Neutral Citation Number: [2018] EWCA Civ 1841

Case No: B3/2017/0199

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
Jay J
[2016] EWHC 3275 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/08/2018

Before :

THE MASTER OF THE ROLLS
THE SENIOR PRESIDENT OF TRIBUNALS
and
LADY JUSTICE MACUR

- -

Between :

Elicia HENDERSON (a protected party, by her Litigation Friend the Official Solicitor)	**Appellant**
- and -	
DORSET HEALTHCARE UNIVERSITY NHS FOUNDATION TRUST	**Respondent**

- -
- -

Nicholas Bowen QC and **Katie Scott** (instructed by **Russell-Cooke Solicitors**) for the **Appellant**
Angus Moon QC, **Cecily White** and **Judith Ayling** (instructed by **DAC Beachcroft LLP**) for the **Respondent**

Hearing dates : 10 and 11 July 2018

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Judgment Approved

Sir Terence Etherton MR, Sir Ernest Ryder SPT and Lady Justice Macur :

1. This is an appeal from the order dated 19 December 2016 of Jay J in which he held, on the trial of a preliminary issue, that claims in the common law tort of negligence brought by Ms Ecila Henderson ("Ms Henderson"), the appellant, against Dorset Healthcare University NHS Foundation Trust ("the Trust"), the respondent, were barred by the doctrine of illegality. This appeal concerns the correct interpretation of the authorities on the doctrine of illegality as it applies in the field of tort, as well as the impact on those authorities of the recent judgments of the Supreme Court in *Patel v Mirza* [2016] UKSC 42, [2017] AC 467.

The factual background

2. The parties agreed that the issue between them decided by Jay J should be determined on agreed facts. A full copy of the agreed statement of facts is appended to the end of this judgment. The following is an abridged summary of the facts.

3. Ms Henderson was born on 10 August 1971. She has been diagnosed at different times as suffering from paranoid schizophrenia or schizoaffective disorder. She began experiencing problems with her mental health in 1995. From about 2003 she had various formal (pursuant to the Mental Health Act 1983 ("the MHA 1983")) and informal hospital admissions. Her condition had recently worsened when, on 25 August 2010, whilst experiencing a serious psychotic episode, she stabbed her mother to death.

4. At the time of the offence, Ms Henderson was under the care of the Southbourne community mental health team ("SCMHT"), which is managed and operated by the Trust. An independent investigation was commissioned by the NHS South West and the Bournemouth and Poole Adults Safeguarding Board. It found failings by the Trust in her care and treatment, ultimately concluding that, while the killing of Ms Henderson's mother could not have been predicted, a serious untoward incident of some kind was foreseeable based upon Ms Henderson's previous behaviour when experiencing a psychotic episode. The killing of Ms Henderson's mother was preventable and, had a rapid response been forthcoming, the tragic incident would probably not have occurred. It is, therefore, common ground between the parties that this tragic event would not have happened but for the Trust's breaches of duty in failing to respond in an appropriate way to Ms Henderson's mental collapse.

5. Ms Henderson was charged with the murder of her mother. Having regard to the opinions of two consultant forensic psychiatrists, Dr Caroline Bradley and Dr Adrian Lord, the prosecution accepted a plea of manslaughter by reason of diminished responsibility. Foskett J, sitting at the Crown Court in Winchester on 8 July 2011, heard oral evidence from Dr Lord. Foskett J made a hospital order under section 37 of the MHA 1983 with a restriction order under section 41 of the MHA 1983. Ms Henderson has remained subject to detention pursuant to the MHA 1983 ever since. She is not expected to be released for some significant time.

6. The sentencing remarks of Foskett J, so far as relevant, were as follows:

> "On whatever analysis is made, this is a desperately sad and tragic case. In August last year, shortly after your 39th

birthday, you repeatedly stabbed your 69-year-old mother, as a result of which she died.

"She had come to try to raise you in your flat when you had effectively locked yourself away for the previous few days. That she should die in these circumstances is the principal tragedy in this case, of course. What, however, is clear from all the evidence, expert and otherwise, is that when this awful event occurred you were in the midst of a serious psychotic episode, derived from the schizophrenia which has affected you for the best part of the last 15 years or so.

"For much of that time the condition has been kept under control with the assistance, including medication, that you have received from the local psychiatric teams with whom you have been in contact. Unfortunately the team was unable to get to you in time to prevent the terrible tragedy last year.

"There has, as Mr Grunwald has said, been a full review of the care being given to you at the time, and it is, I think, inappropriate for me to make any comment one way or the other about that, save to say that it is plain that lessons have been learned from it, as I understand, having read the report.

"The one thing that is clear, from the report, is a conclusion that there was little, if any, basis for believing that your mother would be a potential victim of any violence that you might display in a psychotic episode, and that conclusion and analysis seems to have been borne out by the two expert opinions that I have read in the context of this case.

"When you recovered from that psychotic episode, as you did, you appreciated fully what you had done, and you were distressed beyond measure.

"The very detailed and comprehensive reports I have seen from Dr Bradley and Dr Lord, to whom I express my appreciation, 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 to which I have referred, and to the extent that you had little, if any, true control over what you did.

"That means that the conviction for manslaughter by reason of diminished responsibility is obviously the appropriate verdict, and the prosecution has undoubtedly correctly accepted that is so.

"It is also that mental health background that informs and largely dictates how this case should be disposed of. It is quite plain that in your own interests, and in the interests of the public, if and when you are released, that the most

> important consideration is the successful treatment and/or management of your condition.
>
> "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. Had there been any such suggestion I would have given serious consideration to making an order under section 45A of the Mental Health Act 1983 , however, on the material and evidence before me that issue does not arise.
>
> "The joint recommendation of Drs Bradley and Lord is that you should be made the subject of a hospital order under section 37 of the Act, with an unlimited restriction order under section 41 of the Act.
>
> "Dr Bradley says in her report that your illness is difficult to treat and monitor and that 'A high degree of vigilance and scrutiny of mental state will be needed to ensure successful rehabilitation'.
>
> "Dr Lord says in his report that the effect of such an order would be that you would be 'detained in secure psychiatric services for a substantial period of time in order for such treatment and rehabilitation to be completed and to ensure the safety of the public'. The restrictions imposed by section 41, he says in his report and has repeated in what he has said to me, would be 'invaluable in protecting the public from the risk of serious harm in the future'.
>
> "Given those strong and firm recommendations from two experienced psychiatrists, who examined you and your psychiatric history with very considerable care, it seems to me that this is the order that I should make, and I will make it."

