increasingly agitated, irrational and paranoid. At 18.50 hours there was a confrontation between the Claimant and an officer during which she pushed him back into his cell. No medical review was sought during the afternoon and evening.

11. At 17.40 the Claimant asked to speak to his mother by telephone. He was agitated and delusional, saying she was not his "real mother". The telephone call was cut off by the police. The Claimant's mother telephoned the police station and spoke to a Detention Officer to whom she reported that her son was having a psychotic episode. She told him of her concerns given his previous behaviour when psychotic.

12. At 21.57 hours the Claimant's mother telephoned the police station again and told an officer that the claimant had a history of being violent when unwell and said that she would have "grave concerns" should he be released.

13. At 02.00 hours on 9 February 2019, a police officer called the Claimant's mother and told her that he was going to be released. She remonstrated strongly with the officer, pointing out that it was the middle of the night, the Claimant was unwell, the temperature outside was low, the Claimant had nowhere to go and was a risk. At 02.42 the claimant was woken, charged with the offences of burglary and with criminal damage to his cell. His property was returned to him. That property did not include a mobile telephone.

14. At 02.47 a pre-release plan was recorded. It was noted that the Claimant had been reviewed by the HCP, who had no concerns, and had been seen by the MHP. It was noted that "*mother has phoned in stating that she has grave concerns if he is released as she feels this was how his mental health declined last time. Currently although he has displayed some strange behaviour whilst he's here, he has not caused me any immediate concerns for care on his release…(He) has positively engaged with me whilst here and has agreed to supported sleeping for the night*."

15. He was released on bail at 02.49 and taken to premises known as "The Freedom Centre". After his release a police officer telephoned the Claimant's mother and told her his whereabouts. The Claimant left the Freedom Centre after about three hours and the night manager informed the police of that fact.

16. On the morning of 9 February 2019, the Claimant visited a small holding in the Barnstaple area where he released sheep and alpacas from their enclosure. When challenged, he asked the 84-year-old owner of the small holding if he was a paedophile and then attacked him with a long double-handed saw. Shortly thereafter, he was arrested on suspicion of causing grievous bodily harm. He was detained for a second time at Barnstaple Police Station.

17. In a risk assessment undertaken by a Custody Sergeant at 10.38 it was noted that the Claimant suffered from mental health problems. At 11.05 the Claimant tried to grab an officer's taser gun. He was restrained, taken to his cell, his clothing was cut from him and he was given a "self-harm suit".

18. At the request of the police, HCP Allen Harness attended the Claimant in his cell. He noted the Claimant's past mental health history, his "*bizarre speech*" and his "*uncooperative mood*" and was unable to tell if the claimant was orientated to time and place, or to comment on his memory or concentration. He wrote "*attempt to deliberately misconstrue any attempts at conversation and refused to be seated to allow me entry into his cell*". He concluded he was fit to be detained, interviewed, transferred and charged, and that he did not require an appropriate adult.

19. The police contacted Ms Rebecca Ding, a mental health professional employed by the Third Defendant, who spoke to the Claimant by telephone at 14.40. Ms Ding indicated that the Claimant was agitated, paranoid and presenting with pressured speech. He was "thought-disordered" and lacked insight and presented a risk to the public. At 14.57 PS Samuel Davis noted in the detention log that the MHP had spoken to the Claimant and was intending to visit him in person. He noted that she was "*of opinion he will need a full MH assessment*." At 15.02 Ms Ding recorded her findings in the custody records. She called the Fourth Defendant "*to enquire if they would consider a MHAA without me having seen him in person*…"

20. There were conversation over the following hour or so between the employees of the First, Second and Fourth Defendants concerning the arrangements necessary for a MHA assessment to be conducted on the Claimant. An employee of the Fourth Defendant was unwilling to provide the MHA assessment at Barnstable police station without a face-to-face assessment by the Liaison and Diversion services, but would provide such an assessment if, pursuant to s136 MHA, the Claimant was transferred to a place of safety in Exeter by the Second Defendant. The Third Defendant's employee was unwilling to provide a face to face assessment as her shift was ending at 18.00 and she was in Exeter. The Second Defendant was unwilling to use its powers pursuant to s136 to transfer the Claimant to Exeter. The decision was made that the claimant would be reviewed by a medical examiner employed by the First Defendant, and, if sanctioned by him, a formal assessment would be arranged to take place in Barnstaple overnight.

21. The Third Defendant's MHP, Ms Ding, noted that the Claimant was likely to be charged with the offence of grievous bodily harm. She noted that "*custody staff were reluctant to use s136 as the charges were serious and he would have to be released*

under investigation. The police would then need to re-arrest him if he wasn't detained to charge him with the offence."

22. At 14.11 hours the Claimant's detention was reviewed by Inspector Seear. He noted that the Claimant "*made very little sense…We are in the process of arranging for his mental state to be assessed by an approved Mental Health Practitioner…The DP (*the detained person*) potentially presents a serious risk to the public if released. As such, until such time directed otherwise, we will seek to continue to deal with the criminal matter as it is deemed that DP should be sectioned. … At this time detention is lawful and necessary in order to assess fitness for interview and obtain evidence.*"

23. At 16.21 Ms Ding made a further entry in the detention log which included the following "*custody staff advised that if they are concerned about detainee's mental health presentation and do not feel as though section 136 appropriate, the FME (*Force Medical Examiner) *should be requested if appropriate an MHAA should be requested by them. Advise Custody Sergeant that if detainee is held in policy custody and he hasn't been seen by a MHP by tomorrow morning I can come up and see him…*"

24. At 16.30 hours Custody Sargeant Davies contacted the First Defendant to request attendance of an FME. He was referred to Dr Pichiu, a doctor employed by the First Defendant in the role of FME. Sergeant Davies informed Dr Pichiu of the Claimant's circumstances and of the fact that the Fourth Defendant's Liaison and Diversion ("L and D") services had advised that he "*clearly needs some sort of assessment through the AMHPs*." Dr Pichiu advised that he would not be able to undertake a mental health assessment but agreed to attend.

25. The Claimant's condition continued to deteriorate. He was seen by the First Defendant's employee paramedic, Allen Harness, who noted that he was "*behaving very bizarrely…mood deliberately obstructive, bleak, attention seeking; speech bizarre; evidence of delusions bleak hallucinations… .*" On his medical form Mr. Harness recorded "*behaving bizarrely but I believed this is premeditated and not as a function of any underlying physical defect. As such, [he] remained fit to detain, fit to interview. Consent withdrawn so no assessment of treatment possible*."

26. At 18.15 Dr Pichiu attended the police station and saw the Claimant in his cell. At 18.55 he spoke to Sam Buxton, the duty AHMP employed by the Fourth Defendant, and advised that as long as he was not suicidal or delusional, an MHA assessment was not appropriate. At 19.12 Dr Pichiu recorded on the Claimant's medical form, "*psychotic. No acute medical condition at the time of the examination*."

27. The Claimant's agitated behaviour continued into the late evening and the early morning of 10 February 2019. At 22.56 hours the duty solicitor arrived and was told by PS Tearall that the Claimant has had "*every opportunity to behave but has not done so and I believe now that if he were allowed out of his cell he would assault police staff and also [the appropriate adult] and solicitor*." At 23.28 the Claimant's detention was reviewed by PS Tearall and he was arrested for criminal damage to his cell. During an interview through the cell door, the Claimant continued to spit and punch the hatch showing aggression towards the officers. When he was asked if he had attacked the male with a saw, he said "*yes, I did, he's a pervert*."

28. At 03.09 hours Police Constable Steven Wall telephoned the on-call Superintendent and requested a 12-hour extension of the Claimant's detention. Superintendent Hawley decided an extension under PACE was not justified. She considered police powers to detain a person for assessment under s136 of the MHA. PC Wall told her that the Claimant's mental health had caused concern but that he had been seen by the HCP, FME, and MHP and was deemed not to be psychotic although he would require a MHA assessment.

29. The following morning, Sunday 10 February 2019, the Claimant continued to deteriorate, acting in an agitated manner with "*pressure of speech*". He required restraint and posed a risk to the health and safety of others. At 08.13 Ms Ding noted that he was due to be released on bail in the next hour. At about 09.12 the Claimant was forcibly restrained after clenching his fists with a view to punching an officer. During the course of the restraints, the Claimant injured the thumb of a police officer.

30. The Claimant was granted bail and his property was returned to him. At about 9.38 he was released to the street outside Barnstaple Police Station. In a pre-release plan it was noted that "*the detainee has been spoken to by the MHP and also by the FME. They have requested that the detainee be provided with the L & D letter with contact details for L&D which I have provided*."

