Hilary Term
[2026] UKSC 2
On appeal from: [2024] EWCA Civ 138

JUDGMENT

Lewis-Ranwell (Respondent) *v* G4S Health Services (UK) Ltd and others (Appellants)

before

Lord Reed, President
Lord Hodge, Deputy President
Lord Lloyd-Jones
Lady Rose
Lady Simler

JUDGMENT GIVEN ON
21 January 2026

Heard on 15 and 16 July 2025

First Defendant / First Appellant – G4S Health Services (UK) Limited
Angus Moon KC
Gurion Taussig
(Instructed by G4S Legal Department (London))

Third Defendant / Second Appellant - Devon Partnership NHS Trust
Judith Ayling KC
Alex Ruck Keene KC (Hon)
James Goudkamp
(Instructed by DAC Beachcroft LLP (Bristol))

Fourth Defendant / Third Appellant – Devon County Council
Andrew Warnock KC
Jack Harding
(Instructed by DWF Law LLP (London))

Claimant / Respondent – Alexander Lewis-Ranwell
Selena Plowden KC
Christopher Johnson
Rachel Woodward
(Instructed by Clarke Willmott LLP (Taunton))

LORD HODGE AND LORD LLOYD-JONES (with whom Lord Reed, Lady Rose and Lady Simler agree):

1. Introduction

1. In February 2019 Alexander Lewis-Ranwell, the claimant in these civil proceedings, killed three men who were previously unknown to him. At his criminal trial, he was found not guilty of murder by reason of insanity. He now seeks to recover from the defendants compensation for the consequences of those unlawful killings, including in respect of his detention as ordered by the criminal court and to be indemnified in respect of his civil liability to his victims. The issue before the Supreme Court is whether any or all of the heads of loss claimed in the tort of negligence are barred by the illegality defence.

2. Factual background

2. This matter comes before the Supreme Court as a result of applications to strike out the claimant's claims or to enter summary judgment against him. Consequently, it is necessary to proceed on the assumption that the claimant will make good at trial all the allegations in his pleaded case. It should be noted that these are assumed facts and many of the allegations are disputed by the defendants.

3. The claimant, who was born on 17 March 1991 and is now aged 34, was diagnosed with schizophrenia in his mid-twenties and had periods in psychiatric intensive care in 2016 and 2017.

4. G4S Health Services (UK) Limited ("G4S"), the first defendant and first appellant, is a private company to which the Chief Constable of Devon and Cornwall Police ("the Chief Constable"), the second defendant, outsourced the provision of forensic medical services to persons in custody. Devon Partnership NHS Trust ("the NHS Trust"), the third defendant and second appellant, was responsible for the Liaison and Diversion ("L&D") service in Devon. L&D services are established to ensure that people with mental health and/or learning disabilities in the criminal justice system are assessed and their risks and needs are identified so as to inform decisions about where they should receive treatment. An integral part of the service is liaison with and diversion to other agencies. There is a dispute about whether L&D services are treatment services. Devon County Council ("Devon CC"), the fourth defendant and third appellant, was responsible for the Emergency Duty Team, a community mental health team which includes approved mental health professionals ("AMHPs") who provided and coordinated assessments and applications in the relevant area under the Mental Health Act 1983 ("the Mental Health Act").

5. On 8 February 2019, the claimant was arrested as a result of a suspected burglary at a farm in Barnstaple and detained at Barnstaple Police Station. He was released on bail at about 2.30 a.m. on 9 February.

6. Later on 9 February, he was arrested due to his having caused grievous bodily harm with a saw to an elderly man, Mr John Ellis. He was released on bail at about 10 a.m. on 10 February.

7. During both periods of detention following his first and second arrests, the claimant behaved violently and erratically and was apparently mentally very unwell. He was seen or spoken to by mental health professionals employed by G4S and the NHS Trust. During the second period of detention a face-to-face assessment by the mental health nurse employed by the NHS Trust's L&D service was discussed but did not take place. The need for a Mental Health Act assessment was discussed with an AMHP employed by Devon CC but was not arranged.

8. Later on 10 February, in the course of a serious psychotic episode, the claimant attacked and killed three elderly men by bludgeoning them to death in their own homes in Exeter in the delusional belief that they were paedophiles. The men he killed were Mr Anthony Payne, and brothers Mr Richard Carter and Mr Roger Carter.

9. On 11 February 2019, the claimant was arrested after assaulting the night manager of a hotel, Mr Stasys Belevicius. He was taken into police custody before being compulsorily detained at Wonford Hospital under section 2 of the Mental Health Act.

10. On 12 February 2019, the claimant was arrested for questioning in relation to the deaths of Mr Payne and the Carter brothers.

11. On 16 February 2019, the claimant appeared before Exeter Magistrates Court charged with three counts of murder and two counts of wounding with intent contrary to section 18 of the Offences Against the Person Act 1861. He was remanded to HMP Exeter and then transferred to HMP Long Lartin. On 13 March 2019, he was moved to Broadmoor Hospital.

12. In late November 2019, the claimant was tried on three counts of murder at Exeter Crown Court before May J and a jury. It was not in issue that that he must have known that he was killing (or at least seriously injuring) his victims. The Crown Court received evidence of fact and written and oral expert evidence from three psychiatrists, Dr McAllister, Dr Sandford and Dr Amos. They each concluded that when the claimant killed the three men and injured two others, he was suffering from severe paranoid schizophrenia and the likelihood was that he did not know that what he was doing was

wrong. The prosecution invited the jury to reject this evidence that the claimant did not know that what he was doing was wrong. The trial judge directed the jury that it was for them to decide whether the claimant knew that what he was doing was contrary to the law.

13. During the trial the jury passed a note to the Judge which read: "We, the Jury, have been concerned about the state of the psychiatric health service provision in our county of Devon. Can we be reassured that the failings in care for ALR will be appropriately addressed following this trial?".

14. At the conclusion of the trial, the jury found the claimant not guilty of murder by reason of insanity. Pursuant to sections 5(1) and 5(3) of the Criminal Procedure (Insanity) Act 1964 the court made a hospital order with restrictions under sections 37 and 41 of the Mental Health Act. The claimant was detained at Broadmoor Hospital where he remains. The two counts relating to wounding with intent contrary to section 18 of the Offences Against the Person Act 1861 were ordered to lie on the file.

3. The civil proceedings

15. On 4 February 2020, the claimant issued proceedings against the defendants in the Bristol District Registry of the High Court (Queen's Bench Division). It is not said that the claimant lacks capacity to litigate.

16. In his particulars of claim the claimant alleged that all four defendants had been negligent in failing to provide him with adequate care and mental health assessment, thereby causing him to be released into the community in a psychotic state on 9 and 10 February 2019.

17. The claimant further alleged that by their acts or omissions all four defendants had violated his rights under article 3 and article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the European Convention").

18. The claimant's case on causation is that but for the alleged negligence or breach of his human rights, he would have been admitted to hospital on either 8, 9 or 10 February 2019. He alleges that, as a result, he would not have killed Mr Payne or the Carter brothers or have injured Mr Ellis or Mr Belevicius and would not have been subject to a period of imprisonment and the criminal justice process which followed. He would have received in-patient treatment under the Mental Health Act. He would likely have responded well to medication as previously and would have been discharged into the community within about six months. In light of his history of relapses, he would probably have been discharged on

a community treatment order and have been treated with depot medication and community care.

19. With the proceedings the claimant served a report from a consultant forensic psychiatrist, Professor Jenny Shaw, dated 2 June 2021. It was based on her review of documents and an interview with the claimant on 25 September 2020. She concluded that the diagnosis was paranoid schizophrenia. The defendants have not yet served condition and prognosis evidence given the strike out applications.

20. In his provisional Schedule of Loss, the claimant seeks to recover the following heads of damage:

(1) Damages for past and future psychiatric injury.

(2) Damages for past loss of liberty during his detention in police custody, prison and psychiatric hospital.

(3) Damages for his future detention in Broadmoor Hospital, and subsequent psychiatric units or supervised accommodation over a period of eight to nine years, pursuant to the terms of the section 37/41 order of the criminal court.

(4) Damages for loss of reputation due to adverse media coverage of the killings, arrest, charge, trial and detention.

(5) Past loss of earnings between 2019 and 2023 based on net profits from self-employment of £13,721 in 2018/2019.

(6) Past gratuitous care.

(7) Past miscellaneous expenses.

(8) Future loss of earnings for life on the basis that it is unlikely that he will ever obtain any paid work again.

(9) Future gratuitous care from his mother.

(10) Future medical treatment during his detention.

(11) Future cost of a care package/treatment in 24-hour staffed accommodation after his release from psychiatric detention.

(12) Future psychological treatment in the community.

(13) Future legal costs relating to his detention, including representation at tribunal hearings.

(14) Future deputyship costs.

(15) Future miscellaneous expenses.

(16) An indemnity against any claims brought against him, including claims by the families of men that he killed or any persons that he injured.

21. All four defendants filed defences denying liability in negligence and under the European Convention, as well as relying on the illegality defence and pleading contributory negligence. Devon CC denied that it owed any duty of care to the claimant at common law or at all.

22. G4S, the NHS Trust and Devon CC, the three appellants, but not the Chief Constable, subsequently issued applications to strike out the claim on the ground that it was barred by the doctrine of illegality. The defendants did not argue that the doctrine of illegality barred the claim under the Human Rights Act 1998 ("HRA"), the courts below being bound by the decision in *Al Hassan-Daniel v Revenue and Customs Comrs* [2010] EWCA Civ 1443; [2011] QB 866.

23. Garnham J heard the applications on 9 and 10 March 2022. In a reserved judgment handed down on 20 May 2022 ([2022] EWHC 1213 (QB); [2023] QB 229), he dismissed the applications. Garnham J refused permission to appeal to the Court of Appeal. Leave to appeal was subsequently granted by Asplin LJ.

24. The Court of Appeal (Dame Victoria Sharp P, Underhill and Andrews LJJ) heard the appeals on 20 and 21 June 2023 and handed down judgment on 20 February 2024 ([2024] EWCA Civ 138; [2024] KB 745). By a majority the Court of Appeal dismissed the appeals, Andrews LJ dissenting.

25. On 28 May 2024 the Supreme Court (Lord Reed, Lord Hamblen and Lord Richards) granted permission to appeal to the Supreme Court. Permission was also

granted to G4S to appeal on the issue of whether the claim under the HRA was also barred by illegality. That ground of appeal, however, is not pursued.

4. The issues

26. The issues on this appeal may be summarised as follows. In circumstances where the claimant was charged with murder and found not guilty by reason of insanity:

(1) Is the defence of illegality engaged by his civil claim in negligence?

(2) If so, does it bar the claimant's claim in whole or in part?

5. The defence of illegality

27. For many years the starting point for a consideration of the defence of illegality has been the maxim of Lord Mansfield two and a half centuries ago in *Holman v Johnson* (1775) 1 Cowp 341, 343, which was a case concerning an allegation that the claimant had sold tea to the defendant with the intention that it be smuggled into England and a submission that the court should not enforce a claim for the price of the tea. Lord Mansfield stated: "No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act." He continued:

> "If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the Court says he has no right to be assisted. It is upon that ground the Court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and the defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are *equally* in fault, potior est conditio defendentis." (Emphasis in original)

From the outset, therefore, the reason for the defence has been one of public policy. It is not concerned with any assessment of the balance of merits between the parties to a dispute.

28. It is not necessary to trace the development of the defence until comparatively recent times as there has been a flurry of cases in the last 30 years which has done much to clarify the principles underlying the application of the defence.

29. In *Tinsley v Milligan* [1994] 1 AC 340 the House of Lords addressed a dispute between two women who had purchased a house in which they lived together and had taken title in the sole name of the plaintiff but on the understanding that they were joint beneficial owners of the property. This arrangement was adopted to conceal the defendant's interest in the property and thereby to assist both in the making of fraudulent benefit claims against the Department of Social Security ("DSS"). The benefits received helped them pay their bills but were not a substantial part of their income. The women fell out after the plaintiff disclosed the frauds to the DSS. The plaintiff gave the defendant a notice to quit and commenced proceedings asserting sole ownership and claiming possession of the property. The defendant counterclaimed for an order of sale and a declaration that the plaintiff held the property on trust for the parties in equal shares. At each level of the judicial hierarchy the court dismissed the plaintiff's claim and allowed the defendant's counterclaim. But their reasoning differed. Their Lordships unanimously rejected the test which the Court of Appeal had adopted and had applied for several years, which was whether the public conscience would be affronted if the defendant's counterclaim were to succeed. The minority (Lord Keith of Kinkel and Lord Goff of Chieveley) would have allowed the plaintiff's appeal on the basis that the court would not assist the defendant to assert an equitable interest in the property as she had concealed her interest in it for a fraudulent purpose: the claim was tainted by its close connection with the illegal purpose (Lord Goff at pp 354-356). The test which the majority (Lords Jauncey, Lowry and Browne-Wilkinson) adopted was stated by Lord Browne-Wilkinson at p 376:

> "[A claimant who founds his claim on a legal or equitable title] is entitled to recover if he is not forced to plead or rely on the illegality, even if it emerges that the title on which he relied was acquired in the course of carrying through an illegal transaction."

Because there was a presumption of a resulting trust Ms Milligan did not have to plead or rely on the agreement to defraud. Accordingly, she succeeded in her counterclaim. In our discussion which follows we refer to this test as "the reliance test".