Legislative background

The criminal law

7. The offence of murder is committed when a person of sound mind unlawfully kills another, with the intention to kill or cause grievous bodily harm.

8. If the mental illness of the defendant plays a part in the unlawful killing, two defences may arise.

9. The first is the defence of insanity which requires the defendant to satisfy the *M'Naghten* rules. As formulated by Tindal CJ in *M'Naghten's Case* (1843) 10 Clark & Finnelly 200 at 209:

> "... to establish a defence on the ground of insanity, it must be clearly provided that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature

> and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong".

10. Provided that there is written or oral evidence of two or more registered medical practitioners, at least one of whom is duly approved, the jury may return a special verdict that the accused is not guilty by reason of insanity: section 2 of the Trial of Lunatics Act 1883 and section 1 of the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991.

11. The second is the defence of diminished responsibility, which reduces what would otherwise be a conviction for murder to a conviction for manslaughter by reason of diminished responsibility. This is defined by section 2 of the Homicide Act 1957, as amended by section 52 of the Coroners and Justice Act 2009, as follows:

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

The MHA 1983

12. Section 3 of the MHA 1983 provides for a person suffering from a mental disorder of a nature or degree which makes it appropriate for him or her to receive medical treatment in a hospital to be admitted to a hospital and detained there in certain circumstances:

> "(1) A patient may be admitted to a hospital and detained there for the period allowed by the following provisions of this Act in pursuance of an application (in this Act referred to as *"an application for admission for treatment"*) made in accordance with this section.
>
> (2) An application for admission for treatment may be made in respect of a patient on the grounds that—
>
> (a) he is suffering from mental disorder of a nature or degree which makes it appropriate for him to receive medical treatment in a hospital; and
>
> (c) it is necessary for the health or safety of the patient or for the protection of other persons that he should receive such treatment and it cannot be provided unless he is detained under this section; and
>
> (d) appropriate medical treatment is available for him.
>
> (3) An application for admission for treatment shall be founded on the written recommendations in the prescribed form of two registered medical practitioners, including in each case a statement that in the opinion of the practitioner the conditions set out in subsection (2) above are complied with; and each such recommendation shall include—
>
> (a) such particulars as may be prescribed of the grounds for that opinion so far as it relates to the conditions set out in paragraphs (a) and (d) of that subsection; and
>
> (b) a statement of the reasons for that opinion so far as it relates to the conditions set out in paragraph (c) of that subsection, specifying whether other methods of dealing with the patient are available and, if so, why they are not appropriate.
>
> (4) In this Act, references to appropriate medical treatment, in relation to a person suffering from mental disorder, are references to medical treatment which is appropriate in his case, taking into account the nature and degree of the mental disorder and all other circumstances of his case."

13. Equivalent detention in hospital for treatment may be ordered by a sentencing judge upon a defendant's conviction for a criminal offence under section 37 of the MHA 1983, as amended:

> "(1) Where a person is convicted before the Crown Court of an offence punishable with imprisonment other than an offence the sentence for which is fixed by law, or is convicted by a magistrates' court of an offence punishable on summary conviction with imprisonment, and the conditions mentioned in subsection (2) below are satisfied,

> the court may by order authorise his admission to and detention in such hospital as may be specified in the order ...
>
> (ii) …(2) The conditions referred to in subsection (1) above are that—
>
> (a) the court is satisfied, on the written or oral evidence of two registered medical practitioners, that the offender is suffering from mental disorder and that either—
>
> (i) the mental disorder from which the offender is suffering is of a nature or degree which makes it appropriate for him to be detained in a hospital for medical treatment and appropriate medical treatment is available for him; or
>
> ...
>
> (b) the court is of the opinion, having regard to all the circumstances including the nature of the offence and the character and antecedents of the offender, and to the other available methods of dealing with him, that the most suitable method of disposing of the case is by means of an order under this section ...
>
> (8)Where an order is made under this section, the court shall not—
>
> (a) pass sentence of imprisonment or impose a fine or make a community order (within the meaning of Part 12 of the Criminal Justice Act 2003) or a youth rehabilitation order (within the meaning of Part 1 of the Criminal Justice and Immigration Act 2008) in respect of the offence, ..."

14. The judgment of Mustill LJ in *R v Birch* (1989) 11 Cr App R (S) 202, 210, which was approved by Lord Bingham in *R v Drew* [2003] 1 WLR 1213, provides a helpful explanation of the operation of a section 37 hospital order:

> "Once the offender is admitted to hospital pursuant to a hospital order or transfer order without restriction on discharge, his position is almost exactly the same as if he were a civil patient. In effect he passes out of the penal system and into the hospital regime. Neither the court nor the Secretary of State has any say in his disposal. Thus, like any other mental patient, he may be detained only for a period of six months, unless the authority to detain is renewed, an event which cannot happen unless certain conditions, which resemble those which were satisfied when he was admitted, are fulfilled. If the authority expires without being renewed, the patient may leave. Furthermore, he may be discharged at any time by the hospital managers or the "responsible medical officer." In addition to these regular modes of discharge, a patient who absconds or is absent without leave and is not retaken within 28 days is automatically discharged at the end of that period (section

> 18(5)) and if he is allowed continuous leave of absence for more than six [now 12] months, he cannot be recalled (section 17(5)).
>
> Another feature of the regime which affects the disordered offender and the civil patient alike is the power of the responsible medical officer to grant leave of absence from the hospital for a particular purpose, or for a specified or indefinite period of time: subject always to a power of recall (except as mentioned above).
>
> There are certain differences between the positions of the offender and of the civil patient, relating to early access to the Review Tribunal and to discharge by the patient's nearest relative, but these are of comparatively modest importance. In general the offender is dealt with in a manner which appears, and is intended to be, humane by comparison with a custodial sentence. A hospital order is not a punishment. Questions of retribution and deterrence, whether personal or general, are immaterial. The offender who has become a patient is not kept on any kind of leash by the court, as he is when he consents to a probation order with a condition of inpatient treatment. The sole purpose of the order is to ensure that the offender receives the medical care and attention which he needs in the hope and expectation of course that the result will be to avoid the commission by the offender of further criminal acts."

15. A section 37 hospital order can be combined with a restriction order under section 41 of the MHA 1983. This was explained in *R v Birch* by Mustill LJ at 210-211 as follows:

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

16. Where neither a sentence of imprisonment, nor a hospital order, on its own appears appropriate in the case of a particular offender, the sentencing judge can impose a

hybrid order of a hospital direction with a penal sentence under section 45A of the MHA 1983, as amended: see *R v Vowles* [2015] EWCA Crim 45.