31. Soon after his release, the Claimant became involved in a series of incidents: he was removed from a supermarket; his presentation frightened a taxi driver; he caused concern to a number of members of the public. Later that same day the Claimant went on to kill the three innocent, elderly men in their homes whilst suffering delusional beliefs about them.

32. At 05.25 on 11 February 2019, the Claimant was arrested for an assault on the night manager of a hotel. He was taken to Exeter police station where he was seen again by Dr Pichiu who initially advised that there was no need for a MHA. He was subsequently assessed under the MHA and detained at Wonford House Hospital. At 23.00 on the 12 February 2019 he was arrested by the police at that hospital and taken to Exeter Police Station for questioning. He was charged with three counts of murder and remanded to Exeter Prison.

33. The Claimant's trial was conducted in Exeter Crown Court between 19 November and 2 December 2019. The evidence of the three psychiatrists at the trial was that the Claimant knew what he was doing but not that what he was doing was immoral or unlawful. The issue for the jury was whether the Claimant was guilty of manslaughter, by reason of diminished responsibility, or not guilty of murder by reason of insanity.

34. Towards the end of the trial, before delivering their verdict, the Jury asked this question:

> "*We the Jury have been concerned at the state of psychiatric health service provision in our county of Devon. Can we be reassured that the failings in care for ALR will be appropriately addressed following this trial?*"

35. The jury found the Claimant not guilty by reason of insanity and he was acquitted of murder and manslaughter. As noted above, following his acquittal on the grounds of insanity, the court, acting in accordance with section 5 (1) and 5 (3) of the Criminal

Procedure (Insanity) Act 1964, made a hospital order with restrictions and the Claimant was detained at Broadmoor hospital.

The Allegations of Negligence

36. The Claimant makes numerous allegations of negligence against each of the Defendants, including the following:

37. As against the First Defendant, he complains about the allegedly negligent assessment and conduct of HCP Allen Harness on 9 February and about the allegedly negligent assessment, conduct and advice of Dr Pichiu on 9 February.

38. As against the Third Defendant, he complains about the failures of Nurse Dennis to undertake adequate triage and screening of him on 8 February, the failure of Ms Ding to arrange proper assessments on 9 February, and the failure of Ms Ding on 10 February to conduct a proper risk assessment, give proper advice to the police and to visit and assess him.

39. As against the Fourth Defendant, he complains about the failures of the emergency duty team to arrange proper assessment of him and proper advice.

40. All these allegations are particularised, at enormous length, in paragraphs 91-104 of the Particulars of Claim. It is not necessary to repeat that detail here.

The Relevant Statutory Provisions

41. Section 2 Trial of Lunatics Act 1883 (as amended by the Criminal Procedure (Insanity) Act 1964) provides that

> (1) Wherein any indictment or information any act or omission is charged against any person as an offence, and it is given in evidence on the trial of such person for that offence that he was insane, so as not to be responsible, according to law, for his actions at the time when the act was done or omission made, then, if it appears to the jury before whom such person is tried that he did the act or made the omission charged, but was insane as aforesaid at the time when he did or made the same, the jury shall return a special verdict that the accused is not guilty by reason of insanity. (Emphasis added)

42. Section 5 (2) Criminal Procedure (Insanity) Act 1964 (as amended) provides that

> (1) This section applies where–
> (a) a special verdict is returned that the accused is not guilty by reason of insanity; or
> (b) findings have been made that the accused is under a disability and that he did the act or made the omission charged against him.
> (2) The court shall make in respect of the accused–
> (a) a hospital order (with or without a restriction order);
> (b) a supervision order; or
> (c) an order for his absolute discharge.
> (3) Where–

> (a) the offence to which the special verdict or the findings relate is an offence the sentence for which is fixed by law, and
> (b) the court have power to make a hospital order,
> the court shall make a hospital order with a restriction order (whether or not they would have power to make a restriction order apart from this subsection). (Emphasis added.)

43. Section 2 Homicide Act 1957 (as amended by section 52 Coroners and Justice Act 2009) provides:

> (1) A person ("D") who kills or is a party to the killing of another is not to be convicted of murder if D was suffering from an abnormality of mental functioning which—
> (a) arose from a recognised medical condition,
> (b) substantially impaired D's ability to do one or more of the things mentioned in subsection (1A), and
> (c) provides an explanation for D's acts and omissions in doing or being a party to the killing.
> (1A) Those things are—
> (a) to understand the nature of D's conduct;
> (b) to form a rational judgment;
> (c) to exercise self-control.
> (1B) For the purposes of subsection (1)(c), an abnormality of mental functioning provides an explanation for D's conduct if it causes, or is a significant contributory factor in causing, D to carry out that conduct.
> (2) On a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder.
> (3) A person who but for this section would be liable, whether as principal or as accessory, to be convicted of murder shall be liable instead to be convicted of manslaughter.

The Competing Arguments

44. I had the benefit of detailed skeleton arguments on this application on behalf of all parties, and those arguments were developed orally. The task of advancing the common elements of the Defendants' cases fell on Mr Warnock QC for the Fourth Defendants. Mr Taussig for the first defendant and Ms Ayling QC for the Third adopted Mr Warnock's argument, adding brief additional remarks of their own. Ms Plowden QC responded on behalf of the Claimant. I am grateful to all counsel for their submissions.

45. All counsel developed their submissions primarily by reference to the following eight authorities: *Clunis v Camden Islington HA* [1998] QB 978; *Hunter Area Health Service v Presland* (2005) 63 NSWLR 22; *Gray v Thames Trains* [2009] 3 WLR 167; *Les Laboratoires Servier v Apotex Inc* [2015] AC 430; *Patel v Mirza* [2016] UKSC 42; [2017] AC 467; *Henderson v Dorset Healthcare University NHS Foundation Trust* [2020] UKSC 43; [2021] AC 563; *Stoffel v Grondona* [2020] UKSC 42; *Traylor & anor v Kent & Medway NHS Social Care Partnership Trust* [2022] EWHC 260 QB. I consider each of those decisions in the "Discussion" section below.

46. Mr Warnock advanced six principal arguments. First, he submitted that a verdict of not guilty by reason of insanity is not the same as a finding that the Claimant bears no legal responsibility for the killings; it is not akin to an outright acquittal. This was not a case where the Claimant did not understand that he was killing someone at all or had no control over his actions. Referring to the "*Special verdict where accused found guilty, but insane at date of act or omission charged, and orders thereupon*", provided for by s2(1) of the 1883 Act, he argued that the Claimant has been found guilty beyond reasonable doubt of committing the alleged crimes and bears some legal and moral responsibility for the killings. If that is the case, he argued, then *Henderson* and *Gray* are binding on this Court and the claim must necessarily fail. He says there is no sustainable distinction, for the purposes of the illegality doctrine, between the quality of intention in a defendant found guilty of manslaughter by way of diminished responsibility (*Henderson*) and a defendant found not guilty by reason of insanity. If there is no sustainable distinction on the facts, then the illegality defence must apply to bar this claim in the same way as it did in *Henderson* and *Gray*.

47. Second, he said that the illegality defence can apply to situations where there is no criminal responsibility, but where public interest and policy considerations dictate that the defence should succeed and this is such a claim. Regardless of the nature and extent of the Claimant's criminal, civil or moral responsibility for the crimes (and they were still 'crimes' notwithstanding the verdict that was reached) a 'bright line' rule is preferable in all factually similar cases to avoid investigations into the quality of intention or blameworthiness that ought to attach in any given case. The 'bright line' established in *Henderson* would be seriously undermined were this claim be permitted to succeed.

48. Third, Mr Warnock argued, it would be incoherent for the law to award damages to the Claimant in this claim when the claims of his three victims or their families could not succeed. The criminal law has imposed a sentence on the Claimant which presupposes that he poses some risk to the public; it would therefore be incoherent to award him damages on the basis that he ought not to have been detained. It would be incoherent for tort law to regard the Claimant as responsible for his actions on the one hand (see *Morriss v Marsden* [1952] 1 All E.R. 925) whilst on the other allowing him to deny that responsibility. Drawing a distinction between *Henderson* and the Claimant's claim would be incoherent on the facts of both cases. The differences between them are so fine and arbitrary as to make different treatment legally unsustainable.