30. Before addressing the case law further we mention, briefly, the work of the Law Commission of England and Wales, which criticised the rules relating to the illegality defence as complex and confused. The Commission's work forms an important part of the background to the more recent judicial development of the law in this field. In 1999 the Law Commission published a consultation paper, Illegal Transactions: The Effect of Illegality on Contracts and Trusts (1999) (Law Com CP No 154). In 2001 the Law Commission published another consultation paper, The Illegality Defence in Tort (2001)

(Law Com CP No 160), in which it provisionally proposed that the courts should be directed by statute to consider whether a claim be allowed or disallowed in the light of underlying policy rationales of the defence and taking into account a number of guiding factors. The suggested factors were (i) the seriousness of the illegality, (ii) the knowledge and intention of the claimant, (iii) whether denying relief would act as a deterrent, (iv) whether denying relief would further the purpose of the rule which renders the claimant's conduct illegal, and (v) whether denying relief would be proportionate to the illegality involved.

31. Although *Gray v Thames Trains Ltd* [2009] UKHL 33; [2009] AC 1339 ("*Gray*") comes into the chronological sequence of cases in the House of Lords at this stage, we defer our discussion of the case until our discussion of the application of the illegality defence to claims for damages by a claimant who has unlawfully killed another person in paras 71-80 below.

32. The Law Commission later moved away from its recommendation for legislation except in the field of trusts. It published a consultation paper on the illegality defence in 2009, The Illegality Defence; A Consultative Report (Law Com CP No 189), in which it identified the principal policy rationales of the defence as (i) furthering the purpose of the rule infringed by the claimant's behaviour, (ii) consistency, (iii) the need to prevent the claimant profiting from his or her wrongdoing, (iv) deterrence and (v) maintaining the integrity of the legal system. A sixth possible rationale, punishment, did not receive support from consultees responding to the Commission's earlier consultation papers (paras 2.5, 2.28-2.29). After receiving consultation responses the Commission published a report, The Illegality Defence (2010) (Law Com No 320), in which it acknowledged that the courts, in among other cases *Gray*, had moved away from what it saw as the mechanical use of the reliance test and had considered the policy reasons that underlie the illegality defence. The Commission recommended that there should be legislation to reform the law of illegality in relation to trusts, where a trust has been created or continued to conceal the beneficiary's interest for a criminal purpose, and attached a draft Bill to its report. Otherwise, it recommended that the courts should be left to develop the common law in relation to the illegality defence, as it applies to claims for breach of contract, tort or unjust enrichment or as it applies to claims to enforce legal interests created, transferred or retained under contracts involving some degree of illegality.

33. The Supreme Court first addressed the defence of illegality in 2014 in *Hounga v Allen* [2014] UKSC 47; [2014] 1 WLR 2889 ("*Hounga*") in the context of a claim by an illegal migrant for discrimination in relation to dismissal from employment. The claimant lived in her employers' house from the age of 14 and looked after their children. The employers had helped her to obtain false identity papers to enable her to enter the United Kingdom. They treated her abusively and failed to pay her wages or arrange schooling for her, which they had offered. The claimant's employers dismissed and evicted her after 18 months, exploiting her vulnerability because of her irregular immigration status. The Court of Appeal set aside the Employment Tribunal's order that the employers pay

compensation, which the Upper Tribunal had upheld, on the ground that the illegality of the contract formed a material part of the claimant's complaint of discrimination and the court would not condone that illegality by upholding it. Lord Wilson (with whom Baroness Hale of Richmond and Lord Kerr of Tonaghmore agreed) wrote the majority judgment overturning the order of the Court of Appeal.

34. Lord Wilson referred to *Tinsley v Milligan* and the subsequent application by the courts of the reliance test to claims in tort. He discussed and rejected as inapplicable the inextricable link test which had been developed in relation to claims in tort. He anticipated the way in which the defence of illegality would be developed by a larger panel of the Supreme Court as we discuss below. He stated that the defence rests on the foundation of public policy and was capable of expansion or modification. He stated (para 42) that it is necessary "first, to ask 'What is the aspect of public policy which founds the defence?' and, second, to ask 'But is there another aspect of public policy to which application of the defence would run counter?'" In answering the first question he derived from the influential judgment of McLachlin J in the Canadian Supreme Court in *Hall v Hebert* [1993] 2 SCR 159, which we cite in para 118 below, the proposition that concern to preserve the integrity of the legal system is the rationale of the aspect of policy which founds the illegality defence. He concluded that considerations of public policy which militated in favour of applying the illegality defence "scarcely exist". By contrast, while expressing great caution, he concluded that Mrs Allen had been guilty of human trafficking and that to deny Ms Hounga's claim on the ground of illegality would be to breach the United Kingdom's international obligations under the Council of Europe Convention on Action against Trafficking in Human Beings (CETS No 197) and run counter to the current direction of public policy which was against trafficking and in favour of the protection of its victims.

35. Lord Hughes, with whom Lord Carnwath agreed, concurred in the outcome of the appeal but on a different basis. Lord Hughes saw two connected aspects of the basis of the defence: (i) the law must act consistently, "it cannot give with one hand what it takes away with another, nor condone when facing right what it condemns when facing left" (para 55), and (ii) before that principle bars a claim there must be a sufficient connection between the illegality and the claim made. He referred at para 58 to *Saunders v Edwards* [1987] 1 WLR 1116, 1134 in which Bingham LJ invoked a criterion of proportionality as between the claimant's offence and the claim, and concluded that there was not a sufficiently close connection between the claimant's unlawful immigration and the statutory tort of discrimination to bar the claim.

36. Several months later, another five-Justice panel of the Supreme Court delivered a judgment on the defence of illegality in *Les Laboratoires Servier v Apotex Inc* [2014] UKSC 55; [2015] AC 430 ("*Apotex*"). This case concerned a claim by the defendants for damages under a cross-undertaking after an interim injunction was obtained for alleged infringement of a European patent, which was subsequently held to be invalid for lack of novelty and obviousness. After a Canadian court held that the defendants had infringed

the Canadian patent for the relevant drug, the claimants applied to amend their points of defence to assert an illegality defence to the claim for damages because the products which the defendants had been prevented by the injunction from importing into the United Kingdom would have been manufactured and imported in breach of Canadian patent law. In the course of appellate proceedings, the defendants conceded that there should be deducted from the award of damages under the cross-undertaking an amount equivalent to what the Canadian court would have ordered to be paid for the infringement of the Canadian patent through the manufacture and export of the drug to the United Kingdom.

37. Lord Sumption, with whom Lord Neuberger of Abbotsbury and Lord Clarke of Stone-cum-Ebony agreed, upheld the reliance test in *Tinsley v Milligan* and the rejection in that case of the public conscience test. He recognised that the doctrine operates harshly in some cases and described the main reason for the disordered state of the case law as being "the distaste of the courts for the consequences of applying their own rules" (para 14). He criticised the approach of the Law Commission as producing uncertainty in the law and as providing no coherent structure in place of the reliance test (para 20). In his discussion of the meaning of "turpitude" Lord Sumption referred to Lord Mansfield's reference in *Holman v Johnson* not only to criminal acts but also "immoral or illegal" ones and stated, at para 23:

> "He meant acts which engage the interests of the state or, as we would put it today, the public interest. The illegality defence, where it arises, arises in the public interest, irrespective of the interests or rights of the parties."

38. He described the acts other than criminal acts to which the illegality defence could apply as "quasi-criminal" because they engage the public interest in the same way as criminal acts, and he included within that term dishonesty or corruption, prostitution, and the infringement of statutory rules enacted for the protection of the public interest and attracting civil sanctions of a penal character (para 25). Acts which were merely tortious or in breach of contract did not engage the public interest and were not within the ambit of the defence. In this case the grant of the Canadian patent gave rise only to private rights and the public interest was not engaged by the breach of those rights (para 30).

39. Lord Mance in a concurring judgment agreed that the appeal failed because the public interest was not engaged (para 34). Lord Toulson also agreed that the appeal should be dismissed but for different reasons. First, he observed that there was no authority that a claim for money offends the doctrine of illegality if it arises from a contract involving the commission of a strict liability tort. Secondly, after quoting Lord Mansfield in *Holman v Johnson* in which he stated "the principle of public policy is this; ex dolo malo non oritur actio" (no legal action can arise from a deceitful/wrongful act), Lord Toulson stated that the case law is notoriously untidy and that the courts should proceed carefully on a case by case basis, considering the policies which underlie the broad principle. Thirdly,

he declined to criticise the Court of Appeal for considering whether public policy considerations merited the application of the defence to the facts of the case, pointing out that that had been the approach of the majority in *Hounga*. He concluded by suggesting that a case might arise when the Supreme Court would have to reconsider *Tinsley v Milligan* in the light of the subsequent criticisms of that case.

40. The defence of illegality arose again in the Supreme Court in *Bilta (UK) Ltd v Nazir (No 2)* [2015] UKSC 23; [2016] AC 1 ("*Bilta*"), in which a seven-Justice panel addressed the claims by a company in liquidation against its directors under section 213 of the Insolvency Act 1986. This provision empowers the court to order the payment of contributions to a company's assets on the application of a liquidator where it appears that any business of the company has been carried on with the intent to defraud its or other person's creditors or for any fraudulent purpose. The claims arose out of the directors' involvement of the company in a VAT carousel fraud which exposed it to very substantial claims by HM Revenue and Customs Commissioners and caused its insolvency. The Court rejected the directors' defence of illegality because the fraudulent actions of the directors could not be attributed to the company. The judgments of the court also revealed the continuing disagreement within the court on the proper approach to the defence of illegality. Lord Sumption considered that the law was correctly stated in *Tinsley v Milligan*, whereas Lord Toulson and Lord Hodge in a joint judgment supported the approach taken in *Hounga*. Lord Neuberger in his judgment, with which Lord Clarke and Lord Carnwath agreed, (paras 14-17) expressed the view that the question should be addressed in another case with seven or nine Justices in which the matter could be fully argued. Lord Mance (para 34) agreed.

41. The opportunity to address the contentious issue of the proper approach to the defence of illegality arose in *Patel v Mirza* [2016] UKSC 42; [2017] AC 467 ("*Patel*") which was heard by an enlarged panel of nine Justices. The claim was for the repayment of a sum of money which the claimant had agreed to give and had given the defendant to bet on the movement of the share price of a company based on insider information that the defendant said he would obtain. The agreement contravened the prohibition on insider dealing in section 52 of the Criminal Justice Act 1993. In the event, the defendant did not obtain that information, and the agreement could not be carried out. The defendant pleaded the illegality defence to resist repayment and succeeded at first instance but the Court of Appeal allowed the claimant's appeal. The Supreme Court unanimously dismissed the defendant's further appeal, holding that a claim in unjust enrichment for the recovery of money should not prima facie be barred by reason of the fact that the consideration which has failed was an unlawful consideration. An order for restitution of the money would have the effect of returning the parties to the position they were in before they concluded the illegal contract and prevented the defendant from being unjustly enriched. The court by a majority did not follow *Tinsley v Milligan* and adopted an approach which was closer to that recommended by the Law Commission and foreshadowed by Lord Wilson in *Hounga*.

42. The majority judgment was delivered by Lord Toulson, with whom Baroness Hale, and Lords Kerr, Wilson and Hodge agreed. Lord Neuberger (para 174) agreed that the structured approach suggested by Lord Toulson, which we discuss below, "provides as reliable and helpful guidance as it is possible to give in this difficult field." The judicial schism remained: the minority, Lords Mance, Clarke and Sumption, did not agree with this approach. But, having obtained the support of a clear majority of the court, the structured approach presented by Lord Toulson, as further developed in subsequent authorities, is now the law.

43. Lord Toulson discussed the criticisms which the Law Commission among others had made about *Tinsley v Milligan*, the case law which followed, including *Hounga* and *Apotex*, the approaches to illegality by courts in Australia, Canada and the United States, and the critique by Professor Burrows of a rules-based approach to illegality. He agreed with the insight of McLachlin J in *Hall v Hebert* that the rationale for rejecting a claim on the ground of illegality was that allowing such a claim "would produce inconsistency and disharmony in the law, and so cause damage to the integrity of the legal system" (para 100). He set out in the following paragraph a structured approach to identifying whether such inconsistency or disharmony would arise in a particular case:

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

In the summary of his decision (at para 120) Lord Toulson reformulated the public interest considerations which were in play by asking whether enforcing a claim "would be harmful to the integrity of the legal system (or, possibly, certain aspects of public morality, the boundaries of which have never been made entirely clear and which do not arise for consideration in this case)."

44. *Patel* has provided a structured analytical template for the assessment of whether to uphold the defence of illegality. We apply that template to the facts of this case in paras 135-162 below.

45. We can address briefly the case law which has built on the test set out in *Patel v Mirza*. We will leave the Supreme Court's judgment in *Henderson v Dorset Healthcare University NHS Foundation Trust* [2020] UKSC 43; [2021] AC 563 ("*Henderson*"), which concerned a claim for damages against healthcare providers by a person convicted of manslaughter by reason of diminished responsibility, to our more detailed discussion in paras 81-91 below. It is sufficient to record that Lord Hamblen, giving the judgment of the court, referred to Lord Toulson's consideration (a) (the underlying purpose of the prohibition which has been transgressed) and stated (para 119) that it:

> "should not be interpreted as being confined to the specific purpose of the prohibition transgressed. Whilst that is of great importance, other general policy considerations that impact on the consistency of the law and the integrity of the legal system also fall to be taken into account."

