HOUSE OF LORDS SESSION 2008–09

[2009] UKHL 33

on appeal from:[2008] EWCA Civ 713

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Gray (Original Respondent and Cross appellants) *v* Thames Trains and others (Original Appellant and Cross respondents)

Appellate Committee

Lord Phillips of Worth Matravers
Lord Hoffmann
Lord Scott of Foscote
Lord Rodger of Earlsferry
Lord Brown of Eaton-under-Heywood

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LORD PHILLIPS OF WORTH MATRAVERS

My Lords,

1. I have had the advantage of reading in draft the opinions of my noble and learned friends Lord Hoffmann and Lord Rodger of Earlsferry and I agree, for the reasons given by each, that this appeal should be allowed. I wish, however, to add some comments on one aspect of this appeal which has caused me some concern.

2. The appellants' negligence was responsible for the Ladbroke Grove rail crash on 5 October 1999. Mr Gray sustained minor physical injuries in the crash, but more significant psychiatric injury in the form of post traumatic stress disorder (PTSD). Under the effects of this condition Mr Gray obtained a knife and repeatedly stabbed a drunken pedestrian, Mr Boultwood, with whom he had had an altercation after he had stepped in front of his car. The pedestrian died of his wounds. Mr Gray gave himself up to the police.

3. Mr Gray was charged with murder but the prosecution accepted a plea to manslaughter on the ground of diminished responsibility. On 3 March 2003 Rafferty J ordered him to be detained in hospital pursuant to section 37 of the Mental Health Act 1983, subject to an indefinite restriction order under section 41 of that Act. Mr Gray was detained in prison while a hospital placement was found and then moved to Runwell Hospital, where he remains detained.

4. The appellants have always accepted liability to Mr Gray for his physical and mental injuries and the legal consequences of the latter. The issue has related to the extent of those consequences. The appellants' case has been that those consequences effectively came to an end when Mr Gray killed Mr Boultwood. Thereafter he has experienced the consequences of his own criminal act, in respect of which he can bring no claim on grounds, *inter alia,* of public policy. The preliminary issue that has given rise to this appeal relates to the effect of the defence of public policy, commonly formulated in Latin as *ex turpi causa non oritur actio.*

5. Mr Gray advanced his claim on two bases. The first accepted that public policy would preclude recovery in respect of the consequences of the killing of Mr Boultwood – *Clunis v Camden and Islington Health Authority* [1998] QB 978; *Worrall v British Railways Board* (unreported), 29 April 1999; Court of Appeal Transcript No 684. Mr Gray argued that he could nonetheless recover loss of earnings in respect of the period during which he was detained pursuant to Rafferty J's order. This was on the basis that the appellants had destroyed his earning capacity before the killing so that their negligence, rather than his act of manslaughter, was responsible for his loss of earnings. The Court of Appeal [2009] 2 WLR 351 accepted this argument but, for the reasons given by Lord Hoffmann and Lord Rodger, I consider that they should not have done so.

6. The alternative way in which Mr Gray put his case was rejected by the Court of Appeal but was advanced before your Lordships by way of cross-appeal. This was that the following events formed an unbroken chain of causation to which *ex turpi causa* had no application:

(i) the rail crash caused by the appellants' negligence;
(ii) Mr Gray's PTSD;
(iii) The killing of Mr Boultwood;
(iv) Mr Gray's conviction for manslaughter;
(v) The hospital order and Mr Gray's detention.

7. Up to the stage of argument in your Lordship's House it was Mr Gray's case that his act of manslaughter was the cause of the hospital order and his detention under it. On that premise I agree with Lord Hoffmann and Lord Rodger, for the reasons that they give, that public policy prevents Mr Gray from recovering damages for his detention and its consequences. In particular, I agree with Lord Hoffmann's

identification of a wider and a narrower rule of public policy, applicable in this case.

8. Where I respectfully differ from Lord Hoffmann is in respect of the general applicability of the following passage in paragraph 41 of his opinion:

> "But the sentence imposed by the court for a criminal offence is usually for a variety of purposes: punishment, treatment, reform, deterrence, protection of the public against the possibility of further offences. It would be impossible to make distinctions on the basis of what appeared to be its predominant purpose. In my view it must be assumed that the sentence was what the criminal court regarded as appropriate to reflect the personal responsibility of the accused for the crime he has committed"

While this statement is true of the sentence imposed by Rafferty J. it will not always be true of a hospital order imposed under section 37 of the 1983 Act.

9. In *R v Drew* [2003] UKHL 25; [2003] 1 WLR 1213, when giving the considered opinion of the Committee, Lord Bingham of Cornhill stated at paragraph 9 that it was unnecessary to review the detailed statutory provisions governing the admission of offenders to hospital under s. 37 of the 1983 Act since their effect was clearly and authoritatively explained by the Court of Appeal (Criminal Division) in *R v Birch* (1989) 11 Cr. App. R. (S.) 202 at 210. I shall follow Lord Bingham's example by quoting extensively from the judgment of that Court, given by Mustill LJ. The first passage at p. 210 deals with a hospital order under section 37 that is not accompanied by a restriction order under section 41:

> "Once the offender is admitted to hospital pursuant to a hospital order or transfer order without restriction on discharge, his position is almost exactly the same as if he were a civil patient. In effect he passes out of the penal system and into the hospital regime. Neither the court nor the Secretary of State has any say in his disposal. Thus,

like any other mental patient, he may be detained only for a period of six months, unless the authority to detain is renewed, an event which cannot happen unless certain conditions, which resemble those which were satisfied when he was admitted, are fulfilled. If the authority expires without being renewed, the patient may leave. Furthermore, he may be discharged at any time by the hospital managers or the 'responsible medical officer'. In addition to these regular modes of discharge, a patient who absconds or is absent without leave and is not retaken within 28 days is automatically discharged at the end of that period (section 18(5)) and if he is allowed continuous leave of absence for more than six [now twelve] months, he cannot be recalled (section 17(5)).

Another feature of the regime which affects the disordered offender and the civil patient alike is the power of the responsible medical officer to grant leave of absence from the hospital for a particular purpose, or for a specified or indefinite period of time: subject always to a power of recall (except as mentioned above).

There are certain differences between the positions of the offender and of the civil patient, relating to early access to the Review Tribunal and to discharge by the patient's nearest relative, but these are of comparatively modest importance. In general the offender is dealt with in a manner which appears, and is intended to be, humane by comparison with a custodial sentence. A hospital order is not a punishment. Questions of retribution and deterrence, whether personal or general, are immaterial. The offender who has become a patient is not kept on any kind of leash by the court, as he is when he consents to a probation order with a condition of inpatient treatment. The sole purpose of the order is to ensure that the offender receives the medical care and attention which he needs in the hope and expectation of course that the result will be to avoid the commission by the offender of further criminal acts."

10. Mustill LJ then added this in relation to the effect of a restriction order, at pp 210-11:

> "In marked contrast with the regime under an ordinary hospital order, is an order coupled with a restriction on discharge pursuant to section 41. A restriction order has no existence independently of the hospital order to which it relates; it is not a separate means of disposal. Nevertheless, it fundamentally affects the circumstances in which the patient is detained. No longer is the offender regarded simply as a patient whose interests are paramount. No longer is the control of him handed over unconditionally to the hospital authorities. Instead the interests of public safety are regarded by transferring the responsibility for discharge from the responsible medical officer and the hospital to the Secretary of State alone (before September 30, 1983) and now to the Secretary of State and the Mental Health Review Tribunal. A patient who has been subject to a restriction order is likely to be detained for much longer in hospital than one who is not, and will have fewer opportunities for leave of absence."

11. In a third passage at p. 215 Mustill LJ dealt with the problem facing a sentencer where the defendant needs hospital treatment but his offence merits punishment:

> "For the present purposes it is, we believe, sufficient to note that the choice of prison as an alternative to hospital may arise in two quite different ways: . . . (2) Where the sentencer considers that notwithstanding the offender's mental disorder there was an element of culpability in the offence which merits punishment. This may happen where there is no connection between the mental disorder and the offence, or where the defendant's responsibility for the offence is 'diminished' but not wholly extinguished. That the imposition of a prison sentence is capable of being a proper exercise of discretion is shown by *Morris* (1961) 2 Q.B. 237 and *Gunnell*. Nevertheless the more recent decision *Mbatha* (1985) 7 Cr.App.R(S) 373 strongly indicates that even where there is culpability, the right way to deal with a dangerous and disordered person is to make an order under section 37 and 41."