49. Fourth, he argued that balancing competing public interests, this claim should not be allowed to proceed. He said this claim would be highly likely to offend public notions of the fair distribution of resources were the Claimant to be compensated out of public funds. Public confidence is likely to be shaken by the obvious injustice of the Claimant receiving damages for the killings, whilst the victims and their families would receive nothing. The Claimant bears, at a very minimum, a degree of moral responsibility for his failure to manage his mental health, especially when compared with the complete blamelessness of his victims. The acts committed by the Claimant could not be more serious or more central to his claim.

50. Fifth, it was submitted that the 'narrow claim' (for heads of loss flowing from the consequences of the criminal sentence) is barred under the ratio of *Gray* as a matter of causation. The heads of loss which flow directly from the lawful imposition of a sentence under the criminal law (i.e. loss of earnings whilst incarcerated) are barred

under the ratio of *Gray* (see [50]). As a matter of causation these heads of loss were caused by the operation of the criminal law which determined that the Claimant posed a risk to the public. The sentence imposed in *Gray* was the same as that imposed upon the Claimant and it was irrelevant whether the sentence was imposed for treatment or punishment.

51. Sixth, Mr Warnock said that there is an obvious deterrent effect in having a clear rule that killing a person never results in compensation. Given the fundamental importance of the right to life, such a bright-line rule is clearly beneficialImposing civil responsibility for the unpredictable and potentially criminal acts of a mentally unstable individual is likely to impact inappropriately on the decision-making process when considering whether to deprive an individual of their liberty on mental health grounds and may lead to overly-defensive practices. In both *Henderson* and *Stoffel* the Supreme Court accorded particular weight to the consideration of centrality of the illegal or immoral act to the claim. Plainly, the killings are of crucial and central importance to the claim and the conduct committed by the Claimant was of the most serious nature. The losses he claims flow directly from the killings.

52. Mr Warnock summed up his case in this way: the illegality defence is at heart a rule of public policy, concerned with ensuring coherence and consistency within the legal system. The defence applies not just to acts which are criminal, but to acts which "*engage the interest of the state, or the public interest*". The nature of the killings engages the illegality defence as a matter engaging the public interest.

53. He identified the following polices in favour of denying the claim. First, consistency and coherence: although the Claimant was not criminally responsible for that act, it would be incoherent for the law to order damages for the consequences of the order imposed by the criminal justice system, on the basis that he is presumed to pose a risk to the public, on the basis that he should not have been detained. There would also be an inconsistency with tort law on the one hand saying that he can recover damages because he is not responsible for his actions, and on the other saying that he is.

54. The public confidence principle is also engaged: the Claimant is being detained by the state for public safety given that he killed three people. A claim for compensation leads to an instinctive recoil. The centrality of the killings is important here. There was intent, albeit not an understanding that what he did was wrong. Intent in any event is only one of the factors identified in the balancing act.

55. Ms Ayling substantially adopted Mr Warnock's submissions. She accepted that there had been no criminal trial of the assault charge, and that this could not properly form the basis of a strike out application. As to Mr Warnock's first and second points, the circumstances in which the principle applies, she said the fact that the Claimant was found not guilty by reason of insanity does not entitle him to recover damages. If he was not criminally responsible for the killings, they were deliberate and unlawful acts, and the assault on the owner of the small holding was a serious criminal act. The fact that he was found not guilty of murder by reason of insanity does not render his acts lawful or moral. For the purposes of the criminal law he had *mens rea*. She said that public policy mandates a conclusion that all heads of loss should be denied; the act does not have to be illegal to engage the defence, and an immoral or illegal act may also engage it.

56. On his third point, she said the consistency principle and the public confidence principles are engaged and the wrongdoing was of the utmost gravity. To compensate the Claimant for detention designed and intended to protect the public from the risk of serious harm in the future would be incoherent and self-defeating, and would mean the law giving with the right hand what it took away with the left. NHS funding is an issue of significant public interest and importance and, if recovery from the Trust is permitted, funds will be taken from the NHS budget to compensate the Claimant for the consequences of the killings, including for the consequences of a disposal no different to what it would have been had the Claimant been guilty of manslaughter by reason of (even very substantially) diminished responsibility. Ms Ayling argued that the public policy factors relied on by the Claimant plainly outweighed those identified by the defendants.

57. On his fifth issue, causation, she said liability for each head of damage was denied by the Trust on the basis that the damage complained of is the consequence of the disposal of the criminal court under the Criminal Procedure (Insanity) Act 1964 and/or is the consequence of the Claimant's own unlawful conduct. She said that the proximate cause of the Claimant's detention and remand to hospital and its consequences was his own deliberate and unlawful act in killing the three men and the disposal of the criminal court; and the assault on Mr Ellis would likely have led to a criminal disposal. There is a very close connection between the claim and the killings were the immediate and effective cause of all heads of loss claimed, and the sole effective cause of such loss. The Claimant, she argues, is seeking redress in respect of damage lawfully inflicted on him by the criminal court with the result that his claim, if allowed, would bring tort law into direct conflict with criminal law.

58. Pointing to the seriousness of the killings, the centrality of that conduct, the fact that the first limb of *M'Naghten* was met and the disparity of the parties conduct, she said that denial of the claim would be a proportionate response to the illegality.

59. Mr Taussig adopted the submissions of Mr Warnock and Ms Ayling.

60. In response, Ms Plowden began by emphasising that the illegality/ex turpi defence is draconian in that it prevents the Court from adjudicating civil issues between parties. The dual underlying purpose of the defence is to prevent a Claimant profiting from his wrongdoing and to prevent incoherence between the civil and the criminal law.

61. She said that the illegality defence has not (in modern times) in this jurisdiction been applied to debar a tortious claim on the basis of conduct other than criminal conduct. Even criminal conduct does not automatically engage the defence. The courts have repeatedly emphasised the importance of establishing that, at the time of the conduct, the claimant knew that what he was doing was wrong. To apply the illegality defence to this case and to debar the Claimant from litigating his legitimate common law claim would run counter to established principles; would introduce incoherence between the operation of the criminal and civil law; would extend the doctrine of illegality and judicial abstention when there is no good public policy reason to do so; would run counter to the public interest in ensuring that the failings in care for the Claimant are appropriately addressed and would be a disproportionate response to a perceived but unfounded perception of moral opprobrium.

62. There are, Ms Plowden says, important qualitative differences between a conviction for diminished responsibility manslaughter and an acquittal on grounds of insanity which go to the heart of the illegality defence. In addition to the central fact that one involves a conviction and the other an acquittal, the first involves behaviour which the claimant knew to be wrong and the second involves behaviour which the claimant did not know to be wrong. She says that what distinguishes those verdicts, namely whether the individual knew his behaviour was wrong, is also central to establishing the illegality defence.

63. In case the court was against her on these fundamental submissions, Ms Plowden addressed the competing public interests. She contended that on a proper application of the range of public policy factors/ trio of considerations identified in *Patel v Mirza* and modified in *Henderson* the balance fell in the Claimant's favour and he should not be debarred from bringing his claim. To allow the defence in this case would introduce incoherence into the civil law. The criminal court draws a clear legal line between a conviction for manslaughter and an acquittal for insanity. Permitting the claim would not introduce inconsistency: the criminal law has tried and acquitted the Claimant of legal and moral responsibility for the killings. Disharmony would not arise as a result of the civil law recognising the criminal law's findings and refusing to bar a legitimate tortious claim on the basis of defence of illegality/ moral turpitude. Debarring the claim would introduce inconsistency: it would be incoherent for the criminal courts to acquit the Claimant of legal and moral responsibility for his actions but for the civil courts to debar him from bringing a legitimate claim on the basis he bears legal and/or moral responsibility.

64. Ms Plowden acknowledges that it is plainly in the public interest that everything is done to enhance protection of the right to life and to prevent the killing of innocent victims by mentally disordered persons. But, she says, debarring this claim would not enhance that protection; it would not serve to deter an insane person from killing whilst acting under delusions. On the other hand, permitting the claim may very well enhance that protection by exposing what went wrong in this case and enabling lessons to be learned so that high risk psychotic patients are not released without assessment into the community. She argued that the function of the law of tort is not only to compensate claimants but also to delineate and vindicate civil rights. The role of tort in holding state authorities to account and of exposing weaknesses in public health systems serves an important public interest.

65. She argues that it would not be an affront to the public conscience to allow the claim. She pointed out that the jury in this case considered harrowing evidence as to the violent deaths of the deceased. That did not cause them to hold the Claimant in moral opprobrium. Instead, having considered his state of mind, they acquitted him of responsibility and raised questions at the heart of the claim as to the provision of mental health services. Denying the Claimant the right to bring this claim would be to deprive the public as well as the Claimant of a full and adequate investigation and hearing of this legitimate and serious concern.