46. In *Grondona v Stoffel & Co* [2020] UKSC 42; [2021] AC 540 ("*Grondona*"), the Supreme Court addressed a claim by the client of conveyancing solicitors for damages for professional negligence in failing to register in the Land Register both the transfer of property to her and the charge in favour of the financial institution which lent her money to finance the purchase. The defendant solicitors argued that her claim was barred by illegality on the ground that the mortgage loan had been obtained by fraudulent misrepresentations pursuant to an agreement between Ms Grondona and another by which she agreed to take loans in her name and thereby conceal the other person's interest in the properties specified in the agreement. The defence was rejected at first instance (on the basis of *Tinsley v Milligan*), by the Court of Appeal, and the Supreme Court dismissed the further appeal. The judgment of the Supreme Court, which applied the trio of considerations set out by Lord Toulson in *Patel*, was delivered by Lord Lloyd-Jones, with whom Lord Reed, Lord Hodge, Lady Black and Lady Arden agreed. At para 23 Lord Lloyd-Jones stated that the evaluation of factors which Lord Toulson set out at para 101 in *Patel* "is directed specifically at determining whether there might be inconsistency damaging to the integrity of the legal system". He continued (para 26):

> "In the application of stages (a) and (b) of [the *Patel*] trio a court will be concerned to identify the relevant policy considerations at a relatively high level of generality before considering their application to the situation before the court. In particular, I would not normally expect a court to admit or to address evidence on matters such as the effectiveness of the criminal law in particular situations or the likely social consequences of permitting a claim in specified circumstances. The essential question is whether to allow the claim would damage the integrity of the legal system. The answer will depend on whether it would be inconsistent with the policies to which the legal system gives effect. … In considering proportionality at

> stage (c), by contrast, it is likely that the court will have to give close scrutiny to the detail of the case in hand."

47. For completeness, we observe that the courts of England and Wales adopt a discerning approach, where it is justified, of giving effect to the illegality defence to exclude recovery of certain heads of loss but not others: see *Hewison v Meridian Shipping Services PTE Ltd* [2002] EWCA Civ 1821; [2003] ICR 766; and *Ali v HSF Logistics Polska sp z oo* [2024] EWCA Civ 1479; [2025] 4 WLR 8. This is an example of what Stuart-Smith LJ in the latter case (para 26) described as "[t]he adaptive flexibility of the common law's remedies".

48. In Scotland, a similar approach is taken to the law of illegality, and the courts have proceeded on the basis of English authorities. In *Khan v Hussain* [2019] CSOH 11; 2019 SC 322, in which counsel cited *Gray*, *Hounga*, *Apotex* and *Bilta* (but surprisingly not *Patel*), Lord Ericht, drawing on *Gray* as an analogy, upheld the defence of illegality in a professional negligence case in relation to a claim for loss of earnings caused by a sanction imposed by the Financial Standards Agency which prohibited the pursuer (ie the claimant) from performing any function in relation to any regulated activities. In *DD v NHS Fife Health Board* [2022] SAC (Civ) 27 the Sheriff Appeal Court addressed a claim that a medical professional employed by the defenders had negligently revoked a short-term detention certificate and discharged the pursuer from hospital while he was suffering from a mental disorder. Thereafter he behaved aggressively and eventually was detained on remand in prison for 30 days. He claimed damages including for loss of reputation and loss of earnings resulting from criminal convictions for assault and abusive behaviour. The sheriff excluded as irrelevant (ie struck out) the pleadings seeking damages which resulted from the pursuer's criminal conduct, upholding the Health Board's defence of illegality, and allowed the other averments of loss to go to proof (ie trial). The Sheriff Appeal Court referred to *Gray*, *Patel* and *Henderson* and upheld the sheriff's decision.

6. Relevant criminal law

Murder

49. In England and Wales murder is an offence at common law. For present purposes, the actus reus of murder may be taken to be the unlawful killing of a person and the mens rea of murder an intention to kill or to cause grievous bodily harm. In order to be criminally responsible for murder a person must be at least ten years old, not insane within the *M'Naghten* rules, and, since 1957, not suffering from diminished responsibility (David Ormerod, Karl Laird and Matthew Gibson*, Smith, Hogan and Ormerod's Criminal Law*, 17th ed (2024) ("*Smith, Hogan and Ormerod*"), para 12.1.1).

Diminished responsibility

50. Diminished responsibility is a defence to murder. It was first introduced by section 2 of the Homicide Act 1957 and has since been replaced by a defence of the same name under section 52 of the Coroners and Justice Act 2009. The defence applies only to murder. It is not a total defence; if successful it allows a defendant to be found guilty only of manslaughter. The burden of proof is on the defendant to prove the elements of diminished responsibility (*R v Foye (Lee Robert)* [2013] EWCA Crim 475; (2013) 177 JP 449; *R v Wilcocks* [2016] EWCA Crim 2043; [2017] 4 WLR 39). The standard of proof is on the balance of probabilities (*R v Dunbar* [1958] 1 QB 1; *Smith, Hogan and Ormerod*, para 13.2).

51. As originally introduced in England and Wales by the Homicide Act 1957, the defence of diminished responsibility was available on a charge of murder where a defendant could prove that "he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing" (section 2 of the Homicide Act 1957). The defence as modernised by section 52 of the Coroners and Justice Act 2009 came into force on 4 October 2010 and applies to any murder committed on or after that date. It reflects in part recommendations by the Law Commission. It provides:

> "**2 Persons suffering from diminished responsibility (England and Wales)**
>
> (1) A person ('D') who kills or is a party to the killing of another is not to be convicted of murder if D was suffering from an abnormality of mental functioning which—
>
> (a) arose from a recognised medical condition,
>
> (b) substantially impaired D's ability to do one or more of the things mentioned in subsection (1A), and
>
> (c) provides an explanation for D's acts and omissions in doing or being a party to the killing.
>
> (1A) Those things are—

(a) to understand the nature of D's conduct;

(b) to form a rational judgment;

(c) to exercise self-control.

(1B) For the purposes of subsection (1)(c), an abnormality of mental functioning provides an explanation for D's conduct if it causes, or is a significant contributory factor in causing, D to carry out that conduct."

52. *Smith, Hogan and Ormerod*, para 13.2.2.1, identifies four elements of the plea:

(1) an abnormality of mental functioning;

(2) arising from a mental condition;

(3) which substantially impairs the defendant's ability to understand the nature of his conduct, to form a rational judgement or to exercise self-control; and

(4) which is a cause or contributory cause of the defendant's conduct.

53. Where a defendant is convicted of manslaughter by reason of diminished responsibility, one sentencing option available to the judge will be a hospital order with a restriction order under sections 37 and 41 of the Mental Health Act. The effect of such an order is considered below. If neither a hospital order nor a sentence of imprisonment is considered appropriate, the sentencing judge may impose a hybrid order combining a hospital direction with a penal sentence under section 45A of the Mental Health Act.

Not guilty by reason of insanity

54. A verdict of guilty of manslaughter by reason of diminished responsibility must be contrasted with a verdict of not guilty by reason of insanity. Unlike diminished responsibility, insanity is a general defence not limited to murder and leads to a verdict of not guilty by reason of insanity as opposed to reducing a conviction of murder to a conviction of manslaughter. The defendant bears the burden of proving on the balance of probabilities that he or she is insane within the *M'Naghten* rules: see Law Commission

Discussion Paper, Criminal Liability: Insanity and Automatism (July 2013) paras 1.24 and 1.63.

55. Section 2(1) of the Trial of Lunatics Act 1883 (46 & 47 Vict, c 38), as originally enacted, provided for a special verdict of guilty but insane. In *Felstead v The King* [1914] AC 534 the House of Lords held that a special verdict under section 2(1) of the Act resulted in an acquittal rather than a conviction and therefore did not give rise to a right of appeal under section 3 of the Criminal Appeal Act 1907. Lord Reading observed (at p 543) that it was unfortunate that the word "guilty" was used in section 2(1):

> "as it suggests the responsibility for a criminal act. If the requirement under the statute had been merely to find that the accused did the act, instead of that he was guilty of the act, there could have been no room for doubt that such a verdict was not a conviction, but was an acquittal."

56. Section 2(1) was amended by section 1 of the Criminal Procedure (Insanity) Act 1964 and now reads as follows:

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

57. The test of insanity is a matter of common law and continues to be governed by the opinions delivered in *M'Naghten's case* (1843) 10 Cl & Fin 200 at p 210:

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

58. That this remains the test of insanity was confirmed by the Court of Appeal (Criminal Division) in *R v Keal* [2022] EWCA Crim 341; [2022] 4 WLR 41. That decision did, however, clarify one point. It had previously been understood that the reference to knowing "he was doing what was wrong" meant understanding that it was contrary to law. In *Keal* the Court of Appeal explained that "wrong" extended to what was morally wrong or wrong by the standards of ordinary people. We note that in the trial of the claimant in the present case, which took place in 2019, the trial judge directed the jury in accordance with the law as it was understood prior to *Keal*. The finding of insanity was, therefore, arrived at on the basis of the claimant's lack of understanding of the illegality, as opposed to the moral wrongfulness, of his actions.

59. In an appropriate case it is open to the prosecution to accept a plea of guilty to manslaughter by reason of diminished responsibility. However, it is not open to the prosecution to accept a plea of not guilty by reason of insanity. The effect of section 2(1) of the Trial of Lunatics Act 1883 as amended is that the issue is required to be decided by the jury. It must be given in evidence at the trial that the defendant did the act or made the omission charged and that he was insane so as not to be responsible, according to law, for his actions or omissions at the relevant time.

60. The requirement that the prosecution prove the actus reus of the offence is an important protection for the defendant. Those who are legally insane should not be made subject to orders of the courts exercising criminal jurisdiction unless they have behaved in a way which constitutes the actus reus of a criminal offence (*Attorney-General's Reference (No 3 of 1998)* [2000] QB 401 per Judge LJ at 409F-G). A further protection for the defendant is the requirement that if there is objective evidence which raises the issue of mistake, accident, self-defence or involuntariness, the jury should not find that the defendant performed the actus reus unless it is satisfied beyond reasonable doubt that the prosecution has negatived that defence (*Attorney-General's Reference (No 3 of 1998)* per Judge LJ at 410G-411F; *R v Antoine* [2001] 1 AC 340 per Lord Hutton at 376F-377D).

61. Does insanity negative mens rea? The question whether a defendant found not guilty of murder by reason of insanity possessed the mens rea for murder is likely to depend on which limb of the test in the *M'Naghten* rules led to the verdict, ie whether he did not know the nature and quality of his acts or whether he did not know what he was doing was wrong. A defendant who understands what he is doing, ie who intends to kill or cause grievous bodily harm, but does not know that it is wrong will have the mens rea for murder but will be not guilty of murder because he does not know that what he is doing is wrong (*Loake v Director of Public Prosecutions* [2017] EWHC 2855 (Admin); [2018] QB 998 per Irwin LJ at paras 39-41). In this regard, we note that at the criminal trial of the claimant the evidence of the psychiatric experts did not support a conclusion that the claimant did not know the nature and quality of his acts. On the contrary, the evidence was that he intended to kill his victims and believed that he was justified in doing so because he believed, erroneously, that they were paedophiles. The jury's verdict of not guilty by reason of insanity must, therefore, have been arrived at on the basis that

he did not understand that what he did was wrong. In the particular circumstances of this case, it follows that the claimant committed the actus reus of murder with the mens rea of murder. However, insanity under either limb of the *M'Naghten* rules negatives the criminal responsibility of the defendant. Where it is established that the defendant was insane under either limb of the *M'Naghten* rules at the time of the alleged offence the jury is not concerned with the issue of mens rea. The prosecution is required to prove only the actus reus of the offence. (See *Attorney-General's Reference (No 3 of 1998)* per Judge LJ at 411E-F; *R v Antoine* per Lord Hutton at 374B-D.)

62. We do not suggest that such distinctions should be used as the basis for either the threshold question of whether a case is within the ambit of the illegality defence, or, if it is, the application of the trio of considerations set out in *Patel*. On the contrary, either limb of the *M'Naghten* rules negatives the criminal responsibility of the defendant. In any event, it will often be impossible to know the basis on which a jury arrived at its verdict of not guilty by reason of insanity.

63. Where a defendant is charged with murder and raises the defence of diminished responsibility and the prosecution has evidence that the defendant is insane within the *M'Naghten* rules, the prosecution may adduce or elicit evidence tending to show that this is so. Conversely, where a defendant sets up insanity the prosecution may contend that the defendant was suffering only from diminished responsibility. In either case the prosecution must establish its contention beyond a reasonable doubt. (See *Smith, Hogan and Ormerod*, para 13.2.2.3 and section 6 of the Criminal Procedure (Insanity) Act 1964.)

Sentencing powers and powers of disposal

64. Where a special verdict of guilty but insane was returned under the Trial of Lunatics Act 1883 as originally enacted, the court was obliged to order that the accused be kept in custody as a criminal lunatic. As we have seen, section 1 of the Criminal Procedure (Insanity) Act 1964 amended the special verdict under section 2(1) to one of "not guilty by reason of insanity". At the same time section 5 of the Criminal Procedure (Insanity) Act 1964 made new provision for the powers of a judge following a special verdict of not guilty by reason of insanity. The relevant effect of that provision for present purposes, as further amended inter alia by the Domestic Violence, Crime and Victims Act 2004, may be summarised as follows:

(1) Section 5(2) provides that the court shall make in respect of the accused:

(a) a hospital order (with or without a restriction order);

(b) a supervision order; or

(c) an order for his absolute discharge.

Section 5(4) provides that a hospital order has the meaning in section 37 of the Mental Health Act and a restriction order has the meaning in section 41 of that Act.

Section 5(3A) provides:

> "Where the court have power under subsection (2)(c) to make an order for the absolute discharge of the accused, they may do so where they think, having regard to the circumstances, including the nature of the offence charged and the character of the accused, that such an order would be most suitable in all the circumstances of the case."