The proceedings

17. There have been a number of stages in the civil proceedings brought by the Official Solicitor, on Ms Henderson's behalf, in the aftermath of her conviction and sentence.

Forfeiture Act 1982 Claim

18. Ms Henderson was named as a beneficiary under her mother's will which provided that she should inherit one half of her mother's beach hut at Sandbanks and one quarter of the residue of her estate less £20,000. Given the value of the estate on 14 February 2012, under the terms of the will Ms Henderson should have inherited £123,888.37. Ms Henderson brought a claim pursuant to section 2 of the Forfeiture Act 1982 ("the FA 1982") to modify the common law forfeiture rule which is recognised by section 1 of the FA 1982. The forfeiture rule is a rule of public policy which in certain circumstances precludes a person who has unlawfully killed another from acquiring a benefit in consequence of the killing. A consent order was entered by Deputy Master Cousins in the Chancery Division of the High Court on 3 October 2012 excluding the rule in respect of 50% of Ms Henderson's interest under the will. The effect of this order is that Ms Henderson has been able to inherit £61,944. She did not recover an order for her costs of those proceedings.

The present proceedings

19. Ms Henderson issued proceedings against the Trust on 22 August 2013 claiming damages under various heads pursuant to the common law tort of negligence and also pursuant to the Human Rights Act 1998 ("HRA 1998").

20. On 12 March 2014 the Trust admitted liability and consented to judgment being entered. The court approved a consent order dated 12 May 2014 entering judgment on the claim with damages to be assessed.

21. Particulars of claim were served on 23 September 2014 together with a "Preliminary Schedule of Damages". The particulars of claim made no mention of claims under the HRA 1998. On 23 November 2016 Warby J refused Ms Henderson's application to amend her particulars of claim to advance a claim under the HRA 1998: *Henderson v Dorset Healthcare University NHS Foundation Trust* [2016] EWHC 3032 (QB), [2017] Med LR 57.

22. The Schedule of Damages itemised Ms Henderson's losses, in respect of which she claimed, under six heads:

    i) General damages for personal injury (a depressive disorder and post-traumatic stress disorder ("PTSD")) consequent on her killing of her mother;

    ii) General damages for her loss of liberty caused by her compulsory detention in hospital pursuant to sections 37 and 41 of the MHA 1983;

    iii) General damages for loss of amenity arising from the consequences to her of having killed her mother;

iv) Past loss in the sum of £61,944 being the share in her mother's estate which she is unable to recover as a result of the operation of the provisions of the FA 1982;

v) The cost of psychotherapy (by way of future loss);

vi) The cost of a care manager/support worker (by way of future loss).

23. The Trust's position is that the entirety of the claim, including all six heads of loss, should be defeated on illegality or public policy grounds. Accordingly, on 17 February 2016 Master Cook ordered that there be a trial of a preliminary issue to determine whether some or all of those six heads of claim are irrecoverable on the grounds of illegality.

24. After hearing argument over the course of two days between 6 and 7 December 2016, Jay J handed down judgment on 19 December 2016 in which he dismissed Ms Henderson's claims and found in favour of the Trust on the preliminary issue of illegality.

Judgment under appeal

25. The following is a very brief summary of the Judge's careful analysis.

26. The first issue addressed by the Judge was the correct interpretation of the sentencing remarks of Foskett J, and the extent to which it is permissible, if at all, to go behind them. He considered (at [14]-[16]) that Ms Henderson's conviction of manslaughter on the ground of diminished responsibility under section 2 of the Homicide Act 1957 is conclusive evidence that she was suffering from an abnormality of mental functioning which "substantially impaired", although did not fully impair, her ability to understand the nature of her conduct, to form a rational judgment and to exercise self control. He found that it would be inimical to the policy of the law to permit Ms Henderson to re-open the basis of her conviction in the criminal court in these proceedings. He also considered (at [18]-[21]) that there must be a range of culpability within the span of substantial impairment recognised by the Homicide Act 1957. The law and modern psychiatry recognises that cases fall along a spectrum. Although the Judge did not interpret Foskett J as holding that Ms Henderson had no personal responsibility whatsoever, the Judge did read the sentencing remarks as supporting the interpretation that this case falls towards the lower end of the spectrum of personal responsibility. The Judge refused (at [22]) to undermine or impugn Foskett J's findings. He therefore proceeded on the footing that Ms Henderson's responsibility was low and/or less than significant.

27. The Judge went on to consider the second issue as to whether there was binding authority of the Court of Appeal and House of Lords precluding some or all of Ms Henderson's claims.

28. In *Clunis v Camden and Islington Health Authority* [1998] QB 978 proceedings were brought against Camden and Islington Health Authority for damages for loss of liberty. The plaintiff's case was that the Health Authority's breach of duty to him in failing to treat his worsening schizoaffective disorder caused him to kill a man by stabbing him, be convicted of manslaughter on the ground of diminished responsibility, and be detained in hospital under sections 37 and 41 of the MHA 1983. The Court of Appeal struck out the whole of Mr Clunis' claim, holding that

it was barred by public policy. Jay J considered that there were no discernable matters or aspects of factual differentiation between Ms Henderson and Mr Clunis and concluded that, if the ratio of *Clunis* still represents the law, he would be bound to conclude that the whole of Ms Henderson's case should fail on the ground of public policy as her claim must be seen as essentially based on her illegal act of manslaughter. Further he deduced that, in reaching that conclusion, the Court of Appeal did not distinguish between degrees of personal responsibility: at least for the purposes of the ascription of civil liability, the question is treated as being monist, not as one capable of differential factual evaluation.

29. In *Gray v Thames Trains Ltd* [2009] UKHL 33, [2009] AC 1339 proceedings were brought by the plaintiff against the train company alleging that its breach of duty had caused the Ladbroke Grove rail disaster in 1999, causing him to suffer Post-Traumatic Stress Disorder, which in turn caused him to kill a man, be convicted of manslaughter on the ground of diminished responsibility, and be detained in hospital under sections 37 and 41 of the MHA 1983. On his analysis, Jay J held that a majority of the members of the appellate committee agreed that: (1) the rule of public policy distils into two forms – a narrow form (or rule), which holds that damages cannot be claimed for loss of liberty lawfully imposed in consequence of one's own unlawful act, and a wide form (or rule) which holds that recovery is barred for loss suffered in consequence of one's own criminal act; and (2) it made no difference whether a claimant had a significant level of personal responsibility for his or her offence.