12. In *Drew* at paragraph 13 Lord Bingham also considered what he described as the problematic situation where neither a sentence of imprisonment, nor a hospital order, on its own appeared appropriate in

the case of a particular offender and where the mutually exclusive operation of such disposals appeared unsatisfactory. He quoted from the White Paper "Protecting the Public: The Government's Strategy on Crime in England and Wales", Cm 3190, March 1996 which proposed a solution to this problem:

> "8.12. The Government proposes changes in the arrangements for the remand, sentencing and subsequent management of mentally disordered offenders to provide greater protection for the public and to improve access to effective medical treatment for those offenders who need it. The central change, if adopted, would be the provision of a 'hybrid order' for certain mentally disordered offenders for whom the present form of hospital order is unsatisfactory, particularly those who are considered to bear a significant degree of responsibility for their offences. The order would enable the courts, in effect, to pass a prison sentence on an offender and at the same time order his immediate admission to hospital for medical treatment.
>
> 8.13. The hybrid order, together with other proposals amending the detail of the Mental Health Act 1983, would substantially increase the flexibility of arrangements for dealing with mentally disordered offenders at all stages from remand through to rehabilitation. In particular, it would enable the courts to deal with some of the most difficult cases in a way which took proper account of the offender's need for treatment; the demands of justice; and the right of other people to be protected from harm.
>
> 8.14. Existing sentencing arrangements for offenders who are mentally disordered require the court to decide either to order the offender's detention in hospital for treatment, or to sentence him to imprisonment, or to make some other disposal. In some cases, an offender needs treatment in hospital but the circumstances of the offence also require a fixed period to be served in detention. This may be because the offender is found to bear some significant responsibility for the offence notwithstanding his disorder, or because the link between the offending behaviour and the mental disorder is not clear at the time of sentencing. The hybrid disposal would be a way of enabling the requirements of sentencing in such cases to be met. Under

> the order, an offender would remain in hospital for as long as his mental condition required, but if he recovered or was found to be untreatable during the fixed period set by the court, he would be remitted to prison. The hybrid order was recommended for use in sentencing offenders suffering from psychopathic disorder by the Department of Health and Home Office Working Group on Psychopathic Disorder. The Government is considering whether it might be made available in respect of offenders suffering from all types of mental disorder currently covered by mental health legislation."

13. As Lord Bingham observed, legislative effect was given to this proposal in the case of an offender suffering from psychopathic disorder, by section 45A of the 1983 Act, inserted by section 46 of the Crime (Sentences) Act 1997. By amendment made by section 1 of and Schedule 1 to the Mental Health Act 2007 this provision now applies more widely to an offender suffering from a "mental disorder". In respect of such a person a court can now combine a hospital direction with a penal sentence - see section 45A of the 1983 Act.

14. The comments of both Mustill LJ and Lord Bingham recognised that a mentally disordered offender whose mental condition did not satisfy the test of insanity or render him unfit to plead might nonetheless have no significant responsibility for his offence. Furthermore, while a conviction for an offence punishable with imprisonment is necessary to confer jurisdiction on a judge to impose a hospital order under section 37, the offence leading to that conviction may have no relevance to the decision to make the hospital order. Thus in *R v Eaton* [1976] Crim. L.R. 390 a hospital order with a restriction order unlimited as to time was made in respect of a woman with a psychopathic disorder where her offence was minor criminal damage.

15. In such an extreme case, where the sentencing judge makes it clear that the defendant's offending behaviour has played no part in the decision to impose the hospital order, it is strongly arguable that the hospital order should be treated as being a consequence of the defendant's mental condition and not of the defendant's criminal act. In that event the public policy defence of *ex turpi causa* would not apply. More difficult is the situation where it is the criminal act of the defendant that demonstrates the need to detain the defendant both for his own treatment and for the protection of the public, but the judge makes it clear that he does not consider that the defendant should bear

significant personal responsibility for his crime. I would reserve judgment as to whether *ex turpi causa* applies in either of these situations, for we did not hear full argument in relation to them. In so doing I take the same stance as Lord Rodger.

16. In the course of his submissions to the House, counsel for Mr Gray for the first time submitted that the hospital order made in respect of Mr Gray should not be treated as imposed because he had committed manslaughter but because he needed treatment. Such a submission had not been advanced in the courts below and did not appear in the respondent's written case. On the contrary, it had always been Mr Gray's case that the manslaughter was the cause of his hospital order but that the respondents were responsible for both the manslaughter and its consequences.

17. Rafferty J. did not have available the possibility of imposing a sentence on Mr Gray that was subject to a hospital direction. In order to protect the public she had a stark choice between a hospital order together with a restriction order and a discretionary sentence of life imprisonment. The fact that she chose the former is no indication that she did not consider that Mr Gray had to accept significant responsibility for his actions. Section 41 of the 1983 Act required her to have regard to "the nature of the offence, the antecedents of the offender and the risk of his committing further offences if set at large" when considering whether the "protection of the public from serious harm" required the imposition of a restriction order. The horrific nature of Mr Gray's crime is likely to have been the most significant factor in leading her to conclude that a restriction order was necessary.

18. Flaux J held, on the basis of the evidence of a psychiatrist who had examined Mr Gray immediately prior to the manslaughter that it could not be said that, on a balance of probabilities, the claimant would have been admitted to or detained in a psychiatric hospital if he had not committed manslaughter. That finding has not been challenged. It is conclusive of the causative link between the manslaughter and the hospital order.

19. Subject to these observations I agree with the reasoning of Lord Hoffmann, as well as that of Lord Rodger, and like them would allow this appeal and restore the order of Flaux J.

LORD HOFFMANN

My Lords,

20. On 5 October 1999 a three-car Turbo Train operated by Thames Trains collided with a First Great Western High Speed Train approaching Paddington Station. 31 people were killed and over 500 injured. The accident was caused by the negligence of employees of Thames Trains and Railtrack plc (now Network Rail Infrastructure Ltd), who are appellants before your Lordships' House.

21. The respondent Mr Gray was travelling in the Turbo Train. He was a 39-year-old local authority employee who had led a relatively uneventful life. He sustained only minor physical injuries but the experience caused post-traumatic stress disorder and depression. On 19 August 2001, when he was receiving medication and treatment to relieve this condition, he became involved in an altercation with a drunken pedestrian who stepped into the path of his car. When the incident was over, Mr Gray drove to the nearby house of his girl-friend's parents, took a knife from a drawer, drove off in pursuit of the pedestrian, found him and stabbed him to death.

22. Mr Gray was charged with murder and remanded in custody. At the trial in the Crown Court at Chelmsford on 22 April 2002, the Crown accepted a plea of guilty to manslaughter on the grounds of diminished responsibility caused by post-traumatic stress disorder. He was sentenced to be detained in hospital pursuant to section 37 of the Mental Health Act 1983 with an indefinite restriction order under section 41. After a period of detention in prison, because no hospital accommodation was available, he was moved to Runwell Hospital in Essex, where he remains.

23. On 17 August 2005 Mr Gray commenced an action for negligence against the appellants. In his schedule of special damage he claimed loss of earnings until the date of trial and continuing. For the period between the railway accident and the killing, he was from time to time employed and claims the difference between what he actually earned and what he would have earned had he continued in his previous occupation. For the period during which he has been detained after the killing, he claims the whole of what he would have earned in his previous occupation. The claim for future loss is based on the

assumption that after release from hospital he is unlikely to find employment. He also claims general damages for his detention, conviction, feelings of guilt and remorse and damage to reputation and an indemnity against any claims which might be brought by dependants of the dead pedestrian.

24. When the action came before Flaux J for trial, counsel invited the judge to decide whether the claim for Mr Gray's loss of earnings while he was detained in prison or the hospital and the general damages for the consequences of the killing were irrecoverable by reason of a rule of law, based on public policy, which prevents someone from obtaining compensation for the consequences of his own criminal act. That seems to me the most accurate way of putting the question, but no formal preliminary issue was directed to be tried and both counsel and the judge used different language to express it. The judge said that it was whether the claimant was precluded from recovering such losses "by application of the principle *ex turpi causa non oritur actio*" and the agreed statement of facts and issues says that it is whether such recovery is "precluded by the principle of *ex turpi causa*." Neither formulation attempted to define what, in the context of this case, the principle is.

25. The judge decided that there is the rule of law for which the appellants contend and that it precludes recovery for both loss of earnings and general damages after and in consequence of the killing. The Court of Appeal (Sir Anthony Clarke MR, Tuckey and Smith LJJ) [2009] 2 WLR 351 said that they were bound by authority to hold that it precluded the claim for general damages but not for loss of earnings. Accordingly they allowed the appeal on this point, but remitted to the judge what they called the issue of causation, which they said had not been considered in either court.

26. The appellants appeal to your Lordships' House against the part of the order of the Court of Appeal which reversed the judge and Mr Gray cross-appeals against the part which affirmed him.

27. My Lords, the question in this case is in my opinion 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. The facts of which were clearly established by the evidence and the verdict at the trial. On the one hand, but for the accident and the stress disorder which it caused, Mr Gray would not have killed and would

therefore not have suffered the consequences for which he seeks compensation. On the other hand, the killing was a voluntary and deliberate act. The stress disorder diminished Mr Gray's responsibility but did not extinguish it. 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.