However, section 5(3) provides:

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

The sentence for murder is fixed by law. As a result the range of orders provided for in section 5(2) does not apply where the offence to which the special verdict relates is murder. Provided that the mandatory requirements in section 37(2) of the Mental Health Act as to medical evidence are met, where a defendant is found not guilty of murder by reason of insanity, the court has no option but to make a hospital order with a restriction order.

65. In *R v Birch* (1989) 90 Cr App R 78, pp 84-85, Mustill LJ described the effect of an order under sections 37 and 41 of the Mental Health Act. He explained that where a section 37 order is made the position of the offender:

> "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."

However, he went on to explain that where a restriction order is made under section 41:

> "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 … and the Mental Health Review Tribunal."

(See also *Henderson* per Lord Hamblen at para 27.)

66. An order made under sections 37 and 41 must be contrasted with a hybrid order made under section 45A of the Mental Health Act. Where a defendant is found guilty of manslaughter by reason of diminished responsibility and where neither a sentence of imprisonment nor a hospital order (with or without a restriction order) is appropriate, the sentencing judge can impose a hybrid order, ie a hospital direction with a penal sentence under section 45A. The effect of a hybrid order under section 45A was described by Lady Carr CJ in the following terms in *R v Calocane* [2024] EWCA Crim 490; [2024] 4 All ER 1063, para 63:

> "A key difference between a hospital and [restriction] order, on the one hand, and a hybrid order, on the other, is that if an offender who is subject to a hospital and [restriction] order recovers so that they no longer need to remain in hospital, they will be released into the community. In contrast, if an offender who is subject to a hybrid order recovers such that they can be discharged from hospital, they will be transferred to prison (at least before expiry of the minimum term). The other key difference is that, where an offender is under a hospital and [restriction] order, the decision whether they will be released into the community will [be] subject to the consent of the Secretary of State, after consultation with the responsible physician, whereas if an offender is subject to a hybrid order, and has been discharged from hospital, the decision about whether they should be released from prison will be a matter for the Parole Board."

67. The claimant in these proceedings is detained under sections 37 and 41 of the Mental Health Act, the same provisions under which Mr Clunis (in *Clunis v Camden and Islington Health Authority* [1998] QB 978), Mr Gray (in *Gray*) and Ms Henderson (in *Henderson*) were detained, all three having been convicted of manslaughter by reason of diminished responsibility. However, in the case of the claimant, having been found not guilty of murder by reason of insanity, his detention is on a different legal basis, namely section 5(2) of the Criminal Procedure (Insanity) Act 1964.

7. Domestic authority on the illegality defence in comparable civil cases

68. Courts in England and Wales have been confronted with comparable civil cases on a number of occasions.

Clunis v Camden and Islington Health Authority

69. In *Clunis* the plaintiff, who had a history of mental disorder, had been detained in hospital under section 3 of the Mental Health Act. Following his discharge from hospital in September 1992 he was subject to after-care by the defendant health authority under section 117 of the Mental Health Act but he failed to attend appointments arranged by the responsible medical officer. In December 1992 he attacked and killed a man by stabbing him in a sudden and unprovoked attack. He pleaded guilty to manslaughter on the grounds of diminished responsibility and was sentenced to a hospital order and a restriction order under sections 37 and 41 of the Mental Health Act. The plaintiff brought a civil claim maintaining that he had suffered injury, loss and damage because the defendant was negligent and responsible for breach of a duty of care at common law to treat him with reasonable professional care and skill. It was said that the defendant should have realised that the plaintiff was in urgent need of treatment and was dangerous and that had he been assessed he would either have been detained or consented to treatment and would not have committed manslaughter. The defendant applied for the claim to be dismissed, inter alia, because the claim was based substantially if not entirely upon the claimant's own illegal act which amounted to the crime of manslaughter.

70. Beldam LJ, delivering the judgment of the Court of Appeal (Beldam and Potter LJJ and Bracewell J) dismissing the claim, considered that whether a claim brought was founded in contract or in tort, public policy only required the court to deny its assistance to a plaintiff seeking to enforce a cause of action if he was implicated in the illegality and in putting forward his case he sought to rely upon the illegal acts. Beldam LJ distinguished between diminished responsibility and insanity in this context (at p 989E-G):

> "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."

He expressed the Court of Appeal's conclusion as follows (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 and we would therefore allow the appeal on this ground."

Gray v Thames Trains Ltd

71. In *Gray* the claimant had suffered significant psychiatric injury (post-traumatic stress disorder ("PTSD")) in the Ladbroke Grove rail crash which was caused by the negligence of the defendants. Under the effects of PTSD the claimant repeatedly stabbed and killed a drunken pedestrian who had stepped in front of his car. The prosecution accepted a plea of guilty to manslaughter on grounds of diminished responsibility. He was ordered to be detained in hospital pursuant to sections 37 and 41 of the Mental Health Act. The claimant brought proceedings against the defendants claiming damages for loss of earnings after his detention, for loss of liberty and damage to reputation, for feelings of guilt and remorse consequent on the killing and an indemnity against any claims which might be brought against him by dependants of the man he had killed. The defendants admitted negligence but claimed that public policy precluded the recovery of losses incurred after the date of the manslaughter.

72. In the House of Lords, on the premise that the claimant's act of manslaughter was the cause of the hospital order and his detention under it, Lord Phillips of Worth Matravers, Lord Hoffmann, Lord Rodger of Earlsferry and Lord Brown of Eaton-under-Heywood delivered speeches agreeing that public policy prevented the claimant from

recovering damages for his detention and its consequences. Lord Scott of Foscote agreed with Lord Hoffmann and Lord Rodger. In particular, Lord Hoffmann identified (at paras 29 and 32) a wider and a narrower rule of public policy, both of which were applicable:

> "The particular rule for which the appellants contend may … 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."

73. Lord Hoffmann explained that there was a justification for the narrower version which did not necessarily apply to the wider version. As Denning J had observed in *Askey v Golden Wine Co Ltd* [1948] 2 All ER 35 at p 38C-D, punishment inflicted by a criminal court is personal to the offender and the civil courts will not entertain an action by the offender to recover an indemnity against the consequences of that punishment (para 33). Lord Hoffmann explained that there is an inconsistency between the criminal law, which authorises 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 (para 37). He considered (paras 39-40) that the narrower rule has the support of high authority in the Commonwealth (*British Columbia v Zastowny* [2008] 1 SCR 27; *State Rail Authority of New South Wales v Wiegold* (1991) 25 NSWLR 500). Lord Hoffmann rejected a submission that the narrower version should not apply where a hospital order was imposed for the patient's own good (para 41). In his view it must be assumed that the sentence imposed on Mr Gray was what the criminal court regarded as appropriate to reflect the personal responsibility of the accused for the crime he had committed (cf Lord Phillips at para 8, Lord Rodger at para 83 and Lord Brown at para 103 considered further below). Lord Hoffmann observed (para 42) that there are dicta, for example in *Clunis* at p 989, which suggest that the rule does not apply when the plaintiff, by reason of insanity, is not responsible for his actions. However, the majority in *Hunter Area Health Service v Presland* [2005] NSWCA 33; (2005) 63 NSWLR 22 regarded compensation even in such a case as contrary to public policy. For the purposes of *Gray* it was sufficient that the case against compensating Mr Gray for his loss of liberty was based upon the inconsistency of requiring someone to be compensated for a sentence imposed because of his own personal responsibility for a criminal act (para 44). That was sufficient to dispose of Mr Gray's claims for loss of earnings after his arrest and for general damages for his detention, conviction and damage to reputation. They were all claims for damage caused by the lawful sentence imposed upon him for manslaughter and therefore fell within the narrower version of the rule (para 50).

74. Lord Hoffmann considered, however, that there were additional claims which were more difficult to bring within the narrower version of the 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 which was a consequence of the sentence of the criminal court (para 50). He stated (at para 51):

> "[The wider version] differs from the narrower version in at least two respects: first, it cannot … 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. …"

He concluded (at para 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."

75. Lord Rodger, agreeing with Lord Hoffmann, examined the two bases on which Mr Gray advanced his claim. First, he alleged that the defendants' negligence caused him to develop psychological problems which caused him to commit manslaughter and to be detained, losing earnings as a result. That claim fell foul of the ex turpi causa maxim since the claimant was asking the defendants to compensate him for the consequences of his own deliberate criminal act (para 64). Citing *Wiegold* and *Zastowny* he concluded (at para 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."

Secondly, Mr Gray maintained that, even if he had not committed manslaughter, he would have continued to suffer some loss of earnings after that date. However, the killing might still provide a defence to the claim for loss of earnings, even if it did not make the claim unlawful (para 73). The defendants relied on the manslaughter and its consequences. They maintained that they were not liable for loss of earnings because the claimant, by his unlawful act, put himself in a position where he was prevented from earning (para 73). There was, however, a fundamental objection to this version of the claim. There was a need for consistency between the criminal and civil courts. The orders made by the criminal court were necessary for the protection of the public. It would be inconsistent with the policy underlying the making of the orders for a civil court to award the claimant damages for loss of earnings relating to the period when he was subject to them (paras 76-79). The other claims, in particular the claim for an indemnity, could not be regarded as a consequence of the sentence of the criminal court. Nevertheless, they also had to be rejected (para 84). The claimant was not entitled to be indemnified for the consequences of his criminal acts or to recover for his feelings of guilt and remorse arising from them. Alternatively, these claims could be dismissed on grounds of causation (paras 86-87).

76. Lord Brown substantially agreed with the other judgments (para 103). There was an obvious and fundamental problem in Mr Gray claiming his full loss of future earnings after the killing. To establish this he needed to rely not only on the defendants' negligence resulting in his psychological injury and consequential reduced earning capacity but also on the fact of his killing the victim and his resultant detention transforming his partial earning loss into a total one. He clearly could not obtain compensation for the consequences of his own deliberate act in killing, an act for which the law holds him criminally responsible, notwithstanding that his responsibility was diminished because of the injuries resulting from the defendants' negligence (para 93). Turning to the possibility of a continuing claim for partial loss of earnings, Lord Brown questioned whether the need to take account of subsequent events (the vicissitudes principle) was sufficient to dispose of a claim for partial loss of future earnings (paras 95-96). However, he considered that the consistency principle operated to defeat both a total loss claim and a partial loss claim (para 101). While recognising that in the result the tortfeasor benefits from criminality which in one sense he himself had contributed to bringing about, the opposite conclusion would result in the claimant being able to ignore a vicissitude for which he had been held responsible, if only to a diminished extent (para 102).

77. It is necessary to refer further to two reservations entered by Lord Phillips (at paras 14 and 15) to the application of the ex turpi causa doctrine.

> "14. The comments of both Mustill LJ [in *Birch*, at p 215] and Lord Bingham [in *R v Drew* [2003] 1 WLR 1213, para 13] recognised that a mentally disordered offender whose mental condition did not satisfy the test of insanity or render him unfit to plead might none the less 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 LR 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."

78. As Lord Hamblen explained in *Henderson* (at para 54), the first reservation relates to a case where the offending behaviour plays no part in the decision to impose the hospital order and the second reservation relates to a case where the sentencing judge makes it clear that he does not consider that the defendant should bear significant personal responsibility for his crime.

79. In *Gray*, at para 83, Lord Rodger stated, with regard to Lord Phillips's first reservation:

> "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 defendant's 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."

As Lord Hamblen pointed out in *Henderson* (at paras 56 and 80) Lord Rodger's reservation did not relate to a case where there was no significant personal responsibility, but rather to a more specific example of Lord Phillips's first reservation. There was therefore no agreement between them on Lord Phillips's second reservation.

80. At para 103 Lord Brown stated that he substantially agreed with the reservations expressed by Lord Phillips.

Henderson v Dorset Healthcare University NHS Foundation Trust

81. In *Henderson* the claimant, who had a history of schizophrenia with paranoia, killed her mother during a psychotic episode while she was under the care of a community mental health team managed and operated by the defendant NHS trust. She pleaded guilty to manslaughter on the ground of diminished responsibility and the Crown Court imposed a hospital order and a restriction order under sections 37 and 41 of the Mental Health Act. In sentencing her, Foskett J observed:

> "The very detailed and comprehensive reports I have seen …, demonstrate clearly that your ability to act rationally and with self-control at the time of the incident was substantially and profoundly impaired, because of the psychotic episode … and to the extent that you had little, if any, true control over what you did … I should say that there is no suggestion in your case that you should be seen as bearing a significant degree of responsibility for what you did. …"

82. The claimant brought an action in negligence against the trust, maintaining that, but for the trust's breach of duty in failing to return her to hospital when her condition deteriorated, she would not have killed her mother. She claimed damages for loss of liberty and loss of amenity consequent on her detention, and damages for having developed a depressive illness and lost her share in her mother's estate pursuant to section 1 of the Forfeiture Act 1982. The trust admitted breach of duty but contended that since the damages claimed were the consequence of the sentence imposed by the criminal court or the claimant's criminal conduct, they were irrecoverable on grounds of illegality or public policy. On the trial of a preliminary issue Jay J dismissed the claims on the ground that the facts were materially identical to those in *Gray*. The Court of Appeal dismissed

the appeal. On appeal to the Supreme Court, it was submitted that *Gray* was distinguishable as having only concerned claimants with significant personal responsibility for their crimes. Alternatively, it was submitted that *Gray* should be overruled as incompatible with *Patel*. A panel of seven justices dismissed the appeal.

83. The single judgment in *Henderson* was delivered by Lord Hamblen. He explained (at paras 76-77) that although *Patel* concerned a claim in unjust enrichment it was intended to provide guidance as to the proper approach to the common law illegality defence across civil law more generally. However, that did not mean that *Patel* represented "year zero" or that in all future illegality cases it was *Patel* alone that was to be considered and applied. That would be to disregard the value of decided cases addressing particular factual situations unless they were inconsistent with the approach or reasoning of *Patel*.