30. The Judge went on to conclude (at [68]) that he was bound by both *Gray* and *Clunis* to dismiss all six heads of Ms Henderson's claim, on the basis that the majority in *Gray* specifically endorsed the Court of Appeal's reasoning in *Clunis* both in relation to the wide and the narrow rule.

31. The Judge rejected submissions that *Clunis* should not be followed, pursuant to the third exception to *stare decisis* outlined in *Young v Bristol Aeroplane Co Ltd* [1944] KB 718, because its reasoning is wholly inconsistent with the discretionary approach subsequently laid down by the majority of the Supreme Court in *Patel v Mirza* [2016] UKSC 42, [2017] AC 467. Jay J noted, in particular, (at [89]) that neither *Patel*, nor any of the other Supreme Court cases in the line of authority leading to that decision, expressly criticised *Clunis* or *Gray*.

32. The Judge, therefore, found (at [94]) that he was bound to dismiss Ms Henderson's claims on the basis that they were barred by the doctrine of illegality.

33. Mr Nicholas Bowen QC, counsel for Ms Henderson, made an application for a certificate under section 12 of the Administration of Justice Act 1969 for a leapfrog appeal to the Supreme Court. The Judge refused to issue such a certificate and also refused permission to appeal to the Court of Appeal.

Grounds of appeal

34. On 3 November 2017 Hamblen LJ granted permission to appeal on the grounds that the judge was wrong to conclude that: (i) he was bound by *Gray* when the majority limited the ratio of *Gray* to those who had significant responsibility for the offences they committed; and (ii) he was bound by *Clunis* on the basis that *Clunis* did not fall within one of the exceptions set out in *Young*.

35. The respondent's notice dated 24 November 2017 seeks to uphold the Judge's judgment for the additional reason that, even if the Judge was not bound by *Gray* and/or *Clunis*, the claimed heads of loss are still barred by the operation of the defence of illegality and the public policy justifications underlying that defence, as articulated in *Gray* and *Patel*.

Discussion

36. There are three issues to be decided on this appeal:

    a) What is the *ratio* of *Clunis*?

    b) What is the *ratio* of *Gray* and in particular were the reservations of Lord Phillips approved by the majority of the House of Lords?

    c) Does *Clunis* survive the judgment of the Supreme Court in *Patel*? This issue requires us to consider whether *Clunis* cannot stand with *Patel* within the meaning of the third limb in *Young*.

37. If Ms Henderson were to the succeed on all of these issues, then a fourth issue would arise, namely whether Ms Henderson's claim is barred by illegality applying the test set out by Lord Toulson in *Patel*.

38. The primary argument of Ms Henderson is that *Clunis* does not survive *Patel* and that Lord Phillips' reservations were approved by the majority of the House of Lords in *Gray*. The question of whether she can succeed is, it is submitted, at large and this court should decide that her case is not barred for public policy reasons by applying the test set out by Lord Toulson in *Patel*.

39. The Trust submits that the ratios of both *Clunis* and *Gray* bind this court with the consequence that we should dismiss Ms Henderson's appeal, as all of the heads of her claim claimed are barred by illegality. Further, the second reservation of Lord Phillips was not approved by the majority of the House of Lords in *Gray* and the judgment in *Clunis* can stand with *Patel* so that it is not impliedly overruled. The fourth issue does not fall for consideration on the Trust's primary case. If, however, Ms Henderson succeeds on the first three issues, the Trust submits that her case would be barred for illegality if the test of Lord Toulson in *Patel* is applied.

Clunis

40. The plaintiff in *Clunis*, who had a history of mental health problems and had been detained under section 3 of the MHA 1983, killed a man after having been discharged from hospital and while he was receiving after-care services by the defendant health authority under section 117 of the MHA 1983. He pleaded guilty to manslaughter on the ground of diminished responsibility. His plea was accepted. The trial judge ordered that he be detained in a secure hospital, pursuant to section 37 of the MHA 1983, subject to an indefinite restriction order under section 41 of the MHA 1983.

41. The plaintiff brought proceedings against the defendant health authority for negligence and breach of duty of care on the ground that, if he had been properly treated, he would not have killed his victim and would not have been convicted of the offence of manslaughter. He alleged that the consequence of the defendant's

breach of duty was that he would be detained for longer than he otherwise would have been under section 3 MHA 1983 and that he was unlikely to regain his liberty for many years. His case was that his damages were caused by or directly related to his criminal sentence. The defendant applied for an order striking out the plaintiff's claim on the ground that the claim was based substantially, if not entirely, upon the plaintiff's own illegal act. The application was dismissed at first instance. The defendant appealed to the Court of Appeal.

42. The Court of Appeal rejected the plaintiff's submission that the illegality defence does not apply to causes of action in tort. Beldam LJ, giving the judgment of the Court, said (at 987A-C) that, whether a claim is founded in contract or in tort, public policy requires 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 seeks to rely upon the illegal acts:

> "We did not consider that the public policy that the court will not lend its aid to a litigant who relies on his own criminal or immoral act is confined to particular causes of action.
>
> In our view the plaintiff's claim does arise out of and depend upon proof of his commission of a criminal offence."

43. Beldam LJ referred (at 988H) to a submission of the plaintiff's counsel that many summary offences were not sufficiently serious to warrant invocation of the illegality defence and that, where the degree of responsibility was diminished by reason of mental disorder, the court should not apply the defence. That submission was firmly rejected in the following way (at 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 [the victim] 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. We do not consider that in such a case a court can or should go behind the conviction … The plaintiff in this case, though his responsibility is in law reduced, must in Best C.J.'s words be presumed to have known that he was doing an unlawful act."

44. The Court summarised its conclusion (at 990D-E) as follows:

> "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."

45. *Clunis* was approved by the majority of the House of Lords in *Gray*. Lord Hoffmann (with whom Lord Scott agreed) considered *Clunis* from [34] to [35] and [38] to [51] without criticism. Lord Rodger cited *Clunis* with apparent approval at [66]. Lord Hoffmann characterised the *ratio* of *Clunis* into a narrow and a wider rule i.e. that restricted to the facts and that derived from the reasoning. The former is authority for the proposition that a person who has been convicted of a serious criminal offence cannot recover damage in tort which is the consequence of a sentence of detention imposed upon that person for the criminal act whereas the latter is authority for the proposition that such a person cannot recover for damage which is the consequence of that person's criminal act.