66. If, Ms Plowden submits, the result of weighing the factors above is in the Claimant's favour, the Defendants' applications must fail and there is no need to go on to consider the further limb of proportionality. Referring to *Stoffel*, she says that if the result of the exercise is in the Defendants' favour, the Court must go on to consider a final safeguard: whether debarring the claim would be disproportionate. She says that

barring the claim at this stage would not be based on illegal or immoral behaviour, but on the Court's own assessment of what is likely to offend public notions of unfairness. That would be to disregard the clear sentiment expressed by the Jury in both their verdict and their note to the Judge and would do a disservice to the current state of public opinion. Permitting the claim to be brought would not prevent a fair consideration of other issues raised by the Defendants relating to the duty and standards of care, the factual issues and questions of causation.

67. Ms Plowden summed up her submissions in this way: the effect of the illegality defence is to bar an otherwise good claim. As a matter of principle, because of this draconian effect, the court should be wary of any extension to the illegality defence.

68. To accede to Defendants' applications in this case would be to apply the defence in circumstances where it has never previously been applied in England and Wales and where all authority has been against its application. The law must be predictable, and this predictability is undermined by uncertain or expansive application of discretionary doctrines such as the illegality defence. It would mark a significant extension of the law of ex turpi in circumstances which would not enhance – and indeed would run counter to, the public polices underlying the defence– the consistency principle and public confidence principle.

69. It would also run counter to the public interest in protecting the civil rights of mentally ill patients to appropriate medical care, particularly when detained in police stations. It would risk conflating behaviour caused by the most severe mental illness with criminality, despite the finding of the criminal court acquitting the Claimant of criminal responsibility.

Discussion

Insanity

70. The test for insanity in the criminal law was set out by Lord Tindal CJ in *Daniel M'Naghten's Case* (1843) 10 CL & F 200, 210. He held that:

> *to establish a defence on the ground of insanity, it must be clearly provided that at the time of the committing of the act the party accused was labouring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know, he was doing what was wrong*

71. That *M'Naughten* continues to provide the appropriate test for insanity in criminal cases was confirmed by Lord Burnett CJ in *R v Keal* [2022] EWCA Crim 341.

72. A person satisfying that test will be found not guilty by reason of insanity. By contrast in civil law a defendant who is insane but who commits an intentional trespass to the person will be liable in damages if he knew 'the nature and quality of the act', even though he did not know that what he was doing was wrong. In Morriss v Marsden, the defendant attacked the manager of the hotel where he was staying. It was established that the defendant was suffering from a disease of the mind at the time of the attack. He knew the nature and quality of his act but he did not know that what he was doing was wrong. Stable J held that *"knowledge of wrongdoing is an immaterial averment*

and . . . where there is the capacity to know the nature and quality of the act, albeit that the mind directing the hand that did the wrong was diseased, that suffices".

73. The jury at the Claimant's trial found him not guilty by reason of insanity on the basis that, although he was labouring under a defect of reason, he knew the nature and quality of his actions when he killed the three men but, critically, he did not know that what he was doing was unlawful.

Ex Turpi Causa

74. The foundation of the *ex turpi causa* doctrine is the observation of Lord Mansfield C.J. in *Holman v. Johnson* (1775) 1 Cowp. 341, 343 that it is a rule of public policy that: "*No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act.*" *Holman* was a claim for goods sold and delivered but the principle was not limited to such cases. Lord Mansfield continued:

> The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff (emphasis added.)

The Modern Case Law

75. The requirements for advancing such a defence were considered in *Clunis.* There, the Claimant, who suffered from a mental disorder, had been discharged from hospital into the care of the Health Authority when he killed a stranger in an unprovoked attack. He was charged with murder, which was reduced to manslaughter after his plea of diminished responsibility was accepted. He brought a claim against the Health Authority, claiming damages for negligence and breach of a common law duty of care to treat him with reasonable care and skill, arguing that, if he had been assessed before the date on which the killing took place, he would either have been detained or would have agreed to admission for treatment and would not have committed manslaughter. The Health Authority appealed against the dismissal of its application to strike out the Claimant's claim as disclosing no cause of action.

76. The Court of Appeal allowed the appeal holding that considerations of public policy prevented the Claimant from relying on his own criminal act to establish a claim in negligence. Beldam LJ, giving the judgment of the court, said at 989D:

> In the present case the plaintiff has been convicted of a serious criminal offence. In such a case public policy would in our judgment preclude the court from entertaining the plaintiff's claim unless it could be said that he did not know the nature and quality of his act or that what he was doing was wrong. The offence of murder was reduced to one of manslaughter by reason of the plaintiff's mental disorder but his mental state did not justify a verdict of not guilty by reason of insanity. Consequently, though his responsibility for killing Mr. Zito is diminished, he must be taken to have known what he was doing and that it was wrong. A plea of diminished responsibility accepts that the accused's mental responsibility is substantially impaired but it does not remove liability for his criminal act. (Emphasis added.)

77. He went on

> … we consider the defendant has made out its plea that the plaintiff's claim is essentially based on his illegal act of manslaughter; he must be taken to have known what he was doing and that it was wrong, notwithstanding that the degree of his culpability was reduced by reason of mental disorder. The court ought not to allow itself to be made an instrument to enforce obligations alleged to arise out of the plaintiff's own criminal act and we would therefore allow the appeal on this ground.

78. The critical limitation in the application of the principle emerging from *Clunis* is that it does not apply if the claimant "*did not know the nature and quality of his act or that what he was doing was wrong*", an obvious echo of the *M'Naughton* test for insanity.

79. The validity of that limitation to the applicability of the defence was tested in the Australian case of *Hunter Area Health Service v Presland,* a case on which some little time was spent in argument. The Supreme Court of New South Wales allowed an appeal from the judgment of Adams J whereby the plaintiff (Presland) was awarded damages in respect of losses sustained as a result of the negligence of a psychiatric hospital (Hunter Area Health Service) and a psychiatrist (Dr Nazarian) in discharging and failing to restrain him and care for him, in circumstances where he was at risk to himself and others as a consequence of a mental illness. Six hours after Presland was released from the psychiatric hospital, he killed the fiancée of his brother, Ms Laws. Presland was acquitted of the murder of Ms Laws on the grounds of mental illness and was detained for a period in a psychiatric hospital until released pursuant to the *Mental Health (Criminal Procedure)* Act 1990.

80. It was common ground before me that it is was not easy to discern the ratio of this decision. Spigelman CJ would have found for the plaintiff but he was in the minority. At [78] he said:

> The significance of moral culpability in determining the weight to be given to unlawful conduct is clearly established on the authorities. Where, as here, a person has been held not to be criminally responsible for his or her actions on the grounds of insanity, the common law should not deny that person the right to a remedy as a plaintiff. In such a context the unlawfulness of the conduct is not entitled to weight in a multifactorial analysis.

81. He concluded his judgment (at [95]) by observing:

> how a society treats it citizens who suffer from mental illness, particularly the criminally insane, is often a test of its fairness. It is never easy to be fair where an innocent person has suffered as Ms Laws, and those who grieve her loss, clearly have. The law must, however, insist on protecting the rights of people, even if they are unpopular. Mr Presland was the instrument by which Ms Laws died. However, by reason of his insanity, his acts were not such that his right to receive proper medical treatment should effectively be taken away without compensation.

82. The judgment of Sheller JA, who was in the majority, is, with respect, not easy to understand. He observed (at [292]) that the plaintiff's act "*was not justifiable homicide but an unlawful homicide for which he was not criminally responsible*" and at [295] that "*public policy must loom large in a court's consideration of whether the plaintiff*

be compensated for the harm so suffered." At [298] he said that "*the detention and treatment of the plaintiff was that prescribed by law as the consequence of the unlawful killing of Ms Laws*". Then at [300] he concluded:

> If, in the present case, instead of killing Ms Laws the plaintiff had come upon Dr Nazarian that night and killed or injured him, Dr Nazarian's estate or Dr Nazarian would by parity of reason, have been liable to compensate the plaintiff for the consequences of his detention as a result of the unlawful killing of or assault upon Dr Nazarian. In this case, identification of the nature of the harm suffered by the plaintiff points as a matter of commonsense against the existence of a legal responsibility in the defendants for that harm. In my opinion, the verdict and judgment in favour of the plaintiff must be set aside.