84. On behalf of Ms Henderson it had been argued below that Lord Phillips's second reservation in *Gray* had the support of Lord Rodger and Lord Brown and therefore reflected a majority view. As we have seen, however, there was no agreement in *Gray* on the second reservation, the point had not been argued and the observations were in any event obiter. Nevertheless, it was submitted in *Henderson* on behalf of Ms Henderson that, whereas in *Gray* the claimant bore significant personal responsibility, in *Henderson* Foskett J when sentencing in the Crown Court had found that Ms Henderson did not. Lord Hamblen rejected the submission (at paras 83-86). The degree of responsibility involved had formed no part of the reasoning of the majority in *Gray*. The crucial consideration for the majority was the fact that the claimant had been found to be criminally responsible, not the degree of personal responsibility which that reflected. As a result, *Gray* could not be distinguished. It involved the same offence, the same sentence and the reasoning of the majority applied regardless of the degree of personal responsibility for the offending.

85. In *Henderson* the Supreme Court declined an invitation to depart from the decision of the House of Lords in *Gray* pursuant to the 1966 Practice Statement: *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234 (and to overrule *Clunis*).

86. First, the Supreme Court considered that the essential reasoning in *Gray* was consistent with the approach to illegality adopted in *Patel*. *Gray* did not involve the now discredited reliance-based approach, nor did it follow or apply *Tinsley v Milligan*. *Gray* was correctly seen in *Patel*, where it was cited with apparent approval, as an example of a decision on illegality based on policy considerations rather than reliance. The fundamental policy consideration relied upon in *Gray* was the need for consistency so as to maintain the integrity of the legal system, the very matter that was held in *Patel* to be the underlying policy question (paras 90-96).

87. Secondly, the Supreme Court rejected a submission that there is no inconsistency or incoherence between the civil and the criminal law in denying a defence of illegality in a case in which the claimant has no significant personal responsibility for a criminal act. In support of the submission, it was said that the existing state of the law of criminal responsibility was unsatisfactory and it would, therefore, introduce no incoherence into the law to adopt a different approach to the law of responsibility in tort (para 100). Furthermore, it was said that the absence of inconsistency was borne out in *Henderson* by the fact that the sentence imposed under sections 37 and 41 of the Mental Health Act involved no penal element. The degree of personal responsibility could be decided by the judge hearing the civil claim. These submissions were rejected by the Supreme Court (at paras 104-112). The key consideration so far as the majority in *Gray* were concerned was that the claimant had been found to be criminally responsible for his acts. That he had been convicted of manslaughter on the grounds of diminished responsibility meant that responsibility for his criminal acts was diminished but it was not removed. It was not an insanity case and so Mr Gray must be taken to have known what he was doing and that it was wrong (para 105). Lord Hamblen continued (at para 106):

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

Furthermore, if the degree of personal responsibility was a matter for determination by the trial judge in the civil claim, there was a risk of inconsistent decisions in criminal and civil courts (para 108). Moreover, the fact that there may not be a penal element to the sentence imposed by the criminal court did not alter matters. A conviction for manslaughter by diminished responsibility still involved blame (para 109). Finally, the submission that the lack of significant personal responsibility meant that there was insufficient turpitude to give rise to an illegality defence ignored the seriousness of a criminal conviction for manslaughter. It is necessary to set out para 112 of the judgment and to return to it later:

> "Finally, the appellant advances a related argument that the lack of significant personal responsibility means that there is insufficient turpitude to give rise to an illegality defence. This again ignores the seriousness of a criminal conviction for

> manslaughter. It is an indictable-only offence punishable by a sentence of life imprisonment. It is a 'serious offence' for the purposes of the provisions regarding dangerous offenders in the Criminal Justice Act 2003. The plea of guilty to manslaughter by reason of diminished responsibility means acceptance by the appellant that she possessed the mental prerequisites of criminal responsibility for murder, namely an intention to kill or to cause grievous bodily harm. In the present case, the expert psychiatrists also agreed that the appellant knew that what she was doing was morally and legally wrong when she inflicted the stab wounds on her mother. In *Les Laboratoires Servier v Apotex Inc* [2015] AC 430 Lord Sumption JSC stated at para 23 that: 'The paradigm case of an illegal act engaging the defence is a criminal offence.' As Lord Sumption JSC explained at para 29, there may be some exceptional cases where a criminal act will not constitute turpitude. The reservation made in *Gray* in relation to trivial offences may be an example of such a case, as may be strict liability offences where the claimant is not privy to the facts making his act unlawful. The serious criminal offence of manslaughter by reason of diminished responsibility does not come close to falling within such an exception and clearly engages the defence."

88. Lord Hamblen then turned (at para 113) to the trio of considerations approach set out in *Patel*. At Stage (a) (the underlying purpose of the prohibition which has been transgressed and whether that purpose would be enhanced by denial of the claim) he identified the following factors. The need to avoid inconsistency to maintain the integrity of the legal system was a central and very weighty public policy consideration. The public confidence principle – the need to avoid an outcome of which public opinion would be likely to disapprove and which would thereby undermine public confidence in the law - was also engaged. Both applied to both the narrower and the wider rules identified by Lord Hoffmann in *Gray*. In that case the gravity of the wrongdoing heightened the significance of the public confidence considerations as did the proper allocation of resources. There was a very close connection between the claim and the illegality. The claimant's crime was the immediate and, on any view, an effective cause of all heads of loss claimed. An important purpose of the prohibition transgressed was to deter unlawful killing thereby providing protection to the public. There was also a public interest in the public condemnation of unlawful killing and the punishment of those who offend in this way. While a person suffering from diminished responsibility might not be deterred by the inability to bring a civil claim, there might well be some deterrent effect in a clear rule that unlawful killing never pays (paras 125-131).

89. At Stage (b) (any other relevant public policy on which the denial of the claim may have an impact) Lord Hamblen addressed the following factors relied on by the claimant.

It was unlikely that limiting the extent of the liability to the victim in cases like this would affect the exercise of due care by potential defendants. He stated that it was not clear that there was a general policy of providing compensation to victims of torts where they were not significantly responsible for their conduct. Reliance on a policy of ensuring that public bodies pay compensation to those they have injured assumed it was their negligence which injured the claimant rather than her own criminal act. The claimant also relied on the policy of ensuring that defendants in criminal trials receive sentences proportionate to their offending. Lord Hamblen recognised that there was force in at least some of these policy considerations but considered that they did not begin to outweigh those which supported denial of the claim (paras 132-137).

90. At Stage (c) (whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is for the criminal courts) Lord Hamblen drew attention to the following factors. This was a very serious offence involving culpable homicide committed with murderous intent. The offending was central to all heads of loss claimed and, as in *Gray*, was the effective cause of such loss. While there may have been no significant personal responsibility, there was nevertheless murderous intent. So far as disparity in the parties' respective wrongdoing was concerned, the claimant may not bear a significant degree of responsibility for what she did, but she knew what she was doing and that it was morally and legally wrong. The defendant had admitted negligence in the claimant's treatment but had not been entirely inactive in response to the claimant's relapse. In all the circumstances, denial of the claim would not be disproportionate (paras 138-143).

91. The application of the trio of considerations in *Patel*, did not therefore lead to a different outcome from that in *Gray* (para 144). The decision in *Gray* should not be departed from but affirmed as being "*Patel*-compliant". All heads of loss claimed were irrecoverable. Damages for loss of liberty and loss of amenity during detention were barred by the narrower rule and the other heads of loss were barred by the wider rule. The Forfeiture Act 1982 claim was distinct and it would be inappropriate to subvert the statutory scheme by permitting recovery from the defendant of what had been denied under that Act (paras 148-149).

Traylor v Kent and Medway NHS Social Care Partnership Trust

92. Finally in this regard, we should mention *Traylor v Kent and Medway NHS Social Care Partnership Trust* [2022] 4 WLR 35 ("*Traylor*"). There the first claimant failed to take medication prescribed for his mental illness and suffered a psychotic episode during which he stabbed and injured his daughter. He was himself shot by armed police officers. He was prosecuted for attempted murder but found not guilty by reason of insanity. He brought a claim against the defendant NHS trust alleging that the stabbing incident and his injuries were the result of the trust's negligent treatment of his illness. The claim failed because the claimant failed to establish breach of duty or causation. The observations of

the judge, Johnson J, on the illegality defence were therefore obiter. He considered that the application of the illegality defence in a case where the *M'Naghten* rules were satisfied would be contrary to authority. It would be contrary to dicta in *Clunis* and contrary to the reasoning in *Henderson* (paras 112-114). In his view, the maintenance of consistency between the civil and criminal law militated in favour of the opposite outcome in *Traylor* because the fact that the claimant satisfied the test in the *M'Naghten* rules meant that he did not know what he was doing or, if he did, he did not know that it was wrong (para 114). On this basis, he was "not inclined to find that the illegality defence is available on the facts of this case" (para 119).

8. Overseas authority on the defence of illegality in the context of insanity

93. It is helpful to look also to the approach of other common law jurisdictions to analogous questions.

94. In *Hunter Area Health Service v Presland* (2005) 63 NSWLR 22 ("*Presland*") the Court of Appeal of New South Wales addressed a claim for damages for professional negligence after a psychiatrist had discharged a psychiatric patient from hospital and the patient killed his brother's fiancée six hours later. The patient was acquitted of murder on the ground of mental illness and was detained in strict custody in a psychiatric hospital as a forensic patient until he was released subject to conditions. The court analysed the effect of the unlawfulness of Mr Presland's act and his consequent lawful detention in the context of an assessment of the scope of the defendant's duty of care. By a majority the court dismissed Mr Presland's claim. Sheller JA stated (para 292):

> "In general terms, two considerations may stand in the way of the plaintiff's success in the present case. *[i]* Although he was acquitted on grounds of mental illness, his act was and remained an unlawful act. His was not justifiable homicide but an unlawful homicide for which he was not criminally responsible. … Adams J recognised that the plaintiff's acts were deliberate acts of killing. His acquittal on the grounds of mental illness proceeded … on the supposition that the plaintiff knew he was killing, knew how he was killing and knew why he was killing, but that he was quite incapable of appreciating the wrongness of the act. *[ii]* Although the plaintiff was acquitted and hence held not criminally responsible for the murder, what followed for which he now seeks compensation was the statutory response to the reason for his acquittal; section 9 of the Mental Health (Criminal Procedure) Act. He was accordingly detained in strict custody in a psychiatric hospital. He claims damages for the consequence of that detention." (Enumeration added)

95. Santow JA agreed with Sheller JA. He referred to Professor HLA Hart's observation in *Punishment and the elimination of responsibility* (1962), p 20 that insanity is not a justification for an unlawful act of homicide but rather an excuse (para 312). He did not rely on the ex turpi causa maxim but on what he thought that legal policy, "ultimately based on community values, would consider just in such a case" (para 315).

96. Spigelman CJ dissented and would have allowed Mr Presland's claim because of the absence of any moral culpability on his part (para 78) but he would have radically reduced the award of general damages to exclude compensation for loss arising out of his detention (paras 98-102).

97. In New Zealand the High Court struck out a medical negligence claim for want of a duty of care in essentially the same circumstances as in *Presland*: *Ellis v Counties Manukau District Health Board* [2006] NZHC 826; [2007] 1 NZLR 196 ("*Ellis*"). Mr Ellis was discharged from hospital while mentally disordered and two weeks later murdered his father. He was found not guilty of murder by reason of insanity. Potter J in striking out the claim did not rely on the ex turpi causa maxim (ie the illegality defence) citing Spigelman CJ in *Presland* (para 172). He held that it was not just and equitable to impose a common law duty on the clinicians to detain Mr Ellis against his wishes.

98. In Canada the Court of Appeal for Ontario upheld the illegality defence to reject claims by five former patients for breach of fiduciary duty in relation to ill-treatment in a maximum-security division of a mental health facility after they had been acquitted of murder by reason of insanity in so far as the damages sought were for loss of income while so detained: *Barker v Barker* 2022 ONCA 567 ("*Barker*"). Those patients argued unsuccessfully that the illegality doctrine did not apply in the absence of guilt or moral responsibility for wrongful conduct (para 299). The Court of Appeal for Ontario dismissed the appeals on this issue. The court at para 301 referred to the decision in *British Columbia v Zastowny* [2008] 1 SCR 27, which at para 20 drew on McLachlin J's insight in *Hall v Hebert* that the justification for the illegality defence was the preservation of the integrity of the legal system. The court went on to hold (paras 304-305) that the illegality defence applied to wrongful conduct as well as criminal conduct and its application to exclude the claims for loss of income was justified to preserve the integrity of the legal system.

99. We were referred to three cases from the United States of America. In one the Court of Appeals of Michigan applied the illegality defence to a plaintiff who had been found not guilty on a charge of murder by reason of insanity on the basis that the plaintiff cannot benefit from a cause of action founded upon an illegal or immoral act: *Lingle v Berrien County* 522 NW 2d 641 (Mich App 1994). In two others a court declined to uphold an illegality defence. In *Boruschewitz v Kirts* 554 NE 2d 1112 (Ill App 1990) the Appellate Court of Illinois rejected the defence where a woman was found guilty of murder but mentally ill on the ground that society cannot hold people who are insane to

the same moral standards as people who are sane (p 1114). In *Bruscato v O'Brien* 705 SE 2d 275 (Ga App 2010) the Court of Appeals of Georgia overturned a summary judgment against the plaintiff in a medical negligence action who had killed his mother after a psychiatrist discontinued his medication which controlled his tendency towards violence. Mr Bruscato had been found unfit to stand trial. The court overturned the order striking out his claim for several reasons, including (i) that he had claims which were not attributable to his killing his mother, (ii) that he was not a wrongdoer because he had not yet been found guilty and was presumed innocent, and (iii) the statutes on which the defendants relied as embodying Georgia's public policy spoke of felonious and intentional killing. (Decision upheld by the Supreme Court of Georgia 715 SE 2d 120 (2011).)