46. On the face of it, by reason of the general statement of principle quoted in paragraphs [42] – [44] above, as a matter of public policy there is a defence of illegality to all Ms Henderson's claims for damages because: (1) Ms Henderson has been convicted of a serious criminal offence; (2) it cannot be said that she did not know the quality and nature of her act or that what she was doing was wrong since her mental state did not justify a verdict of not guilty by reason of insanity under the *M'Naghten* rules; (3) in such a case the court cannot and should not go behind the conviction in order to ascertain whether she had no responsibility for the serious crime to which she pleaded guilty; and (4) she seeks to rely on her illegal act of manslaughter to advance her claims.

47. Viewed more narrowly, in light of the actual claim of the plaintiff in *Clunis* being limited to damages for continued detention as a result of the sentence imposed for manslaughter, that case is binding authority only for the proposition that the defence of illegality bars Ms Henderson's claim for damages relating to her loss of liberty caused by her compulsory detainment in hospital pursuant to sections 37 and 41 of the MHA 1983 as amended - i.e. the second head of her six heads of damage (see [22] above). On this limited approach, if *Clunis* were the only authority, Ms Henderson's remaining heads of damage would still be at large.

Gray

48. The claimant in *Gray* was a passenger on a train which crashed due to the negligence of the two defendants, which were the operator of the train and the entity responsible for the rail infrastructure respectively. As a result of the crash, Mr Gray suffered psychiatric injury in the form of PTSD, depression and substantial personality change. He was previously of unblemished character. Two years after the accident and while under medical treatment he killed a man who had stepped in front of his car and whom he pursued and repeatedly stabbed. He pleaded guilty to manslaughter on the ground of diminished responsibility. His plea was accepted. He was ordered to be detained in a hospital pursuant to section 37 of the MHA 1983, subject to an indefinite restriction order under section 41 of the MHA 1983.

49. Mr Gray brought proceedings in negligence against the defendants, who admitted liability. He claimed damages for loss of earnings until the date of trial and continuing subsequently. For the period between the railway accident and the killing, he was from time to time employed and claimed the difference between what he actually earned and what he would have earned had he continued in his previous occupation. That head of loss was not in dispute. For the period during which he had been detained after the killing, he claimed the whole of what he would have earned in his previous occupation. The claim for future loss was based

on the assumption that, after release from hospital, he would be unlikely to find employment. He also claimed general damages for his detention, conviction, feelings of guilt and remorse and damage to reputation and an indemnity against any claims which might be brought by dependents of the person he killed. All of those heads of loss were in issue.

50. The question that was isolated for preliminary determination (without any formal direction for a preliminary issue) was whether the claims that were in issue were precluded on grounds of public policy as compensation for the consequences of the claimant's own criminal act. The House of Lords held that they were all barred.

51. It is of note that all four members of the appellate committee who gave substantive reasoned speeches referred to *Clunis*. None suggested that it had been wrongly decided. That was confirmed by Lord Toulson in *Patel* at [28]. The only issue between them was as to the scope of the principle for which it is authority.

52. Lord Hoffmann identified (at [32]) the two forms of the relevant rule of public policy that we have referred to as the wider and narrower rules. He said that, in its wider form, the rule is that you cannot recover compensation for loss which you have suffered in consequence of your own criminal act; and, in its narrower form, the rule is that you cannot recover for damage which flows from loss of liberty, a fine or other punishment lawfully imposed upon you in consequence of your own unlawful act. In a case falling within the narrower rule, he said, it is the law which, as a matter of penal policy, causes the damage and it would be inconsistent for the law to require you to be compensated for that damage.

53. Lord Hoffman said (at [34]) that *Clunis* is the leading English authority on the narrower rule. He explained, however, that the defendant health authority in that case relied upon the wider version of the rule, and (quoting the passage in paragraph [43] above) that Beldam LJ, giving the judgment of the court, accepted that submission. Lord Hoffmann cited other domestic case law, in particular, *Worrall v British Railways Board* [1999] CA Transcript No 684, (supported by the Law Commission of England and Wales and a number of Commonwealth decisions) as authority for the narrower rule. He said (at [37]) that, in the context of that rule, the inconsistency is 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. He said (at [41]) that the narrower rule was, therefore, well established.

54. He rejected the submission that Mr Gray's sentence of detention in a hospital reflected the fact that he was not really being punished but detained for his own good to enable him to be treated for PTSD. His view was that (1) the sentence imposed by a court for a criminal offence is usually for a variety of purposes and it would be impossible to make distinctions on the basis of what appeared to be its predominant purpose; and (2) it had to be assumed that the sentence (in that case, the restriction order) was what the criminal court regarded as appropriate to reflect the personal responsibility of the accused for the crime he had committed. He concluded (at [43]) that the Court of Appeal rightly had held that it was bound by the decision in *Clunis* to apply the narrow rule and to reject the claim for damage suffered in consequence of the criminal court's sentence of detention; and (at [44]) that it was sufficient to say 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.

55. Lord Hoffmann decided (at [50]) that Mr Gray's claims for loss of earnings after his arrest and the general damages for his detention, conviction and damage to reputation 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.

56. Lord Hoffmann then turned to the claim for an indemnity against any claims which might be brought by dependents of the man killed by Mr Gray 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. He said (at [51]) that the wider version of the rule had the support of the reasoning of the Court of Appeal in *Clunis* as well as other authorities. He explained that the wider rule cannot be justified on the grounds of inconsistency in the same way as the narrow rule; rather it has to be justified on the grounds 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. He observed that the wider rule may raise problems of causation which cannot arise in connection with the narrow rule. While the sentence of the court is plainly a consequence of the criminality for which the claimant was responsible, other forms of damage may give rise to questions about whether they can properly be said to have been caused by his criminal conduct.