83. Santow JA, echoed Spigelman JA's observation about the way a society treats those who suffer from mental illness but went on:

> [312] I would however add, to paraphrase what was said by McHugh J in *Cole v South Tweed Heads Rugby* (2004) 78 ALJR 933 at [46] "*some minds may instinctively recoil*" at the idea that a hospital authority and psychiatrist, however careless, may be liable for the loss of liberty lawfully suffered by a forensic patient, following his killing of another while insane, itself an unlawful act, but without criminal consequence. Such an instinctive recoil is no substitute for the objective application of tort principle, as McHugh J there points out. But that reaction may nonetheless be a reflection of more considered community values, not to be stigmatised as based merely on prejudice or emotion. ...
>
> 313 But it does not follow that such a person, as distinct from his victim, should be compensated for the lawful consequences to him that followed the hospital authorities' initial failure to detain him for treatment. This is for two possible reasons. The first is grounded in legal policy and the second relates to what would have happened if the supposed duty had been performed.

84. He concluded at [315]

> While here the respondent was, by reason of insanity, judged incapable of acting with the necessary intent, his act of homicide was an unlawful act, hardly to be described as constituting reasonable action. Without in any way relying on the *ex turpi causa* maxim, I ultimately conclude that it would be unjust for the common law to allow the respondent a remedy for the non-physical injuries he has suffered in these circumstances. I here differ respectfully from Spigelman CJ's conclusion to the contrary, at [78]. I do not base my conclusion on any moral culpability on the part of the respondent. Rather I base it on what I conceive legal policy, ultimately based on community values, would consider just in such a case.

85. *Hunter* was considered by Lord Hoffman in *Gray v Thames Trains*, to which I turn in a moment. But, in my judgment and with respect, it should be observed at this stage of the argument that the majority opinions in *Hunter* add little to the analysis of the underlying principle.

86. In *Gray v Thames Trains*, the claimant had been a passenger on a train involved in the Ladbroke Grove rail crash. The train was operated by Thames Trains ("TT") and the accident had been caused by their negligence. Although the claimant sustained only minor injuries, the experience caused him to suffer post-traumatic stress disorder. While he was receiving treatment and taking medication for that condition, he stabbed to death a pedestrian who had stepped into the path of his car. He pleaded guilty to manslaughter on the grounds of diminished responsibility caused by PTSD and was sentenced to be detained in hospital.

87. In an action for negligence against TT he claimed general damages for his conviction, detention and feelings of guilt and remorse, and for damage to his reputation. He claimed special damages in respect of his loss of earnings until the date of trial and continuing, and he sought an indemnity against any claims which might be brought by dependants of his victim. The trial judge decided that a rule of law based on public policy precluded a person from recovering, in consequence of his own criminal act, both general and special damages. The Court of Appeal held that it was bound by the decision in *Clunis* to find that recovery of general damages was precluded, while recovery of loss of earnings was not. The issue was whether the intervention of Gray's criminal act in the causal relationship between TT's breaches of duty and the damage of which he complained prevented him from recovering that loss caused by the criminal act. But for the accident and the stress disorder it caused, the claimant would not have killed and would not have suffered the consequences for which he sought compensation; on the other hand, the killing was a voluntary and deliberate act. The House of Lords applied *Clunis* and allowed the appeal.

88. The Judicial Committee held that there were both narrow and wider expressions of the *ex turpi causa* rule. The narrower expression, that a person could not recover for damage that was the consequence of a sentence imposed on him for a criminal act, was well-established. The Court of Appeal had been right to hold that it was bound by *Clunis* to reject the claimant's claim for damages suffered in consequence of the sentence of detention. However, it had not been right to go on to hold, despite its finding that the rule applied, that he was entitled to compensation for loss of earnings after his arrest.

89. The Claimant's claim for loss of earnings after his arrest and his claim for general damages were claims for damage caused by the lawful sentence imposed upon him for manslaughter. They fell within the narrower version of the rule and were not recoverable. Neither the claim for general damages for feelings of guilt and remorse consequent upon the killing, nor the claim for an indemnity against any claims which might be brought by dependants of the dead pedestrian was a consequence of the sentence of the criminal court. However, the wider version of the rule, applied by the judge at first instance, covered those heads of damage. The claimant's liability to compensate the dependants of the dead pedestrian was an immediate, inextricable consequence of his having intentionally killed him. The same was true of his feelings of guilt and remorse. The judge at first instance was therefore right and his judgment was restored.

90. Lord Hoffman, with whom on this issue, Lords Phillips and Lord Scott agreed, said (at [27]) that the question in the case was

> whether the intervention of Mr Gray's criminal act in the causal relationship between the defendants' breaches of duty and the damage of which he complains prevents him from recovering that part of his loss caused by the criminal act... By reason of his own acknowledged responsibility, Mr Gray committed the serious crime of manslaughter and made himself liable to the sentence of the court. The question is whether these features of the causal relationship between the injury and the damage are such as to prevent Mr Gray from recovering.

91. He held at [29] that it was not sufficient to exclude liability that the immediate cause of the damage was the deliberate act of the claimant himself: "*the mere fact that the killing was Mr Gray's own voluntary and deliberate act is not in itself a reason for excluding the defendants' liability*".

92. He said at [30] that

> The maxim ex turpi causa expresses not so much a principle as a policy. Furthermore, that policy is not based upon a single justification but on a group of reasons, which vary in different situations. … One cannot simply extrapolate rules applicable to a different kind of situation.

93. Lord Hoffman held that "*When a person receives a criminal sanction, he or she is subject to a criminal penalty as well as the civil consequences that are the natural result of the criminal sanction*." He cited with approval the observation of Samuels JA in *State Rail Authority of New South Wales v Wiegold* (1991) 25 NSWLR 500, who held that

> "If the plaintiff has been convicted and sentenced for a crime, it means that the criminal law has taken him to be responsible for his actions, and has imposed an appropriate penalty. He or she should therefore bear the consequences of the punishment, both direct and indirect. If the law of negligence were to say, in effect, that the offender was not responsible for his actions and should be compensated by the tortfeasor, it would set the determination of the criminal court at nought. It would generate the sort of clash between civil and criminal law that is apt to bring the law into disrepute."

94. In my judgment it is significant that the narrower rule flows from the fact that the criminal court imposes a punishment or penalty for a criminal act for which the claimant has been held responsible. As Lord Hoffman put it at [41]

> In my view it must be assumed that the sentence (in this case, the restriction order) was what the criminal court regarded as appropriate to reflect the personal responsibility of the accused for the crime he had committed. As one commentator has said: *Tort law has enough on its plate without having to play the criminal law's conscience*: see EK Banakas [1985] CLJ 195, 197

95. Lord Hoffman then referred to *Hunter Area Health Service v Presland,* which he said went even further

> "and applied the rule when the plaintiff, who had been negligently discharged from a psychiatric hospital, was acquitted of murdering a woman six hours later on the ground of mental illness but ordered to be detained in strict custody as a

> mental patient. There are dicta (for example, in the passage I have quoted from Clunis' case) … which suggest that the rule does not apply when the plaintiff, by reason of insanity, is not responsible for his actions. But the majority regarded compensation even in such a case as contrary to public policy. Sheller JA made the pertinent observation, at para 300, that if the rule did not apply and the plaintiff had killed the negligent psychiatrist who discharged him, the latter's estate would have been liable to pay the plaintiff compensation for his consequent detention. This case … raises an interesting question about the limits of the rule which it is not necessary to decide for the purposes of this appeal.

96. Lord Hoffman identifies the interesting question raised by *Hunter* but does not suggest that that case is authority for the proposition that the insanity provides a foundation for the illegality defence.

97. Having noted that "*interesting question*", Lord Hoffman held that it was sufficient in Mr Gray's case to say that the case against compensating him *"for his loss of liberty is based upon the inconsistency of requiring someone to be compensated for a sentence imposed because of his own personal responsibility for a criminal act."*

98. Again the critical finding was that the sentence was imposed because of the Claimant's responsibility for a criminal act.

99. Having considered the narrow form of the rule, Lord Hoffman in *Gray* then turned to examine a wider version of the rule, which was applied at first instance. This, he said, had the support of the reasoning of the Court of Appeal in *Clunis'* case as well as other authorities.

> It differs from the narrower version in at least two respects: first, it could not be justified on the grounds of inconsistency in the same way as the narrower rule. Instead, the wider rule has to be justified on the ground that it is offensive to public notions of the fair distribution of resources that a claimant should be compensated (usually out of public funds) for the consequences of his own criminal conduct. Secondly, the wider rule may raise problems of causation which cannot arise in connection with the narrower rule. The sentence of the court is plainly a consequence of the criminality for which the claimant was responsible. But other forms of damage may give rise to questions about whether they can properly be said to have been caused by his criminal conduct. [Emphasis added.]