9. The judgments in this case

Judgment of Garnham J

100. Garnham J in a judgment dated 20 May 2022 rejected the first, third and fourth defendants' application to strike out the claims against them. In his reasoning from para 70 onwards he discussed most of the leading cases which we have addressed - the Australian case of *Presland*, and the English cases of *Holman v Johnson*, *Gray*, *Apotex*, *Patel*, *Henderson*, and *Grondona* - as well as *Traylor* which we discussed in para 92 above.

101. At para 127 of his judgment Garnham J set out ten points of principle relevant to the case which he derived from that review. They were:

> "(i) There are two policy reasons for the common law doctrine of illegality as a defence to a civil claim: a person should not be allowed to profit from his own wrongdoing, and the law should be coherent, not self-defeating, and should not condone illegality;
>
> (ii) It is not sufficient to exclude liability that the immediate cause of the damage was the deliberate act of the claimant himself;
>
> (iii) The starting point is to determine what acts constituted 'turpitude' for the purpose of the defence;

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

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

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

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

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

(ix) Whether allowing a claim would be harmful to the integrity of the legal system depended on whether the purpose of the prohibition that had been transgressed would be enhanced by denying the claim; whether denying the claim might have an impact on another relevant public policy; and whether denying the claim would be a proportionate response to the illegality;

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

102. Garnham J then applied the principles he had identified to the facts of the case. The verdict of not guilty by reason of insanity meant that a defendant bears no criminal responsibility for the killing. He referred to *Traylor* and the cases which Johnson J referred to in his judgment to support the conclusion that the illegality defence applies

only where the claimant knew that he was acting unlawfully. The claim had to be based on a criminal act or one very similar in nature – conduct which raises similar public interest objections to those prompted by criminality. There was no question of the claimant profiting from his wrong as wrongdoing implies knowledge of wrongfulness which was negatived by the jury's verdict. The argument that public notions of the fair distribution of resources would be offended if the claimant were compensated out of public funds, of which Lord Hoffmann had spoken in *Gray*, would arise only if the claimant were being compensated for the consequences of his own criminal conduct, which he was not. The strike out application therefore failed.

Judgment of the Court of Appeal

103. In a judgment dated 20 February 2024 the Court of Appeal (Dame Victoria Sharp P, Underhill and Andrews LJJ) by majority (Andrews LJ dissenting) dismissed the defendants' appeal. Underhill LJ gave the principal judgment, with which Dame Victoria Sharp P agreed in a short concurring judgment.

104. In his careful judgment addressing a question which he recognised was not an easy one, Underhill LJ first examined the criminal liability and civil liability of the mentally ill, before reviewing the authorities on the illegality defence, starting with *Patel* which, he stated, had authoritatively restated the correct approach to the defence. He observed (para 31) that the Supreme Court in *Henderson* had emphasised that earlier decisions addressing particular types of situations where the illegality defence was invoked remained of precedential value unless they were shown to be incompatible with the approach set out in *Patel*. From this he saw "the appropriate lens through which to examine the issue" on the appeal was not primarily the general principles enunciated in *Patel* "but rather the comparatively limited number of cases … specifically concerned with the case where the relevant illegal act has been done by a claimant who was mentally ill." He addressed those cases, which we have discussed above, between paras 40 and 82 of his judgment. Among the foreign judgments which he considered were the US cases of *Boruschewitz*, *Lingle* and *Bruscato*, the Australian case of *Presland* and the New Zealand case of *Ellis.* He examined the English cases of *Clunis*, *Gray* and *Henderson* in some detail before in paras 83 and 84 addressing Johnson J's obiter comments on the illegality defence in *Traylor*.

105. In his overview which followed the consideration of those cases, Underhill LJ stated (correctly in our view) that there is no binding authority on the question whether the illegality defence applies where the relevant unlawful act was done while the claimant was insane. He suggested that the reasoning in *Clunis* and in *Henderson*, in so far as it adopts the reasoning in *Clunis*, might be thought to be that the illegality defence did not apply in an insanity case, but he observed that Lord Hoffmann in *Gray* did not regard *Clunis* as necessarily meaning that the defence would not apply in such a case. He recognised that the cases which he cited from other jurisdictions went both ways and

treated them as having limited persuasive authority. He nonetheless believed that the general tendency of the authorities "can fairly be said to be against the illegality defence applying in an insanity case" and noted a consistent focus in the case law that it was wrong that a claim be barred because it depends upon an unlawful act by a claimant who did not know that he or she was acting unlawfully (para 87).

106. Applying his analysis to the facts of the case Underhill LJ rejected first the defendants' assertion that recovery of damages would involve inconsistency with the criminal law; although the claimant committed the actus reus of murder with the necessary mens rea, it was the existence of criminal responsibility, and not the criminal act, which alone could create such inconsistency. As the claimant's lawful detention did not have a punitive element, its lawfulness was irrelevant to the question of inconsistency with the criminal law. There was no inconsistency with the civil law. The fact that the claimant, if sued, would be liable in tort to the victims' estates or dependants was not inconsistent with his right to recover damages from the defendants for the loss they have caused him. This gave rise to no incoherence in the law.

107. He then addressed what Lord Hamblen in *Henderson* called the public confidence principle, which he saw as lying at the heart of the appeal. He recognised that the first reaction of the public might be to recoil from the proposition that someone who had killed three innocent strangers should receive compensation for the loss of liberty which was the consequence of those killings. But, aligning himself with Spigelman CJ in *Presland*, he took the view that humane and fair-minded people would see the claimant also as a victim, as it appears the jury did, and take account of his lack of moral culpability.

108. He did not consider that other public policy considerations which were in play, such as the impact on NHS funding of allowing such a claim or the deterrence of unlawful killing, outweighed the public interest in claimants in insanity cases receiving due compensation for the wrong they have suffered. The effect on overall NHS funding would be tiny as such cases were very rare, and it was unlikely that the denial of compensation would have any deterrent effect. Finally, while the distinction between a finding of diminished responsibility and a finding of insanity might be one of degree only, it was nevertheless a real distinction, and it was not irrational that the illegality defence be applied depending upon that distinction.

109. Dame Victoria Sharp concurred and sought to add only a few words. She explained that there was a clear and principled distinction in criminal law between homicide cases where responsibility is diminished and those where it is extinguished. The special verdict of not guilty by reason of insanity resulted in the court making a hospital order and a restriction order. The claimant was not convicted of any crime and was not sentenced. She referred to *Clunis* and *Henderson* and saw those cases as drawing a "coherent and bright line distinction for the purposes of the ex turpi causa doctrine, between those who are criminally responsible for their acts, whether fully or partially, and those who are not

responsible for their acts because they do not know what they are doing is morally and legally wrong." She concluded (para 161):

> "In my judgment, this common thread running through the criminal and civil law is consistent with principle, a proper understanding of the true implications of acute mental illness and is one which would not offend the sensibilities of ordinary right-thinking members of the public or undermine public confidence in the law."

110. Andrews LJ dissented. While she accepted that the general tenor of the relevant authorities which Underhill LJ cited appeared to be against allowing the illegality defence where the claimant met the *M'Naghten* test for insanity in criminal law, the matter had not been fully argued except in *Presland*. She did not accept that a lack of knowledge or understanding by a person, who intentionally kills another human being, that what he is doing is wrong is a sound and principled basis for allowing that person to make a claim for damages in negligence against someone for putting him in the position which enabled him to commit a deliberate and tortious act (para 122).

111. The starting point of her analysis was that the killings of the three men were unlawful acts and the claimant's insanity, while an excuse, was not a justification for those acts. The claimant would be liable in tort for battery as the assaults were deliberate acts. The absence of moral blame was irrelevant to such torts. She perceived a lack of coherence between, on the one hand, making the claimant liable in tort to compensate his victims' estates and, on the other, permitting him to avoid the consequences of that liability by passing responsibility for his actions to the defendants on the basis that, but for their negligence, he would not have committed those intentional and tortious acts. She considered that the illegality defence applied where the tortious act was a deliberate act regardless of the absence of moral blame. She did not interpret Lord Hamblen's judgment in *Henderson* as treating a claimant's lack of knowledge of the wrongfulness of her act as central to his reasoning; rather he focused on the nature of the act and the closeness of the connection between the unlawful act and the claim which produced inconsistency in the law. In her view, the policy considerations which Lord Hamblen identified in *Henderson* as supporting the denial of her claim were present in this case also: (i) the unlawful acts were of the same nature and gravity, (ii) compensating the claimant would divert funds from the NHS budget, (iii) the unlawful acts were the immediate and effective cause of the main heads of loss claimed, and (iv) denying the claim might have some deterrent effect and uphold the fundamental importance of the right to life. It was not disproportionate to preclude someone who intentionally kills another from bringing a claim in negligence relying on that deliberate and unlawful act.

10. Discussion of the issues

(i) The Threshold Question

112. We begin our discussion of the difficult issues on this appeal by addressing the threshold question: in what circumstances is the illegality defence engaged?

113. There is a need for such a threshold because it would clearly be unjust if every act by a claimant which involved some unlawfulness, however trivial, were to be a bar to his or her pursuit of an otherwise valid legal claim. The question is whether conduct is unlawful in the sense required for the application of the principle.

114. The starting point in identifying the threshold is to remember the dicta of Lord Mansfield in *Holman v Johnson* (para 27 above). He spoke not only of criminal acts but of "immoral or illegal" acts ("No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act.") and the transgression of the positive law of the country. Thus the actions of the claimant do not have to carry criminal responsibility to cross the threshold for the defence of illegality.

115. In *Apotex*, which it will be recalled involved an attempt by Les Laboratoires Servier to rely on the infringement of a Canadian patent as a defence to a claim to enforce a cross-undertaking in damages after its attempt to assert infringement of a UK patent had failed, Apotex argued that the illegality defence did not apply because its actions had not involved turpitude. Lord Sumption's analysis, upholding the essence of Apotex's submission, was that the defence of illegality covered criminal acts and extended to "quasi-criminal acts". This was "because they engage the public interest in the same way" as criminal acts (para 25). He saw "quasi-criminal acts" as involving behaviour which was dishonest or corrupt, but not as covering acts which were "merely tortious or in breach of contract" (paras 25 and 28). He concluded that the public interest was not engaged by a breach of a patentee's rights. Such purely civil wrongs were concerned with the private interests of the parties to a litigation and not with the public interest. The public interest, he held, was "sufficiently served by the availability of a system of corrective justice to regulate their consequences as between the parties affected" (para 28). Lord Mance agreed (para 34).

116. Lord Sumption's requirement that the threshold for invoking the illegality defence required a criminal or quasi-criminal act is consistent with his upholding of the reliance test as the substantive test for the illegality defence, which the House of Lords adopted in *Tinsley v Milligan* (para 29 above) and for which he argued in *Patel*.

117. Lord Toulson's approach to the threshold in *Apotex* (paras 57-62) reflects a different view as to the substantive test for the illegality defence, which was articulated by Lord Wilson in *Hounga* and later by Lord Toulson and Lord Hodge in *Bilta* and was adopted by the majority of the court in *Patel.* He stated (para 57) that the maxim, ex dolo malo non oritur actio (no legal action can arise from a deceitful/wrongful act) did "not provide a simple measuring rod for determining the boundaries of the principle." He continued:

> "In deciding whether the principle should be applied in circumstances not directly covered by well-established authorities, it is right to proceed carefully on a case by case basis, considering the policies which underlie the broad principle."

As we have said, Lord Toulson's analysis of the substantive test prevailed in *Patel*, which has established the structured template of the trio of considerations. That has an important bearing on the threshold question. The nature of the policy considerations which have to be weighed when deciding whether the illegality defence should be upheld is relevant to the question where the threshold for engagement of the defence should be set when the court is faced with novel circumstances.

118. McLachlin J's judgment in *Hall v Hebert* with its emphasis on consistency as the rationale of the illegality defence has been cited with approval frequently in English jurisprudence, including by Lord Sumption, Lord Wilson and Lord Toulson in the cases to which we have referred. Early in her judgment she stated that the basis of the court's power to deny a remedy on the ground of illegality lies in its duty to preserve the integrity of the legal system: "the law refuses to give by its right hand what it takes away by its left" (p 169). She stated (p 176):

> "to allow recovery in these cases would be to allow recovery for what is illegal. It would put the courts in the position of saying that the same conduct is both legal, in the sense of being capable of rectification by the court, and illegal. It would, in short, introduce an inconsistency in the law. It is particularly important in this context that we bear in mind that the law must aspire to be a unified institution, the parts of which, - contract, tort, the criminal law – must be in essential harmony. For the courts to punish conduct with the one hand while rewarding it with the other, would be to 'create an intolerable fissure in the law's conceptually seamless web' … We thus see that the concern, put at its most fundamental, is with the integrity of the legal system."

119. In the debate within the Supreme Court in recent years there has been no dispute that what Lord Mansfield meant by his reference to illegal or immoral acts was acts which engage the interests of the State or the public interest, that the defence of illegality raises questions of public policy, and that the underlying rationale of the defence is the maintenance of the coherence of the legal system.