28. It is not sufficient to exclude liability that the immediate cause of the damage was the deliberate act of the claimant himself. Although in general a defendant will not be liable for damage of which the immediate cause was the deliberate act of the claimant or a third party, that principle does not ordinarily apply when the claimant or third party's act was itself a consequence of the defendant's breach of duty. So in *Corr v IBC Vehicles Ltd* [2008] AC 884 an employer whose negligence had caused post-traumatic stress disorder to a workman was held liable to his dependants for his subsequent death by suicide. Although the immediate cause of the workman's death was his own voluntary and deliberate act, the state of mind in which he had taken his own life had been caused by the employer's breach of duty. In such a case the damages may be reduced, as in *Reeves v Commissioner of Police of the Metropolis* [2000] 1 AC 360, but the defendant's liability is not excluded.

29. It must follow from *Corr's* case that 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. Nor do the appellants say that it is. Their principal argument invokes a special rule of public policy. In its wider form, it is that you cannot recover compensation for loss which you have suffered in consequence of your own criminal act. In its narrower and more specific form, it is that you cannot recover for damage which flows from loss of liberty, a fine or other punishment lawfully imposed upon you in consequence of your own unlawful act. In such a case it is the law which, as a matter of penal policy, causes the damage and it would be inconsistent for the law to require you to be compensated for that damage.

30. Is there such a rule? The appellants say that there is, and that it is one aspect of a wider principle that *ex turpi causa non oritur actio*, (or, as Lord Mansfield said in *Holman v Johnson* (1775) 1 Cowp 341, 343, *ex dolo malo non oritur actio*.) This tag has been invoked to deny a remedy in a wide variety of situations and a good deal of time was spent

in argument examining diverse cases and discussing whether the conditions under which the courts had held the maxim applicable in some other kind of case were satisfied in this one. For example, in cases about rights of property, it has been said that a claimant will fail on grounds of illegality only if his claim requires him to rely upon or plead an illegal act: *Tinsley v Milligan* [1994] 1 AC 340. So Mr Scrivener QC, who appeared for Mr Gray, said that his client's action was founded upon the defendants' act of negligence and not upon the unlawful killing. That of course is true; if the defendants had not been negligent, or the damage had no connection with the train crash which could be described as causal, the claim would not have got past the starting post. But that is not the point; in this kind of case, the question is whether recovery is excluded because the immediate cause of the damage was the act of manslaughter, which resulted in the sentence of the court. Likewise, there was an examination of the pleadings to discover whether Mr Gray had been obliged to plead his unlawful act, Mr Purchas QC, (who appeared for the appellants), saying that he had and Mr Scrivener saying that he had not. Again, the pleadings seem to me to have nothing to do with whether there is the rule of law for which the appellants contend. As a result, I did not find any of this discussion very helpful. The maxim e*x 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. For example, as Beldam LJ pointed out in in *Cross v Kirkby* [2000] CA Transcript No 321, at para 74, in cases in which the court is concerned with the application of the maxim to property or contractual rights between two people who were both parties to an unlawful transaction —

> "it faces the dilemma that by denying relief on the ground of illegality to one party, it appears to confer an unjustified benefit illegally obtained on the other."

31. In cases of that kind, the courts have evolved varying rules to deal with the dilemma: compare the approach of the House of Lords in *Tinsley v Milligan* [1994] 1 AC 340 with that of the High Court of Australia in *Nelson v Nelson* (1995) 184 CLR 538. But the problem to which Beldam LJ drew attention does not arise in this case. The questions of fairness and policy are different and the content of the rule is different. One cannot simply extrapolate rules applicable to a different kind of situation.

32. The particular rule for which the appellants contend may, as I said, be stated in a wider or a narrow form. The wider and simpler

version is that which was applied by Flaux J: you cannot recover for damage which is the consequence of your own criminal act. In its narrower form, it is that you cannot recover for damage which is the consequence of a sentence imposed upon you for a criminal act. I make this distinction between the wider and narrower version of the rule because there is a particular justification for the narrower rule which does not necessarily apply to the wider version.

33. I shall deal first with the narrower version, which was stated in general terms by Denning J in *Askey v Golden Wine Co Ltd* [1948] 2 All ER 35, 38:

> "It is, I think, a principle of our law that the punishment inflicted by a criminal court is personal to the offender, and that the civil courts will not entertain an action by the offender to recover an indemnity against the consequences of that punishment."

34. The leading English authority is the decision of the Court of Appeal in *Clunis v Camden and Islington Health Authority* [1998] QB 978, in which the plaintiff had been detained in hospital for treatment of a mental disorder. On 24 September 1992 the hospital discharged him and on 17 December 1992 he stabbed a man to death. He pleaded guilty to manslaughter on the grounds of diminished responsibility and was sentenced, as in this case, to be detained in hospital pursuant to section 37 of the Mental Health Act 1983 with an indefinite restriction order under section 41.

35. The plaintiff sued the Health Authority, alleging that it had been negligent in discharging him and not providing adequate after care and claiming damages for his loss of liberty. The Health Authority applied to strike out the action on the ground that, even assuming that it had been negligent and that the plaintiff would not otherwise have committed manslaughter, damages could not be recovered for the consequences of the plaintiff's own unlawful act. In other words, the Health Authority relied upon the wider version of the rule. Beldam LJ, who gave the judgment of the Court, accepted this submission. He said (at pp. 989-990):

> "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…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."

36. *Clunis's* case was followed by the Court of Appeal in *Worrall v British Railways Board* [1999] CA Transcript No 684 in which the plaintiff alleged that an injury which he has suffered as a result of his employer's negligence had changed his personality. As a result, he had on two occasions committed sexual assaults on prostitutes, for which offences he had been sentenced to imprisonment for six years. He claimed loss of earnings while in prison and thereafter. The Court of Appeal struck out this claim. Mummery LJ said:

> "It would be inconsistent with his criminal conviction to attribute to the negligent defendant in this action any legal responsibility for the financial consequences of crimes which he has been found guilty of having deliberately committed"

37. The reasoning of Mummery LJ reflects the narrower version of the rule. The inconsistency is between the criminal law, which authorizes the damage suffered by the plaintiff in the form of loss of liberty because of his own personal responsibility for the crimes he committed, and the claim that the civil law should require someone else to compensate him for that loss of liberty. But this reasoning is not applicable to damage which a claimant may suffer as a result of his own

criminal act but which is not inflicted by the criminal law, such as injury which he may suffer in the course of some criminal activity. This kind of case, of which *Vellino v Chief Constable of the Greater Manchester Police* [2002] 1 WLR 218 is a good example, raises somewhat different issues to which I shall return when I discuss the wider form of the rule.

38. The *Clunis* decision was approved by the Law Commission in its Consultation Paper *The Illegality Defence in Tort* (No 160, 2001) on the same narrow ground as that of Mummery LJ in *Worrall's* case:

> "*Clunis v Camden and Islington Heath Authority*…seems entirely justifiable if the rationale of consistency is accepted: it would be quite inconsistent to imprison or detain someone on the grounds that he was responsible for a serious offence and then to compensate him for the detention." (para 4.100)

39. The narrower rule, based on inconsistency, has the support of high authority in the Commonwealth. In *British Columbia v Zastowny* [2008] 1 SCR 27 the plaintiff was a drug addict and petty criminal who had spent most of his life in prison for various offences. While in prison at the age of 18 he had twice been sexually assaulted by a prison officer and the court found that this experience has exacerbated his drug addiction and the criminal conduct which it caused. He sued the Provincial Government as vicariously liable for the assaults, claiming damages for (among other things) loss of earnings during the subsequent years he had spent in prison. The Supreme Court held that such damages were not recoverable. Rothstein J said, at para 22

> "Zastowny's wage loss while incarcerated is occasioned by the illegal acts for which he was convicted and sentenced to serve time. In my view, therefore, the *ex turpi* doctrine bars Zastowny from recovering damages for time spent in prison because such an award would introduce an inconsistency in the fabric of law. This is because such an award would be, as McLachlin J. described in *Hall v. Hebert* [1993] 2 SCR 159, 178, "giving with one hand what it takes away with the other". 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. The consequences of imprisonment include wage loss."

40. Similarly in *State Rail Authority of New South Wales v Wiegold* (1991) 25 NSWLR 500 the plaintiff was seriously injured in an industrial accident caused by the defendant's negligence. For some months he received payments of worker's compensation but when these ceased he took to supplementing his income by growing and selling marijuana. This was a criminal offence for which he was convicted and served some eight months imprisonment. He also lost his employment. He claimed compensation for loss of earnings while in prison and afterwards on the ground that it was a consequence of the impecuniosity caused by the accident. By a majority (Samuels and Handley JJA, Kirby P dissenting) this damage was held to be irrecoverable. Samuels JA said (at p. 514):

> "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."