100. Lord Hoffman held that the facts which give rise to the claim "*must be inextricably linked with the criminal activity. It is not sufficient if the criminal activity merely gives occasion for tortious conduct of the defendant*." He said it might be better

> to avoid metaphors like "inextricably linked" or "integral part" and to treat the question as simply one of causation. Can one say that, although the damage would not have happened but for the tortious conduct of the defendant, it was caused by the criminal act of the claimant? Or is the position that although the damage would not have happened without the criminal act of the claimant, it was caused by the tortious act of the defendant?

101. At [69] Lord Rodger, with whom Lord Phillips and Lord Scott agreed, said this:

> This line of authority, with which I respectfully agree, shows that a civil court will not award damages to compensate a claimant for an injury or disadvantage which the criminal courts of the same jurisdiction have imposed on him by way of punishment for a criminal act for which he was responsible. That principle can indeed be analysed in terms of the ex turpi causa rule since the plaintiff cannot even begin to mount his claim without founding on his own criminal activity

102. Applying that test here the Defendants have to show that the damage was caused by the criminal act for which the Claimant was responsible.

103. In *Les Laboratoires Servier v Apotex Inc* [2015] AC 430, the appellants appealed a decision that the infringement of its Canadian patent by the respondent was not a relevant illegality for the purposes of the ex turpi causa defence. The Supreme Court held that the illegality defence was a rule of law not a mere discretionary power, and was based on public policy not on the merits of the respective claims of parties to a dispute. The starting point was to determine what acts constituted "turpitude" for the purpose of the defence. "Turpitude" meant criminal acts and quasi-criminal acts because only those acts engaged the public interest.

104. Lord Sumption, with whom Lord Neuberger and Lord Clarke agreed, held, at [19], that neither the narrower nor the wider rule in Lord Hoffman's analysis in *Gray* "*depended on the court's assessment of the significance of the illegality, the proportionality of its application or the merits of the particular case. Nor does anything else in the speeches justify a test which would include such an assessment*."

105. Lord Sumption said that the first task for a court faced with an ex turpi causa argument was to identify the "turpitude". At [23] he said:

> The paradigm case of an illegal act engaging the defence is a criminal offence. So much so, that much modern judicial analysis deals with the question as if nothing else was relevant. Yet in his famous statement of principle in Holman v Johnson Lord Mansfield spoke not only of criminal acts but of "immoral or illegal" ones. What did he mean by this? I think that what he meant is clear from the characteristics of the rule as he described it, and as judges have always applied it. He meant acts which engage the interests of the state or, as we would put it today, the public interest. The illegality defence, where it arises, arises in the public interest, irrespective of the interests or rights of the parties. It is because the public has its own interest in conduct giving rise to the illegality defence that the judge may be bound to take the point of his own motion, contrary to the ordinary principle in adversarial litigation.

106. He went on at [25]

> The ex turpi causa principle is concerned with claims founded on acts which are contrary to the public law of the state and engage the public interest. 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…This additional category of non-criminal acts giving rise to the defence includes cases of dishonesty or corruption, which have always been regarded as engaging the public interest even in the context of purely civil

> disputes; some anomalous categories of misconduct, such as prostitution, which without itself being criminal are contrary to public policy and involve criminal liability on the part of secondary parties; and the infringement of statutory rules enacted for the protection of the public interest and attracting civil sanctions of a penal character, such as the competition law…
>
> 28. In my opinion the question what constitutes "turpitude" for the purpose of the defence depends on the legal character of the acts relied on. It means criminal acts, and what I have called quasi-criminal acts. This is because only acts in these categories engage the public interest which is the foundation of the illegality defence.

99. It follows from this passage that the defendants here must show, as a minimum, that the claimant was guilty of criminal or quasi criminal acts, the latter being acts that engage the public interest.

100. Lord Sumption recognised at [29] that not all criminal and quasi-criminal acts will constitute turpitude.

> Some offences might be too trivial to engage the defence. In general, however, the exceptional cases are implicit in the rule itself. This applies in particular where the act in question was not in reality the claimant's at all. Leaving aside questions of attribution which arise when an agent is involved, and which are no part of the present appeal, there is a recognised exception to the category of turpitudinous acts for cases of strict liability, generally arising under statute, where the claimant was not privy to the facts making his act unlawful: ... In such cases, the fact that liability is strict and that the claimant was not aware of the facts making his conduct unlawful may provide a reason for holding that it is not turpitude at all. (Emphasis added.)

107. Again, it is to be noted knowledge of wrongdoing is essential.

108. These and other authorities were considered by the Supreme Court in *Patel v Mirza* in which the appellant appealed against an order that he repay £620,000 paid to him by the respondent (P) pursuant to an agreement between them.

109. The respondent had given the appellant the money to bet on a bank's share price using insider information, and the agreement amounted to a conspiracy to commit the offence of insider dealing. However, the insider information did not materialise, the claimant did not place the bet, and he kept the money for himself. The respondent sought to recover it, claiming breach of contract and unjust enrichment. Applying the "*reliance principle*" in *Tinsley v Milligan* [1994] 1 A.C. 340, the judge held that the respondent's claim was unenforceable because he had to rely on his own illegality to establish it. The majority in the Court of Appeal agreed, but held that because the scheme had not been executed, the respondent's claim succeeded.

110. Dismissing the appeal, Lords Toulson, Kerr, Hale, Wilson and Hodge JJ.SC held that there were two policy reasons for the common law doctrine of illegality as a defence to a civil claim: a person should not be allowed to profit from his own wrongdoing, and the law should be coherent, not self-defeating, and should not condone illegality.

> Whether allowing a claim would be harmful to the integrity of the legal system depended on whether the purpose of the prohibition that had been transgressed would be enhanced by denying the claim; whether denying the claim might have an impact on another relevant public policy; and whether denying the claim would be a proportionate response to the illegality. Within that framework, a range of factors might be relevant and it was not helpful to prescribe a definitive list. That said, the courts could not decide cases in an undisciplined way and a principled and transparent assessment had to be made. Potentially relevant factors included the seriousness of the conduct, its centrality to the contract, whether it was intentional, and whether there was disparity in the parties' respective culpability. Punishment for wrongdoing was the responsibility of the criminal courts. The civil courts were generally concerned with determining private rights and obligations, and they should neither undermine the effectiveness of the criminal law nor impose additional penalties disproportionate to the nature and seriousness of any wrongdoing.

111. At [99] Lord Toulson said:

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

112. At [101] he said:

> …I would say that one cannot judge whether allowing a claim which is in some way tainted by illegality would be contrary to the public interest, because it would be harmful to the integrity of the legal system, without a) considering the underlying purpose of the prohibition which has been transgressed, b) considering conversely any other relevant public policies which may be rendered ineffective or less effective by denial of the claim, and c) keeping in mind the possibility of overkill unless the law is applied with a due sense of proportionality. We are, after all, in the area of public policy. That trio of necessary considerations can be found in the case law.

113. Lords Neuberger, Mance Clarke and Sumption JJ.SC. held that as a general rule a claimant should be entitled to recoup money paid pursuant to a contract to carry out an illegal activity. That was so even if the contract had been wholly or partly performed, as long as restitution could be achieved and was consistent with policy and proportionality. Lords Sumption, Mance and Clarke JJ.S.C. dissented in part when considering Lord Toulson's "range of factors" approach which they held converted a legal principle into an exercise of discretion and required the courts to make value judgments about the respective claims of the public interest and each of the parties. Such a change was unjustified and was not necessary to achieve substantial justice in most cases. Moreover, it would lead to complexity, uncertainty, arbitrariness and a lack of transparency.

114. Despite the powerful dissent on the range of factors issue, it is plain that I am bound by the majority view and must consider those factors in considering the facts of the present case.

115. In *Henderson v Dorset Healthcare University NHS Foundation Trust*, the Claimant, who suffered from paranoid schizophrenia, stabbed her mother to death during a serious psychotic episode. She pleaded guilty to manslaughter by reason of diminished responsibility. She was sentenced to a hospital order under the MHA s.37 and an unlimited restriction order under s.41. The Trust admitted negligence by its failure to return the patient to hospital on the basis of her manifest psychotic state.