57. Lord Hoffmann elaborated on this causation issue as follows (at [54]:

> "This distinction, between causing something and merely providing the occasion for someone else to cause something, is one with which we are very familiar in the law of torts. It is the same principle by which the law normally holds that even though damage would not have occurred but for a tortious act, the defendant is not liable if the immediate cause was the deliberate act of another individual. Examples of cases falling on one side of the line or the other are given in the judgment of Judge LJ in *Cross v Kirkby* [2000] CA Transcript No 321. It was Judge LJ, at para 103, who formulated the test of "inextricably linked" which was afterwards adopted by Sir Murray Stuart-Smith in *Vellino v Chief Constable of the Greater Manchester Police* [2002] 1 WLR 218. Other expressions which he approved, at paras 100 and 104, were "an integral part or a necessarily direct consequence" of the unlawful act (Rougier J: see *Revill v Newbery* [1996] QB 567, 571) and "arises directly *ex turpi causa*": Bingham LJ in *Saunders v Edwards* [1987] 1 WLR 1116, 1134. It might be better to avoid metaphors like "inextricably linked" or "integral part" and to treat the question as simply one of causation. Can one say that, although the damage would not have happened but for the tortious conduct of the defendant, it was caused by the criminal act of the claimant? (*Vellino v Chief Constable of the Greater Manchester Police* [2002] 1 WLR 218). Or is the position that although the damage would not have happened without the criminal act of the claimant, it was caused by the tortious act of the defendant? (*Revill v Newbery* [1996] QB 567)."

58. Lord Hoffmann concluded (at [55]) that, however the causation test is expressed, the wider rule covered the remaining heads of damage claimed by Mr Gray. He

said that Mr Gray's liability to compensate the dependants of the man he killed was an immediate "inextricable" consequence of his having intentionally killed him, and the same was true of his feelings of guilt and remorse.

59. Lord Rodger adopted (at [66]) the Law Commission's rationale for the outcome in *Clunis*, which was the principle of consistency, or, in Lord Hoffman's terms, the narrow rule. Having referred to Commonwealth authority to the same effect, Lord Rodger said (at [69]) that this line of authority, with which he agreed, showed 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.

60. Lord Rodger rejected Mr Gray's claim to loss of earnings on that ground. He rejected any suggestion that Mr Gray was not sufficiently culpable to engage the rule of public policy. He said (at [78]) that the civil courts had to proceed on the basis that, even though Mr Gray's responsibility for the killing was diminished by his stress disorder, he nevertheless knew what he was doing when he committed the killing and he was responsible for what he did. He said that it had to be assumed that the disposals adopted by the criminal courts were appropriate in all the circumstances, including the circumstance that Mr Gray was suffering from PTSD. He added that, while it is correct to say that a hospital order, even with a restriction, is not regarded as a punishment, this did not mean that the criminal trial judge was treating Mr Gray as not being to blame for what he did. He said that, even where there is culpability, a hospital order with a restriction order may well be the appropriate way to deal with a dangerous and disordered person; and that the court therefore had to proceed on the basis that the criminal trial judge correctly considered that the orders which she made were necessary for the protection of the public from serious harm, having regard, in particular, to Mr Gray's violent attack.

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

62. Lord Rodger then turned to the other heads of claim. He agreed (at [84]) with Lord Hoffmann that those claims were not a consequence of the sentence of the criminal court, and so could not be disposed of on the ground of inconsistency. He, nevertheless, agreed with Lord Hoffmann that they should be rejected. He said that this was either on the public policy ground that Mr Gray should not be entitled to an indemnity or damages for any loss or damage suffered by him in consequence of his having committed the assault and killing, or, alternatively, by treating the claims as simply raising issues of causation and so to be disposed of as Lord Hoffmann had explained.

63. Lord Scott agreed (at [56]) with both Lord Hoffmann and Lord Rodger.

64. There was debate before the Judge in this case and before us as to the proper interpretation and application of various parts of the speeches of Lord Phillips and Lord Brown. We shall comment briefly on that debate in due course. In view of the agreement of the majority, comprising Lord Hoffmann, Lord Rodger and Lord Scott, this appeal does not turn on that debate. In summary, the majority agreed in *Gray* on the following. First, *Clunis* was correctly decided. Second, in the context of a criminal conviction for unlawful killing, there is a wider and a narrower form of public policy which precludes a claim by the killer from recovering damages in proceedings for negligence against the person whose act or omission is alleged to have been responsible for bringing about the claimant's unlawful conduct in carrying out the killing. Third, the narrower form is that there can be no recovery for damage which flows from loss of liberty, a fine or other punishment lawfully imposed in consequence of the unlawful act since it is the law, as a matter of penal policy, which causes the damage and it would be inconsistent for the law to require compensation for that damage. Fourth, the wider form is a combination of public policy and causation. If the tortious conduct of the defendant merely provided the occasion or opportunity for the killing, but (in causation terms) the immediate cause of the damage was the criminal act of the claimant, it is offensive to public notions of the fair distribution of resources that a claimant should be compensated (usually out of public funds) for such damage.

65. The consequence of those principles, which bind this court, is that all the heads of loss claimed by Ms Henderson in the present case are barred as a matter of public policy.

66. We observe that the claim for loss said to have arisen because Ms Henderson failed in her application under the FA 1982 to obtain an order entitling her to recover the full share of her mother's estate is particularly egregious. Section 2(2) of the FA 1982 provides that, in deciding whether or not to modify the effect of the forfeiture rule, the court must have regard to the conduct of the offender and of the deceased and to such other circumstances as appear to the court to be material and to the justice of the case. Accordingly, all matters relevant to the responsibility of Ms Henderson for the killing of her mother were relevant on that application. It would be manifestly inconsistent and entirely inappropriate for the court in the present proceedings to enable Ms Henderson to recover from the defendant what the court did not permit her to recover on her application for relief under the FA 1982.

67. Mr Nicholas Bowen QC, for Ms Henderson, sought to support her case by relying on *obiter* statements of Lord Phillips, Lord Rodger and Lord Brown in *Gray*.

68. Lord Phillips said (at [7]) that he agreed with Lord Hoffmann and Lord Rodger, and for the reasons they gave, that public policy prevented Mr Gray from recovering damages for his detention and its consequences. He agreed with Lord Hoffmann's identification of a wider and a narrower rule of public policy applicable to the case. He expressed disagreement, however, with Lord Hoffmann's view that one cannot distinguish a sentence on the basis of its predominant purpose and that it must always be assumed that the sentence imposed by the court for a criminal offence is what the criminal court regards as appropriate to reflect the personal responsibility of the accused for the crime he has committed. He said (at [8]) that, while that statement was true of the sentence imposed by the trial judge in the case of Mr Gray, it would not always be true of a hospital order imposed under section 37 of the MHA 1983.

69. Lord Phillips elaborated on that reservation in paragraphs [13]-[15] of his speech. He observed that, in the case of an offender suffering from psychopathic disorder, under section 45A of the 1983 Act (inserted by section 46 of the Crime (Sentences) Act 1997) a court could combine a hospital order with a penal sentence.