120. On this appeal we are confronted by a novel situation on which there is no direct authority in this jurisdiction. It is therefore necessary to proceed cautiously on a step-by-step basis, seeking to apply principles established in earlier cases and, where appropriate, developing them incrementally. See Lord Toulson in *Apotex*, para 57.

121. Approaching the threshold issue in this way there is no difficulty in saying that the conduct of the claimant was unlawful so as to engage the illegality defence.

122. The previous analogous cases in the United Kingdom – *Gray*, *Clunis* and *Henderson* – have involved criminal offences. By contrast the present case does not involve criminal offences in that the claimant was found not guilty by reason of insanity. That should not be a decisive consideration however.

123. There is no justification for allowing the distinction between diminished responsibility and insanity in criminal law to fetter the analysis of the availability of a defence in civil law. In its discussion paper, Criminal Liability: Insanity and Automatism (July 2013), the Law Commission referred to criticisms of the insanity defence in criminal law as being out of date and failing to reflect advances made in medicine, psychology and psychiatry. It recorded that the Royal College of Psychiatrists had observed that the criminal law required definitive statements, to which psychiatric assessment does not always lend itself (para 1.58). It advocated a comprehensive review of the mentally disordered offender and the criminal law, including the formulation of a new test for exemption from criminal responsibility on the ground of mental disorder. (The Law Commission has not reported but is considering the defence of insanity in its current 14th programme of law reform.)

124. Concerns about the application of the *M'Naghten* rules in relation to civil claims are not new. In *Corr v IBC Vehicles Ltd* [2008] UKHL 13; [2008] AC 884 Lord Bingham stated (para 16):

> "… whatever the merits or demerits of the *M'Naghten* rules in the field of crime, and they are much debated, there is perceived in that field to be a need for a clear dividing line between conduct for which a defendant may be held criminally responsible and conduct for which he may not. In the civil field of tort there is no need for so blunt an instrument. 'Insane' is

> not a term of medical art even though, in criminal cases, psychiatrists are obliged to use it."

125. In the current case, Dame Victoria Sharp P at para 161 of her judgment stated that there was "a coherent and bright line distinction" for the purposes of the illegality defence between those who are criminally responsible for their acts and those who are not because they do not know what they are doing is morally or legally wrong. Underhill LJ at para 117 expressed a similar conclusion: "There is nothing irrational about the application of the illegality defence depending on the selfsame distinction" between diminished responsibility and insanity. While the application of that distinction to the illegality defence may not be irrational, we respectfully disagree that it is appropriate. The conclusion of the majority of the Court of Appeal places too much weight on the absence of moral culpability, which was a factor but not a determinant in the analysis in *Gray* and *Henderson*, and fails to recognise that in a novel circumstance, such as this, the court should primarily address the question of the coherence of the law, the consideration which McLachlin J identified in *Hall v Hebert* and which has been accepted as the rationale of the illegality defence in English law.

126. The subject matter of the present case – the conduct of the claimant – is closely analogous to that in *Clunis* and in *Henderson*. The difference between the cases is one of degree, a matter of the severity of mental illness and impairment. In his sentencing remarks in *Henderson*, which Lord Hamblen quoted in para 16 of his judgment, the sentencing judge, Foskett J observed that Ms Henderson had a very low level of criminal responsibility and described the case as "desperately sad and tragic".

127. The difference between those who are criminally responsible for their acts, notwithstanding their diminished responsibility, and those who are not because they do not know that what they are doing is morally or legally wrong is between positions on a spectrum of the severity of mental illness. That difference is not critical to the applicability of the policy considerations required under *Patel*. The underlying *Patel* principle of the need to maintain the coherence of the law and the legal system remains in play. In *Patel* Lord Toulson stated (para 99):

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

It is the latter consideration, the risk of producing inconsistency and disharmony in the law and thereby damaging public confidence in the integrity of the legal system or otherwise bringing the law into disrepute in the eyes of the public, which is of central importance in determining the threshold in this case, and which requires the court to make the *Patel* assessment.

128. In this case there is no finding of criminal responsibility, because of the claimant's mental illness. The jury's verdict, however, established that he did the acts – he killed the three men – but was insane: see section 2(1) of the Trial of Lunatics Act 1883 (as amended). Further, the verdict involved both a finding that the claimant behaved in a way which constituted the actus reus of murder (para 61 above: *Attorney General's Reference (No 3 of 1998)*), and, if there had been objective evidence which raised the issue of an arguable defence of mistake, accident, or self-defence, that the Crown had eliminated the possibility of such a defence (*R v Antoine* pp 376F-377B).

129. In the particular circumstances of this case, the finding of not guilty by reason of insanity did not negate the mens rea of murder. The psychiatric evidence before the criminal court was not that the claimant did not understand the nature and quality of his acts but that he did not appreciate that it was wrong. On the contrary the evidence was that he knew he was attacking the three victims. He was acting intentionally under the delusion that they were paedophiles. The jury's verdict must, therefore, have been reached on the basis of the second limb in *M'Naghten*. This is, however, a point of limited significance in relation to the threshold issue. We do not seek to draw a distinction between verdicts of not guilty by reason of insanity on limbs 1 and 2 of *M'Naghten* respectively.

130. Professor John Gardner, the late Professor of Jurisprudence at Oxford University, drew distinctions between (i) actions that are not wrong at all, (ii) actions which are wrong but are justified, (iii) actions which are wrong and unjustified but excused, and (iv) actions which are neither justified nor excused but are nevertheless not punishable. See John Gardner, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (2007) pp 88-89. On Professor Gardner's categorisation the claimant's actions fall into the fourth category: they are neither justified nor excused but are nevertheless not punishable. By contrast, Santow J in *Presland* (para 95 above) cited Professor HLA Hart in support of the view that the defence of insanity did not justify an unlawful act or homicide but gave an excuse. Whichever of those jurisprudential analyses is adopted, the claimant's acts were not justified by his insanity. He was simply excused criminal liability.

131. The order of the court was not the imposition of a criminal penalty. However, it was an order of detention which the court was required to make to protect the public as a result of the claimant's actions and his continuing mental state which made him a danger to the public. By contrast with a negligent or other tortious act which engages the interests

only of the parties to a litigation, the claimant's actions in killing the three men, which manifested the danger which he posed to the public, engaged the interests of the State or the public interest.

132. We do not accept that the lack of any criminal responsibility in this case is a good reason for distinguishing *Clunis*, *Gray*, and *Henderson*. *Clunis* was decided on the basis of the reliance test in *Tinsley v Milligan*, from which this court has departed, and which, as we have seen from the majority judgment in *Apotex*, encouraged a focus on the presence or absence of turpitude. That, while it remains a relevant factor in the third consideration in the *Patel* assessment (proportionality), is no longer the central focus of the law on the prior question of the threshold.

133. The nature and extent of the claimant's responsibility was not central to the reasoning in *Gray* or *Henderson*. While in *Gray* their Lordships spoke of the consequences of a criminal act and criminal responsibility, Lord Phillips (para 15) reserved judgment as to whether the illegality defence would apply where a person was detained in hospital and a judge did not consider that the defendant should bear significant responsibility for his offence or the offence was trivial, Lord Brown (para 103) supported those reservations, Lord Rodger (para 83) reserved judgment if the offence were trivial, and Lord Hoffmann (para 42) did not consider it necessary to address the case of *Presland* to decide what were the limits of the illegality defence. As we discuss more fully below, see (paras 166-167), Andrews LJ is correct in her analysis (Court of Appeal judgment in this case, para 132) that in *Henderson* the fact that the defendant knew that what she was doing was morally and legally wrong was not central to Lord Hamblen's reasoning. Therefore, while there are references in those cases to culpability of the defendant, there is nothing in *Gray* or *Henderson* which pre-empts the present issue.

134. Killing another human being without lawful justification breaches a fundamental moral rule in our society – you shall not kill. This is so even when the person who has killed bears no criminal responsibility for his actions. The claimant has killed three men unlawfully and is the subject of a special verdict under section 2(1) of the Trial of Lunatics Act 1883. His lawful detention which the court has authorised by the hospital order and restriction order is the consequence of those actions. His actions are sufficient to engage and have engaged the interests of the State or the public interest. It is in the public interest that he was made the subject of a hospital order and a restriction order. We therefore conclude that the claimant's killing of the three men is unlawful conduct for the purpose of engaging the illegality defence.

(ii) The *Patel* assessment

135. Having concluded that the illegality defence is engaged by the present claim, we turn to the analysis indicated by Lord Toulson in *Patel* and its application to the features of the present case.

136. In a much-cited passage (at paras 100 ff of his judgment) Lord Toulson focussed on the question whether allowing recovery for something which was illegal would produce inconsistency and disharmony in the law and so cause damage to the integrity of the legal system. In para 43 above we have quoted what he stated in para 101.

137. Lord Toulson returned to this theme later in his judgment (at para 120) where he stated his conclusion:

> "The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system (or, possibly, certain aspects of public morality, the boundaries of which have never been made entirely clear and which do not arise for consideration in this case). In assessing whether the public interest would be harmed in that way, it is necessary (a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, (b) to consider any other relevant public policy on which the denial of the claim may have an impact and (c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts. Within that framework, various factors may be relevant, but it would be a mistake to suggest that the court is free to decide a case in an undisciplined way. The public interest is best served by a principled and transparent assessment of the considerations identified, [rather than by] the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate."

138. In *Grondona* Lord Lloyd-Jones, applying *Patel*, observed (at para 26) that, when addressing the trio of necessary considerations, it must be remembered that they are relevant because of their bearing on determining whether allowing the claim would damage the integrity of the law by permitting incoherent contradictions: see para 46 above.

139. He also explained that, for the same reason, it may not be necessary in every case to complete an exhaustive examination of all stages of the trio of considerations. (See also *Henderson* per Lord Hamblen at paras 115, 119.)

140. Before embarking on the *Patel* analysis it is important to recall what the claimant seeks to achieve by bringing this civil claim. The provisional schedule of loss for which he seeks compensation is summarised at para 20 above. The heads of loss include:

(1) damages for past and future loss of liberty during his detention in police custody, prison and psychiatric hospital;

(2) damages for loss of reputation;

(3) past and future loss of earnings for life;

(4) future cost of care and treatment; and

(5) an indemnity against any claims brought against him including claims by the families of the men he killed or any persons whom he injured.

Stage (a): The underlying purpose of the prohibition transgressed and whether that purpose will be enhanced by denial of the claim

141. The prohibition transgressed is that most fundamental injunction against the taking of human life: you shall not kill. Its purpose is the preservation of life and the promotion of respect for the sanctity of life. The law seeks to protect the public and to deter unlawful killing. As Lord Hamblen observed in *Henderson* (at para 129), there is also a public interest in the public condemnation of unlawful killing and the punishment of those who behave in that way. There is also a public interest in the state's acknowledgement of the grievous wrong done to the victims and to their family and friends.

142. This prohibition and its purpose apply with equal force to the case of a person in the position of the claimant who, having killed, is found not guilty of murder by reason of insanity. Although he is spared criminal responsibility for his conduct and the law focusses on the protection of the public as opposed to punishment, his conduct is neither justified nor excused. His conduct is unlawful and deserves to be condemned.

143. It may be questioned to what extent a person suffering from mental illness amounting to insanity in law is likely to be deterred from killing by the prospect of not

being able to recover compensation from third parties in respect of the consequences of the killing. However, as Lord Hamblen observed in *Henderson* (at para 131), the matter must be examined more broadly and there may be some deterrent effect in a clear rule that unlawful killing never pays.

144. The court is entitled and required to take a broad view of the underlying policies including those relating to the internal consistency of the law and the integrity of the legal system. When approached in this way, it becomes clear that to allow the present civil claim to proceed would give rise to a series of inconsistencies which would damage the integrity of the law and the legal system.

145. First, in the light of the jury's verdict of not guilty by reason of insanity in the present case, the judge was required to make a hospital order under section 37 and a restriction order under section 41 of the Mental Health Act to protect the public. To allow the claimant to recover compensation for his detention would be wholly inconsistent with the rule requiring his detention. It would be inconsistent for a civil court to order the payment of compensation to the claimant for the consequences of his lawful detention ordered by a criminal court. The claimant's attempt to recover losses flowing from his lawful detention pursuant to the criminal court's disposal falls within Lord Hoffmann's narrower rule in *Gray*. Such losses, and in addition the other heads of loss and damage for which recovery is sought, are also irrecoverable under Lord Hoffmann's wider rule in *Gray* because the claimant's own unlawful conduct is their cause.

146. Secondly, the claimant is liable in the tort of battery to the estates of his victims and to their dependants notwithstanding the jury's verdict of not guilty by reason of insanity. Insanity is not a defence to liability in tort for trespass to the person or battery (*Weaver v Ward* (1616) Hob 134; *Morriss v Marsden* [1952] 1 All ER 925). Similarly, the objective standard of care in the tort of negligence excludes a defendant's insanity from consideration (*Dunnage v Randall* [2015] EWCA Civ 673; [2016] QB 639). To hold that the illegality defence does not prevent the claimant from suing the defendants would be inconsistent with the claimant's liability in tort.

147. Thirdly, it appears that if the estates of the victims unlawfully killed by the claimant or dependants of the victims were to claim against the defendants, their claims would be unlikely to succeed because the defendants did not owe the victims a duty of care to keep them safe. (See *Palmer v Tees Health Authority* [2000] PIQR P1; *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4; [2018] AC 736.) The exclusion of such a claim is principled but the public might fairly consider the law to be unjust if it were to allow the claimant to claim in tort against the defendants.