41. The narrower rule is thus well established and the only cases in which it has been questioned are those in which some judges have felt that it was hard on the plaintiff because his conduct had not been as blameworthy as all that. Perhaps an extreme example is the dissent of Kirby P in *State Rail Authority of New South Wales v Wiegold* (1991) 25 NSWLR 500, which appears to have been on the ground that there was "no single view in the Australian community concerning the moral disapprobation of the respondent's conduct in cultivating Indian hemp": see p. 505. Likewise it has been submitted in this case that the sentence of detention in a hospital reflected the fact that Mr Gray was not really being punished but detained for his own good to enable him to be treated for post-traumatic stress disorder. But the sentence imposed by the court for a criminal offence is usually for a variety of purposes: punishment, treatment, reform, deterrence, protection of the public against the possibility of further offences. It would be impossible to

make distinctions on the basis of what appeared to be its predominant purpose. 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 has 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 in [1985] CLJ 185, 197. This was plainly the view of the Court of Appeal in the *Clunis* case, in which the plaintiff had also been sentenced to detention in a hospital. I agree.

42. It should be noticed that in *Hunter Area Health Service v Presland* (2005) 63 NSWLR 22 the New South Wales Court of Appeal (again by a majority: Sheller and Santow JJA, Spigelman CJ dissenting) 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's* case [1998] QB 978, 989) 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, which Sheller JA (at para 294) described as "unusual if not unique" raises an interesting question about the limits of the rule which it is not necessary to decide for the purposes of this appeal.

43. The Court of Appeal rightly held that it was bound by the decision in *Clunis's* case to apply the rule and reject the claim for damage suffered in consequence of the criminal court's sentence of detention. They did so with regret. The Master of the Rolls, giving the judgment of the Court, said (at paragraph 49):

> "There seems to us to be something to be said for the view that the traditional harsh view of public policy expressed in, for example, the *Clunis* case [1998] QB 978 and the *Worrall* case [1999] CA Transcript No 684 should be revisited in a case in which the crime relied upon (whether relied upon by the claimant or the tortfeasor) was itself caused by the tort. In times gone by, it would perhaps have been seen as inconceivable that the murder or

> manslaughter of another could have been caused by a tort. However, the facts and evidence in the *Corr* case [2008] AC 884 and this case, and perhaps a more developed understanding of clinical depression, show that it is no longer inconceivable. It is far from clear to us why the ends of justice are not sufficiently served by the principles of foreseeability, causation and contributory negligence without the need for a further principle of public policy in such a case."

44. This argument treats the whole question as being whether the crime can be said to have been "caused" by the tort. As I have said, there is no dispute that there was a causal connection between the tort and the killing. The evidence which the judge accepted was but for the tort, Mr Gray would not have killed. But the rule of public policy invoked in this case is not based upon some primitive psychology which deems mental stress to be incapable of having a connection with subsequent criminal acts. As *Hunter Area Health Service v Presland* (2005) 63 NSWLR 22 shows, it may reflect more than one facet of public policy, but it is sufficient in the present case to say that the case against compensating Mr Gray 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. The Court of Appeal said nothing about this aspect of the matter.

45. The Court of Appeal [2009] 2 WLR 351, para 51 produced an imaginary example which appeared to them to reveal an anomaly in the rule stated in *Clunis's* case:

> "Suppose a man suffering from clinical depression caused by a tort jumps off a tall building and dies and, just before he does so, he deliberately pushes someone else off, who also dies. Suppose then that both the dependants of the suicide and the dependants of the man who has been pushed off, and thus killed by the suicide, take proceedings against the tortfeasor, it is not clear why, either as a matter of foreseeability or causation on the one hand or public policy on the other, the former should be entitled to recover but not the latter."

46. I find this example puzzling. There seems to me no reason of public policy why the dependants of the man pushed off the building

should not recover damages against the tortfeasor if (as the example assumes) there was a causal connection between the tort and his death and it is regarded as having been a foreseeable consequence. The dependants are not seeking compensation for a consequence of the victim's own crime, still less for the consequence of a sentence imposed for that crime. The victim did not commit any crime at all. As for the claim by the dependants of the suicide, there might until *Corr's* case [2008] AC 884 have been some doubt about whether they could recover, but that has now been settled. So I cannot see any anomaly. It seems to me to illustrate the fact that the Court of Appeal took the rule in *Clunis's* case to be based upon some eccentric view of causation rather than public policy.

47. Despite holding that the rule applied, the Court of Appeal said that Mr Gray was entitled to compensation for loss of earnings after his arrest for the killing. They said, at para 20, that the question was "whether the relevant loss is inextricably linked with the claimant's illegal act" and came to the conclusion that it was not:

> "The claimant's case is simply that he has suffered a loss because, but for the tort, he would have earned money both before and after 19 [August] 2001 and that he is therefore entitled to recover the whole of his loss of earnings from the defendants. The manslaughter is not inextricably bound up with that claim." (para 22)

48. I am afraid that I do not understand this either. Mr Gray was unable to earn money after 19 August 2001 because he was detained; at first in police custody, then in prison and then in hospital. He was detained because he had committed manslaughter. Stripped of the metaphor of the inextricable link, the question is whether his act of manslaughter caused his inability to earn. Either way, the answer seems to me to be plain. He was arrested and detained because he had committed manslaughter. He was sentenced to be detained because he had committed manslaughter. The causation is clear enough and it is hard to think of a more inextricable link.

49. It is true that even if Mr Gray had not committed manslaughter, his earning capacity would have been impaired by the post-traumatic stress disorder caused by the defendants' negligence. But liability on this counter-factual basis is in my opinion precluded by the decision of this House in *Jobling v Associated Dairies Ltd* [1982] AC 794. In that

case, the plaintiff suffered an injury caused by his employer's breach of statutory duty. It caused him partial disablement which reduced his earning capacity. Three years later he was found to be suffering from unrelated illness which was wholly disabling. The question was whether he could claim for the disablement which hypothetically he would have continued to suffer if it had not been overtaken by the effects of the supervening illness. The answer was that he could not. The fact that he would in any event have been disabled from earning could not be disregarded. Likewise in this case, in assessing the damages for the effect of the stress disorder upon Mr Gray's earning capacity, the fact that he would have been unable to earn anything after arrest because he had committed manslaughter cannot be disregarded.

50. My Lords, that is in my opinion sufficient to dispose of most of the claims which are the subject of this appeal. Mr Gray's claims for loss of earnings after his arrest and for general damages for his detention, conviction and damage to reputation are all claims for damage caused by the lawful sentence imposed upon him for manslaughter and therefore fall within the narrower version of the rule which I would invite your Lordships to affirm. But there are some additional claims which may be more difficult to bring within this rule, such as the claim for an indemnity against any claims which might be brought by dependants of the dead pedestrian and the claim for general damages for feelings of guilt and remorse consequent upon the killing. Neither of these was a consequence of the sentence of the criminal court.

51. I must therefore examine a wider version of the rule, which was applied by Flaux J. This has the support of the reasoning of the Court of Appeal in *Clunis's* case [1998] QB 978 as well as other authorities. It differs from the narrower version in at least two respects: first, it cannot, as it seems to me, 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.

52. The wider principle was applied by the Court of Appeal in *Vellino v Chief Constable of the Greater Manchester Police* [2002] 1 WLR 218. The claimant was injured in consequence of jumping from a second-floor window to escape from the custody of the police. He sued the police for damages, claiming that they had not taken reasonable care to prevent him from escaping. Attempting to escape from lawful custody is a criminal offence. The Court of Appeal (Schiemann LJ and Sir Murray Stuart-Smith; Sedley LJ dissenting) held that, assuming the police to have been negligent, recovery was precluded because the injury was the consequence of the plaintiff's unlawful act.

53. This decision seems to me based upon sound common sense. The question, as suggested in the dissenting judgment of Sedley LJ, is how the case should be distinguished from one in which the injury is a consequence of the plaintiff's unlawful act only in the sense that it would not have happened if he had not been committing an unlawful act. An extreme example would be the car which is damaged while unlawfully parked. Sir Murray Stuart-Smith, at para 70, described the distinction:

> "The operation of the principle arises where the claimant's claim is founded upon his own criminal or immoral act. 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."

54. This distinction, between causing something and merely providing the occasion for someone else to cause something, is one with which we are very familiar in the law of torts. It is the same principle by which the law normally holds that even though damage would not have occurred but for a tortious act, the defendant is not liable if the immediate cause was the deliberate act of another individual. Examples of cases falling on one side of the line or the other are given in the judgment of Judge LJ in *Cross v Kirkby* [2000] CA Transcript No 321. It was Judge LJ, at para 103, who formulated the test of "inextricably linked" which was afterwards adopted by Sir Murray Stuart-Smith LJ in *Vellino v Chief Constable of the Greater Manchester Police* [2002] 1 WLR 218. Other expressions which he approved, at paras 100 and 104, were "an integral part or a necessarily direct consequence" of the unlawful act (Rougier J: see *Revill v Newbery* [1996] QB 567, 571) and "arises directly *ex turpi causa*" (Bingham LJ in *Saunders v Edwards* [1987] 1 WLR 1116, 1134.) 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? (*Vellino v Chief Constable of the Greater Manchester Police* [2002] 1 WLR 218). 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? (*Revill v Newbery* [1996] QB 567).