116. The claimant brought a claim for damages arising from the killing. The heads of damage were for personal injury; loss of liberty; a share in her mother's estate; and future losses for psychotherapy and support. At a preliminary issues hearing, her losses were held to be irrecoverable. The judge held that the facts were materially identical to those in *Gray v Thames Trains*, which was binding on him. The claimed losses were irrecoverable by reason of the doctrine of illegality; the patient could not be compensated for loss suffered in consequence of her own criminal act. The Court of Appeal upheld that decision and the claimant appealed. The first issue was whether *Gray* could be distinguished on the basis that the patient lacked personal responsibility for the crime and; if not, whether it should be departed from in the light of the decision on illegality in *Patel v Mirza.*

117. The appeal was dismissed. The court held that *Gray* could not be distinguished: it involved the same offence and the same sentence, and the reasoning of the majority applied regardless of the degree of personal responsibility for the offending. Further, the court held that the essential reasoning in *Gray* was consistent with *Patel.* The fundamental policy consideration relied on in *Gra*y was the need for consistency so as to maintain the integrity of the legal system, which was the underlying policy question in *Patel.* The majority in *Gray* had considered that an inconsistency would arise between the civil and criminal law regimes if a claimant was allowed to recover damages resulting from a sentence imposed on them for an intentional criminal act for which they had been held responsible.

118. At [83] Lord Hamblen JSC said:

> Although there does not appear to have been any specific finding by the trial judge in *Gray* as to the degree of his responsibility, I am prepared to assume that he was regarded as bearing a significant degree of responsibility. The difficulty for the appellant, however, is that the degree of responsibility involved forms no part of the reasoning of the majority. The crucial consideration for the majority was the fact that the claimant had been found to be criminally responsible, not the degree of personal responsibility which that reflected. (Emphasis added)

119. At [105]-[106] he said:

> The key consideration as far as the majority in *Gray* were concerned was that the claimant had been found to be criminally responsible for his acts. That he had been convicted of manslaughter on the grounds of diminished responsibility meant that responsibility for his criminal acts was diminished, but it was not removed. It was not an insanity case and so, as Beldam LJ pointed out in *Clunis* (at p 989): "he must be taken to have known what he was doing and that it was wrong".

> 106. In such circumstances, the majority in Gray justifiably considered that inconsistency would arise not only if he was allowed to recover damages resulting from the sentence imposed, but also if they resulted from the intentional criminal act for which he had been held responsible. To allow recovery would be to attribute responsibility for that criminal act not, as determined by the criminal law, to the criminal but to someone else, namely the tortious defendant. There is a contradiction between the law's treatment of conduct as criminal and the acceptance that such conduct should give rise to a civil right of reimbursement. The criminal under the criminal law becomes the victim under tort law

120. At [108] Lord Hamblen continued:

> If, as the appellant submits, the degree of personal responsibility is a matter for the trial judge to determine in the civil claim there is a clear risk of inconsistent decisions being reached in the criminal and the civil courts, both as to the degree of responsibility involved and as to how that is to be determined. <u>If, as is further submitted, it is appropriate for the civil court to move away from the M'Naghten approach to insanity, and to develop its own approach to such issues, then the inconsistencies will be heightened. (Emphasis added)</u>

121. In *Stoffel v Grondona,* the claimant had agreed with a third party, M, to take part in a mortgage fraud whereby the claimant would use her good credit history to obtain a mortgage advance from a high street lender so that she could buy a property from him. It was agreed that M, who was thereby able to raise capital finance he would not otherwise have been able to obtain, would retain control of the property, making the mortgage repayments and receiving any rental income, but that the claimant would recover 50% of the proceeds of sale if it was later sold. The claimant obtained the mortgage advance without disclosing to the lender any details of her arrangement with M. However, following completion, the claimant's conveyancing solicitors failed to register at the Land Registry the transfer to her of the property or the new legal charge in favour of her lender. Subsequently the mortgage repayments fell into arrears and, being unable to enforce its security over the property, the claimant's lender brought proceedings against her to obtain a money judgment. In turn she brought a claim against her solicitors seeking damages for breach of duty and breach of contract. The solicitors admitted negligence and breach of contract but contended that since the purpose of instructing them had been to further a mortgage fraud, the claim should be dismissed under the common law doctrine of illegality.

122. The Supreme Court applied the principles set out in *Patel* and held that, where a defendant sought to rely on the common law defence of illegality, the essential question for the court was whether allowing the claim to proceed would be inconsistent with policies to which the legal system gave effect and thereby damage the integrity of the legal system; that in conducting that exercise by reference to the trio of considerations formulated for that purpose, the court would identify the relevant public policy considerations at a level of relative generality and without any evaluation of the underlying policies themselves before considering their application to the situation before the court; that if, after identifying the relevant policy considerations and carrying out any necessary balancing exercise where they conflicted, the clear conclusion emerged that the defence should not be allowed, there would be no need to go on to consider proportionality; and that, where a proportionality assessment was necessary, it would involve giving close scrutiny to the detail of the case in hand, including the

seriousness of the impugned conduct and its centrality to the claimed breach of contract or duty.

123. Finally, I turn to the recent judgment of Johnson J in *Traylor & anor v Kent & Medway NHS Social Care Partnership Trust*

124. In *Traylor*, the claimant had been diagnosed with paranoid schizophrenia and morbid jealousy. He had a history of violence particularly towards his wife. Antipsychotic medication was started by depot injection and he was discharged on a Community Treatment Order. He suffered a psychotic episode and in the early hours of 9 February 2015 he stabbed his daughter several times, causing her significant physical and psychiatric injuries. He was shot three times by armed police officers and suffered a cardiac arrest and a hypoxic brain injury. As a result of the shooting the claimant was seriously injured, requiring 24-hour nursing care. He was prosecuted for attempted murder. The jury found him not guilty by reason of insanity.

125. He maintained that the negligent treatment of his mental illness had caused the 9 February events. The Trust accepted that there had been a breach of duty in respect of a decision to discharge the claimant from secondary healthcare but that that decision had not made a difference to the outcome, as the claimant would have continued not to take his medication even if he had not been discharged. It denied other allegations of negligence. His daughter brought a separate claim against the Trust arguing that it had failed to take positive steps to protect her right to life and her right not to be subject to inhuman or degrading treatment pursuant to the Human Rights Act 1998, and that those failings resulted in the events of 9 February. Johnson J rejected the negligence claim and the Human Rights Act claim. He went on, obiter, to consider, and reject, the illegality defence. He referred to two arguments advanced before him, but only faintly addressed before me.

> The Bail Act 1976 makes express provision (by s2(1)(b)) that a person found not guilty by reason of insanity is to be treated, for the purposes of that Act , as if he had been convicted. Rather than supporting the Trust's argument, that further shows that the special verdict is not treated,
> as a matter of the general law, as a conviction. Otherwise s2(1)(b) would not have been necessary. It is not surprising that the 1976 Act , which is in part concerned with public protection and the avoidance of risk, should treat the special verdict in this way. Nor is it surprising that the criminal injuries compensation scheme should enable compensation to be recovered by victims of what would (but for the special verdict) be a crime of violence. The fact that particular provision is made for those found not guilty by reason of insanity further shows that as a matter of the general law such a person is not regarded as having committed a criminal act. Equivalent provision is made for those under the age of criminal responsibility. There are understandable policy reasons why a scheme that provides compensation to victims out of public funds should extend to those who suffer violence at the hands of someone who is insane or is under the age of criminal responsibility. That does not, however, mean that such people are to be regarded, for the purposes of the law of tort, as if they have committed a criminal offence.