148. Fourthly, as noted above, the claimant remains liable in the tort of battery to the estates of his victims. In these proceedings the claimant claims an indemnity "against any

claim or claims that may be brought against him as a result of the events forming the subject matter of this claim, including any claim or claims by the families of the men killed by the claimant or by any persons injured by the claimant" (Provisional Schedule). However, to allow the claimant to claim an indemnity from the defendants in respect of the injury and damage he inflicted on his victims would give rise to further inconsistencies. Here it is necessary to have regard to the submission on behalf of the appellant defendants that such a claim for indemnity would be likely to fail on other grounds in any event. At this stage of the proceedings it is sufficient to draw attention to the following submissions on behalf of the defendants.

> (1) If the estates of the claimant's victims were to sue the defendants, their claims would properly be characterised as claims against a defendant for failing to prevent harm by a third party. Such a claim would be unlikely to succeed because the defendant would not owe a duty of care to the victims as third parties, as discussed above. The claimant would, however, be liable to the estates of the claimant's victims were they to sue him. Any attempt by the claimant to pass on such liability by claiming an indemnity from the defendants would be open to objection on the ground that such an indemnity would cut across and undermine the law on duty of care and expose the defendants to potentially open-ended liabilities.
>
> (2) A claim by the claimant to be indemnified by the defendants against the claims of his victims would be too remote (*Meah v McCreamer (No 2)* [1986] 1 All ER 943).
>
> (3) Any such claim would fail on grounds of causation. (See *Gray* per Lord Hoffmann at paras 50-55, per Lord Rodger at paras 84-88.)

149. Quite independently of these submissions on behalf of the defendants, it seems to us that the claimant should not be able to recover an indemnity from the defendants for an additional reason. Such a claim should be barred on grounds of public policy. In bringing the claim for an indemnity the claimant is seeking to rely on his own wrongful acts. (See *Gray* per Lord Rodger at para 84.) Were such a claim for an indemnity to be permitted, it would bring the law into disrepute. As foreshadowed in both *Gray* and *Henderson*, to allow recovery by the claimant in such circumstances would be to attribute responsibility for his tortious acts to someone else. While it is accepted that the present case differs in that because of the verdict of not guilty by reason of insanity the claimant does not bear criminal responsibility for his acts, it would be a step too far to allow him to shift civil responsibility to the defendants. (See *Henderson* per Lord Hamblen at para 106.)

150. Fifthly, there is the conundrum posed by Sheller JA in *Presland* (at para 300) and commented on by Lord Hoffmann in *Gray* (at para 42). What would be the position if a patient had killed the negligent psychiatrist who had discharged him? Would the psychiatrist's estate be liable to pay the patient compensation for his consequent detention? If sued by the psychiatrist's estate, could the patient counterclaim?

151. Considerations relating to the internal consistency of the law are necessarily closely bound up with public confidence in the integrity of the legal system. The inconsistencies identified above would necessarily be detrimental to the legal system and its coherence. Here, we draw attention to the following matters in particular.

(1) Notwithstanding the fact that the claimant is excused criminal liability, members of the public would be profoundly surprised and concerned if he were able to claim for the consequences of his wrongful act. We do not agree that surprise and concern would be limited to those who are not fair-minded or humane or to those who have an unenlightened attitude towards mental illness.

(2) The purpose of detaining the claimant is in order to protect the public from the risk he poses for the future. To compensate him for this detention would be incoherent. The law would be giving with the right hand what it took away with the left.

(3) The public would also be rightly concerned that, in the case of the NHS Trust and Devon CC, public money should be used to compensate the claimant for the consequences of his wrongful acts. (See *Henderson* per Lord Hamblen at para 127.)

152. Contrary to the submissions of the defendants, we do not accept that allowing the claimant's compensation claim to proceed would incentivise others in a similar position to him to seek to secure a verdict of not guilty by reason of insanity as opposed to a verdict of manslaughter by reason of diminished responsibility. This is not a matter of choice. While a plea of guilty to manslaughter on grounds of diminished responsibility can be accepted by the prosecution, a verdict of not guilty by reason of insanity can be arrived at only after a trial and the verdict of the jury in accordance with section 2 of the Trial of Lunatics Act 1883. Furthermore, a verdict of not guilty by reason of insanity would depend in large measure on the psychiatric evidence.

153. It was also submitted on behalf of the defendants that to allow civil claims such as the claimant's to proceed might result in attempts to undermine criminal verdicts in later civil proceedings. Clearly, it would be an abuse of process for a defendant in criminal proceedings to seek to challenge in later civil proceedings the criminal verdict. That possibility can be discounted. More troubling, however, is the question whether, if a civil

claim by a person in the position of claimant were allowed to proceed, it would be open to a defendant in the civil proceedings to dispute a criminal verdict of not guilty by reason of insanity. If it were, it would create a risk of inconsistent verdicts. If it were not, it would debar the defendant from challenging an element of the claim against him because it had already been established in proceedings in which the defendant had had no opportunity to participate.

154. For these reasons – in particular for reasons of consistency and public confidence – we conclude that there are very weighty considerations supportive of the view that the underlying purpose of the prohibition transgressed would be enhanced by denial of the claim.

Stage (b): Any other relevant public policies which may be rendered ineffective or less effective by denial of the claim

155. We agree with the claimant's submission that it is in general in the public interest that the courts should adjudicate civil wrongs. We also accept that the illegality defence should be available only where to allow the claim to proceed would result in inconsistency in the law or would allow the claimant to profit from his own wrongs. Where the defence applies it is not a procedural bar on access to a court; it is a substantive defence.

156. As in every such case, denial of a civil claim would prevent the claimant from ventilating his complaints and grievances in a court. We would accept that permitting civil claims would have the effect of opening up for examination the standards of care provided and what may have gone wrong in individual cases. This may have the effect of encouraging providers to provide better care for the mentally ill and to enhance standards. In our view there is some force in this submission. There exist, however, alternative procedures, such as inquests and public inquiries, which are better suited for these purposes. In this regard we note that in the present case an inquest into the deaths has been opened and that an inquest review hearing was due to take place on 24 July 2025. The coroner will have the power to report for the purpose of preventing further deaths pursuant to paragraph 7 of Schedule 5 to the Coroners and Justice Act 2009.

157. Contrary to the submissions on behalf of the claimant, debarring his claim would not be inconsistent with the verdict of the criminal court. As explained above, the distinctions drawn by the criminal law between diminished responsibility and insanity cannot be permitted to govern the scope of the illegality defence in civil proceedings which must be determined by the wider considerations now under examination. Moreover, denial of the claim cannot be regarded as a punishment of the claimant in circumstances where the criminal law maintains that he should not be punished. On the contrary, it simply draws the necessary consequences of his conduct in order to save the legal system from incoherence. Furthermore, to apply the defence in the circumstances of

the present case would not divorce it from concepts of illegality or immorality. As demonstrated above, the claimant's conduct must be regarded as unlawful for the purposes of the illegality defence.

158. In the present case we note that there has been no application on behalf of the second defendant, the Chief Constable, to strike out the proceedings against him. We also note that the other defendants have not pursued an application to strike out claims based on the European Convention and the HRA. It appears that those claims will proceed to trial. This, however, does not affect our conclusion in the balancing exercise.

159. Pausing at this point, we have come to the clear view that the policy considerations at stage (a) in favour of denying a civil claim, founded as they are on the need to maintain the integrity of the legal system, greatly outweigh those at stage (b) in favour of permitting a claim.

Stage (c): The proportionality of denying a civil claim

160. This conclusion is reinforced by the analysis of the proportionality of denying a civil claim in the particular circumstances of this case.

161. At this stage of the *Patel* analysis the question is whether denial of the claim would be a proportionate response to the illegality. In considering proportionality at stage (c), the court is likely to engage more closely with the specific facts and to give close scrutiny to the detail of the case in hand.

162. In *Patel* Lord Toulson, while not seeking to lay down a prescriptive or definitive list, identified (at para 107) the following factors as potentially relevant to the proportionality assessment: the seriousness of the conduct, its centrality, whether it was intentional and whether there was marked disparity in the parties' respective culpability. These matters can be addressed very briefly.

(1) The brutal killing of three innocent men is of the utmost seriousness.

(2) The conduct was central to all heads of loss claimed and the effective cause of such loss.

(3) For the purpose of the current strike out and summary judgment applications we must assume that the facts alleged by the claimant in his claim will be established at trial. It must therefore be assumed that the appellants were negligent

in failing to provide the claimant with adequate care and mental health assessments. On the other hand, whether or not a person found not guilty by reason of insanity was aware of the nature and quality of his acts (as the claimant was in this case), those acts amount to unlawful killing.

163. In all the circumstances, denial of the claim would not be a disproportionate response to the illegality.

Previous caselaw

164. This result accords with the essential reasoning of the earlier relevant decisions in this jurisdiction and with the preponderance of Commonwealth authority.

165. We agree with the conclusion of the Court of Appeal in *Clunis*, which forms the ratio decidendi of that appeal, that 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 acts. However, we would disagree with the suggestion in *Clunis* (at p 989E) that the result might have been different had the plaintiff been found not guilty by reason of insanity. That observation was obiter and, for the reasons set out above, we consider that the availability of the plea of illegality should not be fettered by the distinction drawn by the criminal law between diminished responsibility and insanity but should depend on a wider assessment of public policy considerations.

166. Our application of the *Patel* criteria in the present case is also consistent with the decision of the House of Lords in *Gray*. We agree with Lord Hamblen in *Henderson* that the reasoning in *Gray* did not involve the now discredited reliance-based approach. On the contrary the decision in *Gray* was based on policy considerations and was apparently approved in *Patel*. If one were to analyse the heads of claim in the present case in terms of the narrower or wider rules identified by Lord Hoffmann in *Gray*, every head of claim would fail under one or other or both of those rules.

167. We also consider that the conclusion to which we have come on the application of the *Patel* approach is entirely consistent with the decision and reasoning in *Henderson* which was itself decided on this basis. In this regard, however, counsel for the claimant point to the contrast drawn at various points of Lord Hamblen's judgment in *Henderson* between a verdict of guilty of manslaughter by diminished responsibility and a verdict of not guilty by reason of insanity. In particular, Underhill LJ in the Court of Appeal in the present case (at para 78) drew attention to Lord Hamblen's conclusion in *Henderson* that *Gray* applies where the claimant has no significant personal responsibility for the criminal act and/or there is no penal element in the sentence imposed. Underhill LJ observed that Lord Hamblen's essential point is that the claimant had been convicted of a criminal offence which necessarily involved both blame and responsibility. (See in particular

Henderson at paras 109 and 112.) Underhill LJ stated that in that context Lord Hamblen repeated and evidently endorsed the reasoning in *Clunis* and *Gray*. Here Underhill LJ cited para 105 of Lord Hamblen's judgment:

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

168. Underhill LJ observed that the apparent implication is that if *Henderson* had been an insanity case, so that the claimant had no knowledge that what she was doing was wrong and no criminal responsibility, the illegality defence would not have applied. We do not accept that this is a necessary or justified implication from the judgment in *Henderson*. An appreciation by Ms Henderson that what she was doing was morally and legally wrong was not central to Lord Hamblen's reasoning. As Andrews LJ stated in her dissenting judgment in the present case in the Court of Appeal (at para 133):

> "In [*Henderson*], the Supreme Court was not concerned with unlawful acts that did not attract criminal responsibility; the fact that a serious crime had been committed was sufficient to dispose of the appeal, irrespective of the degree of personal responsibility of the offender, see in particular Lord Hamblen's analysis at para 112 [set out at para 87 above]. The focus was very much on the nature of the act itself. Indeed Lord Hamblen refers to the fact that by her guilty plea the defendant in that case accepted that she possessed the mental prerequisites of criminal responsibility for murder, namely an intention to kill or to cause grievous bodily harm (as the claimant did in the present case). He then says that in that case, her psychiatrists *also* agreed that she knew that what she was doing was wrong. That appears to me to be something he is treating as an additional factor rather than the essential factor behind the policy."

169. We consider that Lord Hamblen's reasoning in *Henderson* did not depend on the criminal liability of the claimant. On the contrary, he made clear at para 119 that the governing principle was that:

> "For one branch of the law to enable a person to profit from behaviour which another branch of the law treats as being criminal *or otherwise unlawful* would tend to produce inconsistency and disharmony in the law, and so cause damage to the integrity of the legal system". (Emphasis added.)

170. *Clunis*, *Gray* and *Henderson* were all cases in which the claimant had been convicted of manslaughter on grounds of diminished responsibility. In those circumstances, it is hardly surprising that there are references to the culpability of the claimant. It does not follow, however, that a different result should follow where the claimant had been found not guilty by reason of insanity, a matter not in issue in those cases. On the contrary, in cases such as the present the application of the *Patel* criteria leads inevitably in our view to the conclusion that the illegality defence applies.

171. This result also accords with the preponderance of Commonwealth authority on the point which, although not unequivocal, favours this outcome: see paras 93-101 above. In *Presland* the Court of Appeal of New South Wales dealt with circumstances which are closely analogous to the current case. The plaintiff had committed a homicide which was not justifiable but was an unlawful act, although he was not criminally responsible because he was incapable of knowing the wrongness of his act. The health authority was held not to be liable for the consequences of his lawful detention in a psychiatric hospital. Although the court analysed the question as one of the scope of a defendant's duty of care, the public policy considerations underlying the majority's judgment were similar to those in the illegality defence. A similar approach was adopted by the High Court of New Zealand in *Ellis*. In *Barker* the Court of Appeal for Ontario upheld the illegality defence to exclude the claims of patients, who had been acquitted of murder by reason of insanity, holding that the defence was available in respect of wrongful conduct as well as criminal conduct.

11. Conclusion

172. For these reasons we would allow the appeal.