55. However the test is expressed, the wider rule seems to me to cover the remaining heads of damage in this case. Mr Gray's liability to compensate the dependants of the dead pedestrian was an immediate "inextricable" consequence of his having intentionally killed him. The same is true of his feelings of guilt and remorse. I therefore think that Flaux J was right and I would allow the appeal and restore his judgment.

LORD SCOTT OF FOSCOTE

My Lords,

56. I have had the advantage of reading in draft the opinions on this appeal of my noble and learned friends Lord Hoffmann and Lord Rodger of Earlsferry and find myself wholly convinced by the reasons given by my noble and learned friends for their conclusion that this appeal should be allowed. There is nothing I can usefully add to those reasons and I, too, would allow this appeal.

LORD RODGER OF EARLSFERRY

My Lords,

57. Up until October 1999 Mr Kerrie Gray led a perfectly ordinary life: He was in regular employment, was in a long-term relationship with a partner and had no history of violent behaviour. All that changed when, on 5 October 1999, he was injured in the Ladbroke Grove Rail Crash. His physical injuries were not serious, but he developed post-traumatic stress disorder (PTSD), which led to depression and to a

significant change in his personality. He became withdrawn, was liable to angry outbursts and shunned physical contact – which, naturally, put a strain on his relationship with his partner. He began drinking heavily. From the middle of 2000 he was receiving psychiatric treatment. Although he had returned to work in December 1999, his attendance became irregular, due to various manifestations of PTSD. He changed jobs. During 2001 he found coping with work increasingly difficult. He was absent for periods in May and June. On 13 August he failed to return to work after a period of authorised absence because of an infection.

58. On 19 August 2001 things got dramatically worse. Mr Gray, who had been drinking, was driving along Calcutta Road in Tilbury when a Mr Boultwood, who was drunk, stumbled into the roadway, causing Mr Gray to have to stop. Mr Boultwood then punched the windows of the car and Mr Gray got out. A scuffle ensued, which some bystanders brought to an end. Mr Gray then drove to the home of his partner's parents, took a knife, and drove back to look for Mr Boultwood. When he found him, Mr Gray grabbed him by the throat and stabbed him several times. Mr Boultwood died the following day. Mr Gray gave himself up to the police.

59. Mr Gray was originally charged with murder, but on 22 April 2002 the Crown accepted his plea of diminished responsibility on the ground that he had been suffering from a serious psychological disorder, viz, PTSD, at the time of the killing. While the House has been supplied with no detailed information about the criminal proceedings, we can infer that, following Mr Gray's plea, the judge made an interim order for his detention under section 38 of the Mental Health Act 1983 ("the 1983 Act"). Moreover, we know that on 4 July 2002 he was admitted to Runwell Hospital and that on 3 March 2003, at Wood Green Crown Court, Rafferty J made an order for his detention in hospital under section 37 of the 1983 Act, with a restriction order under section 41. Both orders remain in force.

60. From 20 August 2001 until today, therefore, Mr Gray has either been in prison or in Runwell Hospital and so has not been in a position to work.

61. In August 2005 Mr Gray raised the present proceedings against Thames Trains Ltd and Network Rail Infrastructure Ltd (formerly known as Railtrack PLC) for damages for the loss which he had suffered

as a result of his injuries in the rail crash. They admitted liability but disputed various aspects of his claim for damages. In particular, in their Amended Defence, they relied on "the maxim of law which states that a claimant cannot base a cause of action or head of claim upon his own wrong doing (*ex turpi causa*)." Although the point was expressed generally in this way in the defence, by the time of the trial before Flaux J the main dispute concerned the claim for loss of earnings after 19 August 2001. At the outset of the trial, counsel agreed that the judge should decide the legal issue as to whether the claimant's claim for loss of earnings, during the time he was in prison or in hospital as a result of committing manslaughter, was precluded on the ground of public policy summed up in the maxim *ex turpi causa non oritur actio*. Flaux J held that it was; the Court of Appeal that it was not. The defendants appeal to this House.

62. Before the House the defendants continued to fight under the banner *ex turpi causa non oritur actio* – or on a particular application of the maxim. Not surprisingly, therefore, the focus of the discussion in the judgments below, and of counsel's submissions to the appellate committee, tended to be on the application of that maxim. But Mr Scrivener QC was surely right to this extent, at least: there was nothing unlawful or even base or immoral about the circumstances giving rise to the claimant's right of action against the defendants. That right arose on 5 October 1999 when, as a result of their admitted negligence, he was injured in the Ladbroke Grove crash. Although Mr Gray waited until August 2005 before starting proceedings, at that date his right of action was precisely the same lawful right of action as had accrued to him when the accident occurred. So the defendants' real objection cannot be to the lawfulness of the action as such. Rather, they object that the particular "head of claim" for loss of earnings after 19 August 2001 is precluded by the working of the ex turpi causa doctrine.

63. This case is therefore completely different from cases, such as *National Coal Board v England* [1954] AC 403 or *Cross v Kirkby* The Times 5 April 2000; [2000] CA Transcript No 321 (much relied on by the Court of Appeal), where the argument is that, at the time when he was injured, the claimant was engaged in an unlawful activity and so the policy of the law should be to refuse him a right of action for any injuries sustained in those circumstances. The maxim ex turpi causa non oritur actio is as good a way as any of identifying the policy which the court is asked to apply in those circumstances. And, of course, in such cases questions can arise about the exact scope of the maxim. In the present (very different) case, however, Mr Scrivener appeared to advance Mr Gray's claim on two bases. In my view the maxim is

relevant to the first, but may tend to divert attention from the true nature of the alternative version of the claim and of the defendants' response to it.

64. First, the claimant alleges that the defendants' negligence caused him to develop psychological problems, which in turn led to him committing manslaughter, and so being detained in Runwell Hospital under the 1983 Act, and losing earnings as a result. In my view a claim of that kind undoubtedly falls foul of the ex turpi causa maxim since the claimant is asking the defendant to compensate him for the consequences of his own deliberate criminal act in killing Mr Boultwood.

65. Admittedly, such a claim succeeded in *Meah v McCreamer* [1985] 1 All ER 367, but Woolf J specifically recorded, at p 371j, that counsel for the defendant had not advanced a public policy argument against the claim. As the Court of Appeal held in *Clunis v Camden and Islington Health Authority* [1998] QB 978, 990C, Woolf J's decision cannot accordingly be regarded as authoritative on the issue.

66. The decision of the Court of Appeal in *Clunis* was indeed to the opposite effect. The plaintiff, who had a history of mental disorder, was discharged from hospital. After his discharge, he failed to attend appointments arranged for him and, within two months, he stabbed a man to death in a sudden and unprovoked attack. He pleaded guilty to manslaughter on the ground of diminished responsibility and was ordered to be detained in a secure hospital. He then sued the health authority for damages on the ground that he would not have killed the man and so would not have been subject to prolonged detention, if the authority had not negligently failed to treat him with reasonable professional care and skill and if his responsible medical officer had not failed to arrange a mental health assessment in time. The Court of Appeal struck out his claim. Beldam LJ summarised the decision of the court in this way, at p 990D-E:

> "In the present case 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…."

In its consultation paper on *The Illegality Defence in Tort* (2001), para 4.100, the Law Commission commented, succinctly and correctly, that the decision seemed entirely justifiable

> "if the rationale of consistency is accepted: it would be quite inconsistent to imprison or detain someone on the grounds that he was responsible for a serious offence and then to compensate him for the detention."

67. That line of reasoning had been adopted, some years before, by Samuels JA in *State Rail Authority of New South Wales v Wiegold* (1991) 25 NSWLR 500. The plaintiff had been seriously injured while carrying out maintenance work on overhead electric lines in the course of his employment with the Rail Authority. The authority continued to employ him, but his injuries meant that he could undertake only light duties and his earnings were, accordingly, reduced. In order to make up the deficit after the payments under the workers' compensation scheme finished, the plaintiff took up the cultivation of Indian hemp. He was, however, arrested, pleaded guilty to the relevant drug trafficking offence, and was imprisoned. He lost his job. In the trial of his claim against the Rail Authority for damages for his injuries, the judge proceeded on the basis that the plaintiff would never have got involved in cultivating hemp if he had not been injured due to the defendants' negligence. With obvious reluctance, Samuels JA accepted that finding of fact, but went on to hold that – despite it - the plaintiff was not entitled to damages for being imprisoned and for his loss of earnings while in prison. His Honour declined to follow Woolf J's decision in *Meah v McCreamer* [1985] 1 All ER 367, and expressed his own view in this way, 25 NSWLR 500, 514:

> "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."