70. He postulated (at [15]) "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. He said that in such a case 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, and in that event the public policy defence of "*ex turpi causa*" would not apply. He then said:

> "... 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."

71. It is that passage on which Mr Bowen relied.

72. Lord Phillips, when referring to Lord Rodger, must have been referring to paragraph [83] of Lord Rodger's speech where Lord Rodger said as follows:

> "That is the appropriate approach on the facts of this case. The position might well be different if, for instance, the index offence of which a claimant was convicted were trivial, but his involvement in that offence revealed that he was suffering from a mental disorder, attributable to the defendants' fault, which made it appropriate for the court to make a hospital order under section 37 of the 1983 Act. Then it might be argued that the defendants should be liable for any loss of earnings during the claimant's detention under the section 37 order, just as they should be liable for any loss of earnings during his detention under a section 3 order necessitated by a condition brought about by their negligence. That point does not arise on the facts of this case, however, and it was not fully explored at the hearing. Like my noble and learned friend, Lord Phillips of Worth Matravers, I therefore reserve my opinion on it."

73. Lord Brown said (at [103]) that he was "in substantial agreement with all that others have said including not least the reservations expressed by … Lord Phillips … at paragraph 15 of his opinion".

74. It is impossible to see that those passages can provide any support for Ms Henderson's appeal. Lord Phillips' speculation on the factual scenario postulated in paragraph [15] was not only *obiter* but was expressly made on the footing that it had not been explored at the hearing, and he reserved his position on it. For his part, Lord Rodger did not address at all the scenario postulated by Lord Phillips in paragraph [15]. Lord Rodger's speculation was, moreover, limited to a case where the index offence of which a claimant was convicted was trivial – a case which, he accepted, had not been explored at the hearing and on which he reserved his opinion.

75. Accordingly, a majority of the appellate committee (Lords Hoffmann, Rodger and Scott) did not agree with the observations of Lord Phillips at paragraph [15] of his speech, at the very least insofar as those observations were intended to apply to a serious crime such as manslaughter.

76. At the end of the day, the position quite simply is that the critical elements of the present case, *Clunis* and *Gray* are materially identical so far as concerns the application of public policy. Subject to any implied overruling by *Patel* v *Mizra*, public policy applies to all three in the same way and to the same effect.

The effect of *Patel v Mizra*

77. Both *Clunis* and *Gray* are binding authority that Ms Henderson's claim for damages is barred on the ground of public policy unless *Clunis* has been overruled and the Supreme Court decided to depart from its previous decision in *Gray* in a material respect in accordance with the House of Lords 1966 Practice Statement at [1966] 1 WLR 1234.

78. Mr Bowen did not refer to the 1966 Practice Statement but based this part of his submissions on the analysis in *Young* as to the circumstances in which the Court of Appeal is not bound by its previous decisions and those of courts of co-ordinate jurisdiction. It was held in that case that there are three exceptions to the rule of precedent that the Court of Appeal is bound to follow its own decisions and those of courts of co-ordinate jurisdiction. One of those exceptions, identified at pages 725-726 of *Young*, and relied upon by Mr Bowen, is where a previous decision, although not expressly overruled, cannot stand with a subsequent decision of the House of Lords.

79. In *Patel* the issue was whether a claim to recover money paid to the defendant pursuant to an agreement for use of the money in betting on the movement of shares on the basis of inside information, contrary to the prohibition on insider dealing in section 52 of the Criminal Justice Act 1993, was barred by illegality. The Supreme Court, sitting as a nine judge court, upheld the decision of the Court of Appeal that it was not. Lord Toulson, with whom four other Supreme Court justices agreed, said (at [9]) that the issue in the case was:

> "... whether Lord Mansfield CJ's maxim in *Holman v Johnson* (1775) 1 Cowp 341, 343, that "no court will lend its aid to a man who found his cause of action upon an immoral or illegal act" precludes a party to a contract tainted by illegality from recovering money paid under the contract from the other party under the law of unjust enrichment."

80. Lord Neuberger, the sixth Supreme Court Justice who agreed with Lord Toulson and the four Supreme Court Justices who agreed with him that the appeal should be dismissed, also framed the issue as one concerning illegality and contract. He said (at [145]):

> "The present appeal concerns a claim for the return of money paid by the claimant to the defendant pursuant to a contract to carry out an illegal activity, and the illegal activity is not in the event proceeded with owing to matters beyond the control of either party."

81. It is clear, however, that the analysis of law in order to answer that issue was not confined to contract cases. Indeed, *Gray* itself was mentioned in the judgments of

Lord Toulson, Lord Kerr and Lord Neuberger, that is to say by all those of the majority who gave substantive judgments. They also all mentioned the decision of the House of Lords in *Hounga* v *Allan* [2014] UKSC 47, [2014] 1 WLR 2889, a case of unlawful discrimination contrary to section 4(2)(c) of the Race Relations Act 1976.

82. Lord Toulson's conclusion on the correct approach is framed in general terms (at [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."

83. He then set out how the courts should approach the question at [101]:

> "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."

84. And at [109]:

> "109 The courts must obviously abide by the terms of any statute, but I conclude that it is right for a court which is considering the application of the common law doctrine of illegality to have regard to the policy factors involved and to the nature and circumstances of the illegal conduct in determining whether the public interest in preserving the integrity of the justice system should result in denial of the relief claimed. I put it in that way rather than whether the contract should be regarded as tainted by illegality, because the question is whether the relief claimed should be granted."

85. He brought the elements together at [120]:

> "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 by than the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate."

86. The Supreme Court expressly held that *Tinsley* v *Milligan* [1994] 1 AC 340 (a mutual understanding or informal agreement case, in which the House of Lords laid down what subsequently became known as the 'reliance principle' that a claim is barred by illegality if the claimant has to rely on his or her own illegality to prove his title to disputed property) is no longer good law. In reaching their conclusion, the majority in *Patel* also showed that they favoured the more flexible and nuanced approach of the Supreme Court in *Hounga* where Lord Wilson, with whom the majority agreed, said (at [42]) that it was necessary to ask what aspect of public policy founds the defence and whether there is another aspect of public policy to which application of the defence would run counter.

87. Nevertheless, in view of the actual contractual and unjust enrichment issue in *Patel*, considerable caution must be taken, in the context of the rules of binding precedent, in determining whether there are any other cases in other areas of the law which the Supreme Court in *Patel* held by necessary implication to be overruled or such that they should no longer be followed.