126. At [100] he said:

> I do not accept the submission that Marc Traylor is to be treated as having committed a criminal act. The common law background and legislative history show that those who satisfy the test in the *McNaughten* rules are not regarded in law as having committed the act or having any responsibility for the act ... The sidenote to s2 Trial of Lunatics Act 1883 (in particular the use of the word "guilty") does not now reflect the content of the provision, which has since been amended. Even in its original form, s2 did not have the effect that the defendant was treated as being responsible for the criminal act …

Points of Principle

127. In my view, the following points of principle relevant to the present case emerge from that review of the authorities binding on me:

i) There are two policy reasons for the common law doctrine of illegality as a defence to a civil claim: a person should not be allowed to profit from his own wrongdoing, and the law should be coherent, not self-defeating, and should not condone illegality.

ii) It is not sufficient to exclude liability that the immediate cause of the damage was the deliberate act of the claimant himself.

iii) The starting point is to determine what acts constituted "turpitude" for the purpose of the defence.

iv) The defendants must show, as a minimum, that the claimant was guilty of criminal or quasi criminal acts, (the latter being acts that engage the public interest).

v) A civil court will not award damages to compensate a claimant for an injury or disadvantage which the criminal courts of the same jurisdiction have imposed on him by way of punishment for a criminal act for which he was responsible.

vi) The narrower expression of the rule is that a person should not recover for damage that was the consequence of a sentence imposed on him for a criminal act.

vii) The wider expression of the rule is that it is offensive to public notions of the fair distribution of resources that a claimant should be compensated (usually out of public funds) for the consequences of his own criminal conduct.

viii) The fundamental policy consideration is the need for consistency so as to maintain the integrity of the legal system. An inconsistency would arise between the civil and criminal law regimes if a claimant was allowed to recover damages resulting from a sentence imposed on him for an intentional criminal act for which he had been held responsible.

ix) Whether allowing a claim would be harmful to the integrity of the legal system depended on whether the purpose of the prohibition that had been transgressed would be enhanced by denying the claim; whether denying the claim might

have an impact on another relevant public policy; and whether denying the claim would be a proportionate response to the illegality.

x) Where a proportionality assessment was necessary, it would involve close scrutiny to the detail of the case in hand, including the seriousness of the impugned conduct and its centrality to the claimed breach of contract or duty.

The majority opinions in *Hunter* add little to the analysis of the underlying principle.

Application of the Principles

128. Against that background, I consider the arguments advanced in this case.

129. In my judgment, a verdict of not guilty by reason of insanity is unequivocally a verdict that a defendant is not guilty of the offence charged; and it follows such a verdict that that defendant bears no *criminal* responsibility for the killing. It may well be that the defendant knew the nature and quality of the act he was doing, but knowledge that what he was doing was wrong is an essential element of establishing criminal responsibility and that was not made out.

130. In *Traylor* Johnson J pointed to a number of authorities which support a conclusion that the illegality defence only applies where the claimant knew that he was acting unlawfully:

(1) In *Adamson v Jarvis (1827) 4 Bing 66 130 ER 693* Best CJ said at 73: "… the rule that wrong-doers cannot have redress… is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act."

(2) In *James v British General Insurance Co Ltd [1927] 2 KB 311* Roche J said (at 323) that the defence of illegality only applied to "a known unlawful act."

(3) In *Hardy v Motor Insurers' Bureau [1964] 2 QB 745* Lord Denning MR expressed the illegality defence as a "broad rule of public policy that no person can claim indemnity or reparation for his own wilful and culpable crime." At 769 Diplock LJ said that the defence of illegality applied where there was "an intentional crime committed by the assured."

(4) In *Grey v Barr [1971] 2 QB 554* , Lord Denning MR said (at 558): "If his conduct is wilful and culpable, he is not entitled to recover."

(5) In *Pitts v Hunt [1991] 2 QB 24* at 39G it was said that there is a clear distinction between "deliberate intentional acts and those which are unintentional though grossly negligent."

131. None of these were cited to me (although Ms Plowden referred me to this passage in Johnson J's judgment) but I agree with Johnson J that they illustrate what I have concluded follows from the cases discussed above, namely the need to establish that the Claimant knew that what he was doing was wrong. The Defendants have not established that. They have not established that the Claimant bears criminal responsibility for the three killings.

132. The reference to the old "*Special verdict where accused found guilty, but insane at date of act or omission charged, and orders thereupon*", provided for by s2(1) of the 1883 Act, takes the Defendants nowhere. That provision was amended to make it clear that insanity eliminates criminal responsibility. There is, in my view, an obvious distinction between the nature and quality of intention in a defendant found guilty of manslaughter by way of diminished responsibility and in a defendant found not guilty by reason of insanity. In the former case responsibility is diminished but not eliminated; in the latter case it is eliminated because insanity means the defendant does not know that what he was doing was wrong and that knowledge is essential to affix responsibility.

133. Furthermore, the disposal in the Claimant's case, namely a hospital order and a restriction order under Section 5 (2) Criminal Procedure (Insanity) Act 1964, is not a punishment for a criminal act. It is instead a disposal for public protection made when an insanity defence is made out.

134. I accept that it is possible that the illegality defence could apply in situations where there is no criminal responsibility. But to do so there would have to be quasi-criminality, conduct that raises similar public interest objections to those prompted by criminality. That provides, to adopt Mr Warnock's phrase, an adequate 'bright line' rule and there is no warrant for inventing one that disregards the necessity of establishing that the claim in question is based on a criminal act or one very similar in nature. The 'bright line' established in *Henderson* would not be undermined if this claim were to proceed. The distinction between *Henderson* and the Claimant's claim is not arbitrary but fundamental, turning as it does on the presence or absence of criminal responsibility.

135. The Defendants can show that the death of the three men was the result of deliberate acts of the Claimant. But it is not sufficient to exclude liability that the immediate cause of the damage was the deliberate act of the claimant. The defendants must point to a turpidinous act, an act of knowing wrongfulness. That means they must show that the claimant was guilty of criminal or quasi criminal acts, acts that engage the public interest. They have failed to do so.

136. To permit this claim to proceed would not enable the Claimant to profit from his own wrongdoing. Wrongdoing implies knowledge of wrongfulness and that was excluded by the jury's verdict. The law would not be condoning wrongdoing because the jury's verdict means there was none.

137. The submission that the 'narrow claim' (for heads of loss flowing from the consequences of a criminal sentence) is barred under the ratio of *Gray* as a matter of causation misstates the test. The narrow claim as described in the authorities prohibits loss which flow directly from the lawful imposition of a sentence for breach of the criminal law. Here, by contrast, there is no breach of the criminal law and no sentence. The criminal law has not imposed a sentence on the Claimant; it has imposed certain restrictions made necessary by his mental illness. It will be a question for the court hearing the substantive action whether, as a matter of fact, it was the Claimant's underlying illness that made his detention in hospital necessary, or whether the negligence of the defendants, if such negligence is proved, aggravated that illness or provided the occasion for that illness to manifest itself as it is said it did on 10 February 2019.

138. Promoting legal consistency and avoiding legal incoherence are underlying objectives of the illegality policy. There would be legal incoherence between the criminal law and the law of tort if a Claimant could found a claim on his own criminal or quasi-criminal act. But there is nothing incoherent in permitting a claim founded on a third party's negligence if that negligence was the substantial cause of injury or loss, and the Claimant's insanity meant no blameworthiness attached to him, as is the case here. It may well be the case that claims by the three victims or their families could not succeed against the Defendants in the present case, but they might succeed against the Claimant. It would not be incoherent for tort law to regard the Claimant as responsible for his actions (see *Morriss v Marsden*) whilst criminal law provides a defence founded on his insanity; the criminal law demands more of the state before penal sanctions are applied, than the civil law does before awarding damages.

139. In considering whether allowing a claim would be harmful to the integrity of the legal system it is necessary to decide whether the purpose of the prohibition that had been transgressed would be enhanced by denying the claim; whether denying the claim might have an impact on another relevant public policy; and whether denying the claim would be a proportionate response to the illegality. In my judgment the prohibition being transgressed is the prohibition on the taking of life. That prohibition is not enhanced by preventing a claim in the present circumstances because the claim flows from the actions of someone who is insane and not amenable to the rationale of the prohibition.

140. It was suggested that there is an obvious deterrent effect in having a clear rule that killing a person never results in compensation. I see no such deterrent. The conduct of a person in respect of whom insanity is proven is unlikely in the extreme to be affected by such a principle. Nor do I regard it as realistic that a court would allow the possibility of a claim for damages to impact their decision-making when considering whether to deprive an individual of their liberty on mental health grounds.

141. It was suggested that this claim would be highly likely to offend public notions of the fair distribution of resources were the Claimant to be compensated out of public funds and that public confidence is likely to be shaken by the "obvious injustice" of the Claimant receiving damages for the killings, whilst the victims and their families would receive nothing. As noted above the origin of the test whether an outcome would be offensive to public notions of the fair distribution of resources is the speech of Lord Hoffman in *Gray*. However, what he regarded as potentially offensive was that a claimant should be compensated for the consequences of his own *criminal conduct*, and the claimant here has been found not guilty of any criminal conduct.

142. If there was any element of responsibility remaining in the actions of the Claimant (in other words if he was a person with diminished responsibility) other relevant public policies such as those prayed in aid by Ms Plowden would be readily be outweighed. But there is no such element. In those circumstances the question of proportionality does not arise.

Conclusion

143. In those circumstances, these three claims for orders order striking out the claim on the grounds of illegality must fail.