68. The Supreme Court of Canada discussed the point more recently in *British Columbia v Zastowny* [2008] 1 SCR 27. While a prisoner, the plaintiff was the victim of two sexual assaults by a prison officer. On his release from prison, he became addicted to crack cocaine, committed various offences and spent 12 of the next 15 years in prison. The plaintiff eventually sued the prison authorities for damages for the sexual assaults. The trial judge held that the assaults had caused him to start using heroin and had exacerbated his substance abuse and criminality. He was awarded damages for, inter alia, his loss of earnings during the periods which he had subsequently spent in prison. The Supreme Court allowed the prison authorities' appeal against that part of the award. Delivering the unanimous judgment of the Court, Rothstein J observed, at pp 37-38, paras 22-23:

> "23 Zastowny's wage loss while incarcerated is occasioned by the illegal acts for which he was convicted and sentenced to serve time. In my view, therefore, the *ex turpi* doctrine bars Zastowny from recovering damages for time spent in prison because such an award would introduce an inconsistency in the fabric of law. This is because such an award would be, as McLachlin J described in *Hall v Hebert* [1993] 2 SCR 159, at p 178, 'giving with one hand what it takes away with the other'. 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. The consequences of imprisonment include wage loss. As Deschamps J. found in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Maksteel Québec Inc* [2003] 3 SCR 228, 2003 SCC 68, at para 33, '[e]very incarcerated offender must suffer the consequences that result from being imprisoned, namely loss of employment for unavailability.' An award of damages for wages lost while incarcerated would constitute a rebate of the natural consequence of the penalty provided by the criminal law.

> 23 Preserving the integrity of the justice system by preventing inconsistency in the law is a matter of judicial policy that underlies the *ex turpi* doctrine."

The court went on, at pp 41-42, para 30, to observe:

> "The judicial policy that underlies the *ex turpi* doctrine precludes damages for wage loss due to time spent in incarceration because it introduces an inconsistency in the fabric of the law that compromises the integrity of the justice system. In asking for damages for wage loss for time spent in prison, Zastowny is asking to be indemnified for the consequences of the commission of illegal acts for which he was found criminally responsible. Zastowny was punished for his illegal acts on the basis that he possessed sufficient *mens rea* to be held criminally responsible for them. He is personally responsible for his criminal acts and the consequences that flow from them. He cannot attribute them to others and evade or seek rebate of those consequences. As noted by Samuels JA in *State Rail Authority of New South Wales v Wiegold* (1991) 25 NSWLR 500, to grant a civil remedy for any time spent in prison suggests that criminally sanctioned conduct of an individual can be attributed elsewhere."

69. 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. I would accordingly reject the first version of the claimant's claim.

70. But Mr Scrivener has an alternative version. He submits that, as a result of his injuries in the crash, Mr Gray was losing earnings immediately before 19 August 2001 and, on the balance of probabilities, he would have continued to do so after that date, even if he had not killed Mr Boultwood. He was therefore entitled to damages from the defendants for his loss of earnings after, just as much as before, 19 August. In effect, on this approach that date had little significance for his claim for loss of earnings.

71. Indeed, putting the matter at its boldest, the claimant asserted that the manslaughter and his resulting custody were completely irrelevant: due to the effects of the train crash, he would in any event have landed up being detained in a mental hospital and losing all his earnings, even without the manslaughter. But, in that form, the claim cannot survive Flaux J's finding, based on the available medical evidence, that:

> "it could not be said that, on a balance of probabilities, the claimant would have been admitted to or detained in a psychiatric hospital, even if he had not committed the manslaughter, let alone that he would not have been able to engage in gainful employment at any time from August 2001 through the summer of 2008 (when he may be released from Runwell Hospital) to some indeterminate date in the future."

72. Even though his claim cannot be pitched so high, at trial the claimant might well be able to show that, if he had not committed the manslaughter, he would have continued to suffer some loss of earnings after 19 August 2001. If so, Mr Scrivener submits, the court should award the claimant damages for that loss: his conviction for manslaughter does not come into the picture and should simply be ignored.

73. I would go along with Mr Scrivener's argument to this extent: if the claimant had a perfectly lawful right of action covering loss of earnings after 19 August 2001, that claim did not suddenly become unlawful when he killed Mr Boultwood. But that is not an end of the matter: the killing may still provide a defence to the claim for loss of earnings, even if it did not make that claim unlawful. And, in fact, it is not the claimant but the defendants who found on the events relating to the manslaughter and its consequences. In effect, they say that they are not liable for any loss of earnings after 19 August 2001 because, by killing Mr Boultwood, the claimant put himself in a position where he was prevented from working and earning. On this version of the claim, the real dispute between the parties is, therefore, as to whether the claimant's admitted killing of Mr Boultwood and his subsequent conviction and detention provide a defence to any claim, which the claimant would otherwise have, for damages for loss of earnings after 19 August 2001.

74. That being the issue, I do not derive assistance from the decision of this House in *Corr v IBC Vehicles Ltd* [2008] AC 884 which dealt with liability for the suicide of a man who had suffered depression as a result of injuries for which the defendants were responsible. Since suicide is not a crime, the questions of legal policy are quite different. Nor, on the other hand, do I agree with the Court of Appeal, at para 18 of the judgment of the Master of the Rolls, that the issue can be resolved by asking whether the facts giving rise to the claimant's claim for loss of earnings "are inextricably linked with his criminal conduct." For one thing, opinions are likely to differ as to what facts are or are not "inextricably linked" with the claimant's criminal conduct – here the Court of Appeal and the trial judge reached different answers. In any event, even if the facts giving rise to a claim are not "inextricably linked" with the claimant's criminal conduct, it does not follow that, as a matter of legal policy, his conduct should have no bearing on his right to recover damages from the defendants for his loss of earnings.

75. The immediately obvious objection to the claimant's formulation of his claim for loss of earnings is that it proceeds by ignoring what actually happened – he killed Mr Boultwood and was detained as a result. Yet it is well established that "the court should not speculate when it knows". In other words, the judge should base any award of damages on what has actually happened, rather than on what might have happened, in the period between the tort and the time when the award is to be made. So, even if the court were satisfied that the claimant would have continued to lose earnings after 19 August 2001, due to the PTSD brought on by the accident, it would be highly artificial to ignore the fact that, by committing manslaughter, the claimant had created a new set of circumstances which actually made it impossible for him to work and to earn after that date. Why should the defendants pay damages on the basis that, but for his PTSD, the claimant would have been able to work after 19 August, when, as the court knows, because of the manslaughter, at all material times after that date he was actually in some form of lawful detention which prevented him from working?

76. The claimant's approach is, to say the least, unreal. If that were the worst that could be said against it, it might stand in the uncomfortable company of *Baker v Willoughby* [1970] AC 467. There the plaintiff was injured in a road accident which left him with a permanently stiff leg. About three years later, just before his action of damages was due to come on for trial, he was shot in the same leg, which had then to be amputated. This House held that the plaintiff's disability could be regarded as having two causes and, where the later injuries became a concurrent cause of the disabilities caused by the

injury inflicted by the defendant, they could not reduce the amount of the damages which the defendant had to pay for those disabilities. So the defendants had to pay the same sum by way of damages for the plaintiff's stiff leg, even though it had actually been amputated. In *Jobling v Associated Dairies Ltd* [1982] AC 794, 806G, Lord Edmund-Davies described this approach as "unrealistic" and Lord Keith of Kinkel concluded, at p 814E, that "in its full breadth" the decision was "not acceptable". Happily, there is no need to review the merits of *Baker v Willoughby* in this case since there is a fundamental objection to this version of the claimant's claim for loss of earnings which, in my view, takes it well beyond any possible reach of the reasoning in that case. At this point I return to the desirability of different organs of the same legal system adopting a consistent approach to the same events.

77. In *British Columbia v Zastowny* [2008] 1 SCR 27, 38, at para 23, Rothstein J treated the need to preserve the integrity of the justice system, by preventing inconsistency in the law, as a matter of judicial policy that underlay the ex turpi causa doctrine. In other words, in the circumstances of that case the application of the ex turpi causa doctrine helped to promote the more fundamental legal policy of preventing inconsistency in the law. That such a policy exists is beyond question. In *Zastowny* and the preceding cases, the need was to ensure that the civil and criminal courts were consistent in their handling of the plaintiff's criminal conduct and its consequences. But that is simply one manifestation of a desirable attribute of any developed legal system. In classical Roman law the jurists were at pains to ensure that the various civil law and praetorian remedies worked together in harmony in relation to the same facts. One of the hallmarks of a good modern code is that its provisions should interrelate and interact so as to achieve a consistent application of its overall policy objectives. Complete harmony may well be harder to achieve in an uncodified system – hence the constant attention paid by the classical jurists to the problem - since different remedies will have developed at different times and in response to particular demands. But the gradual drawing together of law and equity in English law illustrates the same pursuit of harmony and consistency. And, certainly, the courts are conscious that inconsistencies should be avoided where possible. So, for instance, a court should not award damages in tort if a contractual claim based on the same events would be excluded by some term in the contract between the parties. Similarly, a court should not give a remedy on the ground of unjust enrichment if this would be tantamount to enforcing a contract which the law would treat as void in the circumstances. Likewise, in the present case, when considering the claim for loss of earnings, a civil court should bear in mind that it is desirable for the criminal and civil courts to be consistent in the way that they regard what the claimant did.

As Samuels JA observed in *State Rail Authority of New South Wales v Wiegold* (1991) 25 NSWLR 500, 514, failure to do so would generate the sort of clash between civil and criminal law that is apt to bring the law into disrepute.

78. After he killed Mr Boultwood, the claimant was detained, first in prison and then in Runwell Hospital, in accordance with a number of orders of the criminal courts. He did not challenge any of those orders. The civil courts must therefore proceed on the basis that, even though the claimant's responsibility for killing Mr Boultwood was diminished by his PTSD, he nevertheless knew what he was doing when he killed him and he was responsible for what he did. Similarly, it must be assumed that the disposals adopted by the criminal courts were appropriate in all the circumstances, including the circumstance that he was suffering from PTSD. Rafferty J imposed a hospital order and a restriction order. While it is correct to say that a hospital order, even with a restriction, is not regarded as a punishment, this does not mean that the judge was treating the claimant as not being to blame for what he did. On the contrary, as the Court of Appeal recalled in *R v Birch* (1989) 11 Cr App R (S) 202, 215, even where there is culpability, a hospital order with a restriction order may well be the appropriate way to deal with a dangerous and disordered person. We must therefore just proceed on the basis that Rafferty J correctly considered that the orders which she made were "necessary for the protection of the public from serious harm", having regard, in particular, to the claimant's violent attack on Mr Boultwood.

79. By imposing the hospital order with a restriction, the judge was ensuring that, because he had committed manslaughter, the claimant would not be free to move around in the community unless and until authorised to do so by the Secretary of State. This meant, among other things, that he was not to be free to work and earn while subject to the orders. In other words, his earning capacity was removed for as long as they were in force. In my view, it would be inconsistent with the policy underlying the making of the orders for a civil court now to award the claimant damages for loss of earnings relating to the period when he was subject to them.

80. Specific authority in favour of that approach, where the plaintiff had been imprisoned, is indeed to be found in the judgment of Samuels JA in *State Rail Authority of New South Wales v Wiegold* (1991) 25 NSWLR 500, 515:

> "It is true that in the present case the learned trial judge did not, as in *Meah v McCreamer* [1985] 1 All ER 367, find that the respondent was entitled to compensation for loss of liberty resulting from imprisonment, or for lost wages during incarceration, or for any loss in post release earning capacity resulting from his conviction and imprisonment. Rather, what he did was to refuse to treat the conviction and imprisonment of the appellant as a vicissitude of life, for want of a better term, which had crystallised before the date of the hearing, and which reduced the notional economic loss which could be attributed to the appellant's negligence: cf *Faulkner v Keffalinos* (1970) 45 ALJR 80, at 85, 88. But in point of principle, I cannot see that there is a relevant distinction between the two sorts of case. If one cannot get 'direct' compensation for the non-economic or economic loss resulting from imprisonment, one should not be able to receive 'indirect' compensation for lost earning capacity after imprisonment by treating the fact of imprisonment as irrelevant to the assessment of economic loss."

81. I respectfully agree with Samuel JA's analysis. It should also be applied in this case, even though the particular disposal chosen by Rafferty J happened to take the form of a hospital order rather than a sentence of imprisonment. That is consistent with the view of the Law Commission in the passage quoted at para 66 above.

82. In short, the civil court should cleave to the same policy as the criminal court. For that reason, the events which the claimant triggered on 19 August 2001 should not be regarded as irrelevant to the due assessment of the loss of earnings for which the defendants are liable. Rather, the House should uphold the defendants' contention that, as a matter of policy, they should not be held liable for any such loss after 20 August 2001 when the claimant gave himself up to the police. I respectfully agree with what my noble and learned friend, Lord Brown of Eaton-under-Heywood says on this point.

83. That is the appropriate approach on the facts of this case. The position might well be different if, for instance, the index offence of which a claimant was convicted were trivial, but his involvement in that offence revealed that he was suffering from a mental disorder, attributable to the defendants' fault, which made it appropriate for the court to make a hospital order under section 37 of the 1983 Act. Then it

might be argued that the defendants should be liable for any loss of earnings during the claimant's detention under the section 37 order, just as they should be liable for any loss of earnings during his detention under a section 3 order necessitated by a condition brought about by their negligence. That point does not arise on the facts of this case, however, and it was not fully explored at the hearing. Like my noble and learned friend, Lord Phillips of Worth Matravers, I therefore reserve my opinion on it.

84. The claimant has a number of other claims for damages, which were not explored in detail at the hearing. In particular, he has what is described as a claim for an "indemnity" against any future liability in damages to Mr Boultwood's dependants – a claim for economic loss. He also has a claim for his feelings of guilt and remorse. As my noble and learned friend, Lord Hoffmann, says, these claims are not a consequence of the sentence of the criminal court and so cannot be disposed of on the ground of inconsistency. Nevertheless, I agree with him that they should be rejected.

85. In *British Columbia v Zastowny* [2008] 1 SCR 27, 41-42, para 30, quoted at para 68 above, Rothstein J observed that a person is not entitled to be indemnified for the consequences of his criminal acts for which he has been found criminally responsible. He cannot attribute them to others or seek rebate of those consequences. Yet that is precisely what the claimant is trying to do, both in his claim for any sum he is found liable to pay in damages to Mr Boultwood's dependants and in his claim for his feelings of guilt and remorse.

86. In *Meah v McCreamer (No 2)* [1986] 1 All ER 943 Woolf J rejected an attempt to recover the damages which the plaintiff had been found liable to pay to two women whom he had subjected to criminal attacks. His main reason for rejecting the claim was that the damages were too remote. But he would also have rejected it, at pp 950h-951f, on the public policy ground that the plaintiff was not entitled to be indemnified for the damages which he was liable to pay as a result of his criminal attacks. That seems to me to be an appropriate application of the ex turpi causa rule.

87. In the same way, in this case the claimant should not be entitled to an indemnity for any damages he had to pay in consequence of his having assaulted and killed Mr Boultwood. The same goes for his claim for feelings of guilt and remorse. Alternatively, the claims can be treated

as simply raising issues of causation and disposed of as Lord Hoffmann explains.

88. For these reasons, and in agreement with Lord Hoffmann, I would allow the appeal and restore the order of Flaux J.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

89. I have the greatest sympathy for this respondent. Truly his life has been a tragedy. For forty years a decent and law-abiding citizen, now, consequent on severe psychological trauma sustained in the Ladbroke Grove rail crash, subject to hospital and restraint orders following conviction for manslaughter. But for his injuries it is inconceivable that the respondent would ever have killed anyone.

90. The detailed facts of the case have been recounted by others of your Lordships. I shall not repeat them but shall instead seek to illustrate the problem they raise by reference to a much simplified set of facts broadly based upon them.

91. Assume A, a man of forty, is psychologically injured by B's negligence so as to suffer a continuing partial loss of earnings: from the date of the accident he earns £15,000 per annum instead of the £20,000 per annum he had previously been earning. Assume that had his claim been heard two years later he would have been awarded £10,000 special damages (for 2 years partial loss of earnings) and, say, £50,000 for future loss of earnings (10 years at £5,000 p.a.). Assume that two years after the accident, his claim not yet having been heard, he deliberately kills C for no good reason, a killing which, but for his injuries, he would never have committed. This is reflected by his being convicted not for murder but for diminished responsibility manslaughter for which he is sentenced to detention in hospital with a restriction order. Assume that when thereafter his claim comes to be heard he remains detained. From the date of the killing he has ceased to earn anything and is not expected to earn again.

92. On these assumed facts A clearly remains entitled to an award of £10,000 special damages. But what of his future loss of earnings? Following the killing he is in fact worse off to the full extent of the £20,000 p.a. he would have been earning but for the accident (£200,000 on a 10 year multiplier). Can he claim this? Or if not this, can he at least continue to assert his partial loss claim at the rate of £5,000 p.a. (£50,000)?

93. There is an obvious and fundamental problem in claiming the full £20,000 per annum. To establish this, A needs to rely not only on B's negligence resulting in his psychological injury and consequential reduced earning capacity but also on the fact of his killing C and his resultant detention transforming his partial earning loss into a total one. For the reasons given by my noble and learned friends Lord Hoffmann and Lord Rodger of Earlsferry, this problem is so plainly insurmountable that it is unnecessary to spend further time upon it. A cannot obtain compensation for the consequences of his own deliberate act in killing C, an act for which the law holds A criminally responsible notwithstanding that his responsibility is diminished because of the injuries resulting from B's negligence. So much is plainly established on the authorities: *State Rail Authority of New South Wales v Wiegold* (1991) 25 NSWLR 500, *Clunis v Camden and Islington Health Authority* [1998] QB 978, *Worrall v British Railways Board* (unreported) 29 April 1999; [1999] CA Transcript No 684 *British Columbia v Zastowny* [2008] 1 SCR 27. Common to all is the principle that the integrity of the justice system depends upon its consistency. The law cannot at one and the same time incarcerate someone for his criminality and compensate him civilly for the financial consequences. I shall refer to this henceforth as the consistency principle. It is the underlying rationale for the application of the *ex turpi causa non oritur actio* doctrine in the present context.

94. On the face of it, however, a continuing partial loss claim looks less objectionable. Here it is not A who is seeking to rely on the killing and its consequences to enlarge his pre-existing claim but rather B who seeks to invoke the killing to terminate A's pre-existing claim. Why should B, whose negligence it was, after all, which diminished A's responsibility for the killing and who therefore might himself be thought partially responsible for the killing, actually be *better* off as a result of it? If, as Lord Hoffmann envisages at paragraph 46 of his opinion, C's dependants would have a claim against B (assuming always that the usual requirements of causal connection and foreseeability are satisfied), so that to that extent at least the law makes B responsible for C's death, why should the killing actually advantage B vis-a-vis A? Could B, for

example, claim indemnity against A in respect of any liability B may be under to C's dependants? Surely not.

95. It does not follow, however, that the continuing partial loss claim remains sustainable and, indeed, two reasons are suggested why it too must fail. One is the basic principle that subsequent events affecting a loss of earnings claim have to be taken into account when assessing what loss is recoverable—see, for example, *Jobling v Associated Dairies Ltd* [1982] AC 794 where, before trial, the claimant was found to be suffering from myelopathy which in any event was to disable him totally. This I shall refer to as "the vicissitudes principle" (as it was called in *Jobling*) and, where the supervening event has already occurred, it applies in conjunction with a second principle, that the court will not speculate when it knows. The other reason is that the partial loss claim, no less than the total loss claim, falls foul of the consistency principle. Lord Hoffmann (at para 49 of his opinion) emphasises the first of those reasons, Lord Rodger (at paras 76-81) the second.

96. For my part I question whether the first reason is in itself sufficient to dispose of the partial loss claim. *Baker v Willoughby* [1970] AC 467, where the claimant was injured by two successive tortfeasers (as succinctly described by Lord Rodger at paragraph 76 of his opinion), demonstrates if nothing else that on occasion justice will require some modification of the vicissitudes principle. How precisely, in the case of successive torts, this modification is to be rationalised and applied—the subject of extensive discussion in the speeches in *Jobling* and some subsequent consideration by Laws LJ in the Court of Appeal in *Rahman v Arearose Ltd* [2001] QB 351 is not presently in point. Just as *Baker v Willoughby* was held to have no application in *Jobling* where "the victim is overtaken before trial by a wholly unconnected and disabling illness" (Lord Edmund-Davies at p809E), so too here, where the respondent ("the victim" of the appellant's tort) has been "overtaken before trial" by a continuing detention order disabling him from working, *Baker v Willoughby* cannot apply. Obviously neither *Jobling* nor the present case involved successive torts. But whereas the disabling subsequent event in *Jobling* (myelopathy) was "wholly unconnected", that can hardly be said of the manslaughter and the respondent's consequential detention here. But for the appellants' negligence there would have been no manslaughter and no detention. That here is a given.

97. All these cases raise in one form or another the question: on what disabling supervening events is the initial tortfeasor entitled to rely to

reduce or extinguish the consequences of his tort? Put another way: from what further misfortunes of the claimant should the tortfeaser be held entitled to benefit?

98. It is perhaps instructive in this context to consider the recent decision of the House in *Corr v IBC Vehicles Ltd* [2008] AC 884. Shift the facts and suppose that Mr Corr had in fact failed rather than succeeded in his suicide attempt but had further injured himself so as to turn a partial loss of earnings into a total one. It inevitably follows from the House's decision that, so far from such a supervening event bringing the claimant's partial earning loss to an end, he would have been found entitled to recover the whole. Why? Why would the continuing loss claim not fall foul of the vicissitudes principle? Essentially, as it seems to me, for two reasons: first, because the original tort remained causative of the suicide attempt (certainly the latter was not "wholly unconnected with the original injuries"), and, secondly, because there was no public policy reason for regarding the suicide attempt as a supervening vicissitude such as to extinguish the tortfeasor's liability for the continuing loss. The first of those reasons is common to this case too (which is why it seems to me that the vicissitudes principle is not sufficient in itself to defeat A's continuing loss claim). But what of the second reason, recognising of course that manslaughter, unlike suicide, *is* a criminal offence?

99. I turn, therefore, to the consistency principle, the principle which so plainly defeats the total loss claim. Does it logically operate to defeat the partial loss claim too? The only one of the many authorities put before your Lordships which appears to bear at all directly upon this question is *State Rail Authority of New South Wales v Wiegold* (the facts of which are sufficiently set out by Lord Rodger at paragraph 67 of his opinion). Of particular relevance is the passage in Samuels JA's judgment already set out by Lord Rodger but which for convenience I now repeat:

> "It is true that in the present case the learned trial judge did not, as in *Meah v McCreamer* [1985] 1 All ER 367, find that the respondent was entitled to compensation for loss of liberty resulting from imprisonment, or for lost wages during incarceration, or for any loss in post release earning capacity resulting from his conviction and imprisonment. Rather, what he did was to refuse to treat the conviction and imprisonment of the appellant as a vicissitude of life, for want of a better term, which had

> crystallised before the date of the hearing, and which reduced the notional economic loss which could be attributed to the appellant's negligence: cf *Faulkner v Keffalinos* (1970) 45 ALJR 80, at 85, 88. But in point of principle, I cannot see that there is a relevant distinction between the two sorts of case. If one cannot get 'direct' compensation for the non-economic or economic loss resulting from imprisonment, one should not be able to receive 'indirect' compensation for lost earning capacity after imprisonment by treating the fact of imprisonment as irrelevant to the assessment of economic loss." (p.515)

100. The authority there referred to, *Faulkner v Keffalinos*, like *Baker v Willoughby*, concerned injuries sustained in successive torts (there two car accidents), but it reached a rather different conclusion. Windeyer J, giving the leading judgment in the High Court of Australia, said this (at p85):

> "The impairment of a faculty, such as a capacity to earn money, is not like damage to property. The capacity has no value unless it be exercisable. It is only while, and for so long as, it can be exercised that an impairment of it can produce a pecuniary loss. It is for this reason that in assessing damages for the destruction or reduction of earning capacity an allowance must ordinarily be made for the contingency—if in the particular case it is seen as a reasonable possibility—of interruptions of a man's working life by periods of unemployment, sickness or accident. If in fact any of such things occurs before the assessment has to be made, what would have been allowed for as a possibility has become an actuality: the risk of an interruption of earnings has materialised and a hypothetical deduction to be made in the computation of damages has crystallised. It is therefore a mistake to think of damages recoverable for the consequences of the first accident as diminished by the second accident. So far as the damages result from the impairment of earning capacity, the second accident merely supplies a measure of one thing that must be taken into account, namely the risk of an accident."

101. In referring to that case, therefore, Samuels JA was saying that the vicissitude principle applied no less where the supervening event

was disability consequent upon imprisonment for a criminal offence (there the cultivation of marijuana) than where it was some other disabling event. And he was saying that, by the same token as the conviction there (notwithstanding that, as here, the claimant would never have committed the offence but for his injuries sustained through the defendant's negligence) precluded any claim based on the losses directly sustained through his imprisonment, so too the fact of imprisonment had to be regarded as a vicissitude rather than ignored when assessing "indirect" loss also. True, the indirect loss there being claimed was not a continuing partial loss of earnings whilst in prison but rather the losses the claimant would suffer both in wages and superannuation benefits following release from prison. But in principle the case is indistinguishable from the present. And, in common with all of your Lordships, I am persuaded that Samuels JA was right. In the last analysis there is no logical basis on which (in my illustration) A could be regarded as responsible and B in no way legally liable for the full consequences of his detention (A's inability to earn the full £20,000 p.a. he would have earned but for his accident) and yet be entitled in respect of the continuing loss claim to disregard his responsibility for his supervening detention and thus ignore it as a vicissitude terminating his claim.

102. Whilst recognising that in the result the tortfeasor benefits from criminality which in one sense he himself has contributed to bringing about, the opposite conclusion would result in the claimant being able to ignore a vicissitude for which he for his part has been held responsible (if only to a diminished extent). And this surely would be a strange conclusion when one bears in mind that vicissitudes for which a claimant may be wholly blameless (as in *Jobling* itself) can and do take effect to terminate what earlier had appeared recoverable long-term continuing losses.

103. I do not think that any of these observations are at odds with anything said by others of your Lordships. On the contrary, I am in substantial agreement with all that others have said—including not least the reservations expressed by my noble and learned friend Lord Phillips of Worth Matravers at paragraph 15 of his opinion. Sympathetic though I am to the respondent, the disputed elements of his claim do indeed fall foul of the *ex turpi causa* principle.

104. For these reasons I too would allow this appeal and restore the order of the judge below.