88. Lord Neuberger, for example, expressed his conclusion explicitly by reference to contract cases when he said (at [174]):

> "I have come to the conclusion that the approach suggested by Lord Toulson JSC in para 101 above provides as reliable and helpful guidance as it is possible to give in this difficult field. When faced with a claim based on a contract which involves illegal activity (whether or not the illegal activity has been wholly, partly or not at all undertaken), the court should, when deciding how to take into account the impact of the illegality on the claim, bear in mind the need for integrity and consistency in the justice system, and in particular (a) the policy behind the illegality, (b) any other public policy issues, and (c) the need for proportionality."

89. Again, Lord Toulson's discussion of proportionality was in the context of contract claims: see [107]. It is impossible to discern in the majority judgments in *Patel* any suggestion that *Clunis* or *Gray* were wrongly decided or to discern that they cannot stand with the reasoning in *Patel*. As we conclude above, *Clunis* was approved in *Gray*. *Gray* was referred to in the judgments of Lord Toulson ([28]-[32]), Lord Kerr ([129]) and Lord Neuberger ([153] and [155]) but in each case with approval of the way the matter had been approached by Lord Hoffmann in *Gray* in identifying the considerations underlying and justifying the rule of public policy. There was no suggestion of any kind that either the approach of Lords Hoffmann, Rodger and Scott or the decision in *Gray* was incorrect.

90. Furthermore, as is set out above, it is clear that the members of the appellate committee in *Gray* had considered issues which might undermine the application of the rule of public policy applicable in situations such as that in *Gray*, *Clunis* and

the present case. They considered the situation where the mental illness of a claimant in tort proceedings against a health authority meant that, despite the conviction for manslaughter which predicates that the claimant committed the offence with intent to kill or to cause grievous bodily harm, they bore no or insignificant responsibility for the killing. As stated above, Lords Hoffmann, Roger and Scott were of the view that the claim against the health authority should, nevertheless, be barred on grounds of public policy.

91. For those reasons, *Gray* remains binding on us and so does *Clunis*.

92. Mr Bowen mentioned a number of other cases on the issue of precedent in the light of *Patel*, including *N v Poole Borough Council* [2017] EWCA Civ 2185, [2018] 2 WLR 1693, and *Browning v The War Office* [1963] 1 QB 750, but they all turn on their particular facts and are of no assistance in meeting the above analysis.

93. In that circumstance, Ms Henderson does not succeed on any of the three issues identified in this appeal. It is, therefore, unnecessary to consider the fourth issue.

Conclusion

94. For the reasons set out above, we dismiss this appeal.

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APPENDIX

The agreed statement of facts

Background to the claim

1. EH, the claimant ("C") was born on 10 August 1971. She has been diagnosed at different times as suffering from paranoid schizophrenia or schizoaffective disorder.

2. C began experiencing problems with her mental health in 1995. From about 2003 she had various formal (pursuant to the Mental Health Act 1983) and informal hospital admissions.

3. Between April 2006 and June 2008 C was detained in hospital pursuant to section 3 of the 1983 Act.

4. In June 2008 C was granted leave from hospital pursuant to section 17 of the 1983 Act to enable her to live in the community. She was subsequently discharged from detention and placed on a community treatment order ("CTO") made under section 17A of the 1983 Act (as inserted by section 32(2) of the Mental Health Act 2007) on 14 January 2009. Her care plan stated that there should be a low threshold for recall to hospital pursuant to section 17E(1) of the 1983 Act.

5. In August 2010 C was living in supported accommodation, Queensland Lodge pursuant to the CTO. She had resided there since November 2009. During this period C was under the care of the Southbourne community mental health team ("SCMHT"), managed and operated by the defendant ("D").

6. On or around 13 August 2010 C began to experience a relapse of her psychiatric condition. In particular on that date she missed her depot appointment with her community psychiatric nurse ("CPN").

7. On 16 August 2010 the missed depot injection was administered to C on a relief visit.

8. On 20 August 2010 C failed to attend her voluntary work at the CRUMBS bakery project.

9. On 23 August 2010 C missed an appointment with the occupational therapist in vocational services.

10. At around 16.15 on 23 August 2010 C was visited by a housing support worker, Ms Loynes, from the supported living accommodation in Queensland Lodge. At first C would not answer the door. When she did she would either not make eye contact or would stare intensely. She appeared agitated. C disclosed that she felt unwell, wanted the SCMHT to be contacted and had not slept the previous night.

11. Ms Loynes made contact with SCMHT and reported to Rochella Harvey, a community mental health nurse that C's mental state was deteriorating and that she had not seen her like this before. Ms Loynes was asked if C was at risk of suicide or self-harm. Ms Loynes was unable to express a view on these matters. Ms Loynes asked for someone to come out and assess C but was told that as C did not appear to be at immediate risk the SCMHT would wait until 25 August to carry out any assessment when C's previous care co-ordinator would be available.

12. Ms Harvey discussed C's case with Shane Sadler, who agreed to review her case the following day having consulted with Emer Kelly (CPN) from the SCMHT who knew C well and had provided her with the depot injection on 16 August 2010.

13. At 09.00 on 24 August 2010 Ms Loynes again telephoned the SCMHT for an update on the plan for C. She was told a plan was being put in place and she would be contacted.

14. On 24 August 2010 the plan devised by Mr Sadler was to involve C's care co-ordinator to assess her mental health on 25 August 2010.

The offence

15. At approximately midday on 25 August 2010 one of C's work colleagues, Samantha, attended Queensland Lodge out of concern for C whom she had not seen for a couple of days. Samantha rang on C's door bell but she would not answer it, despite Samantha being able to see C pacing around inside her flat.

16. Samantha contacted Ms Loynes to express her concerns about C's mental health.

17. C's mother then arrived outside her flat. She informed Samantha that she had been trying to get hold of C for several days without success. C's mother knocked on the door demanding to be let in, she then went down to the garden to make a phone call to Ms Loynes to express her concern about the C's mental health and ask if she could be let into the flat.

18. At this point Samantha looked through the C's letter box and saw that C had picked up a large kitchen knife. C came to the door with the knife. Samantha described C as looking like a different person to the one she knew. Samantha ran down the stairs to the garden and shouted to C's mother to ring the police as C had a knife. C's mother was in the back garden of the flats at this point.

19. While C's mother was on the phone to the police C approached her mother and stabbed her. C's mother is described as trying to get away while C continued to stab her. C stabbed her mother 22 times.

20. C then walked out of the garden into an alleyway and onto the street. She walked into Boscombe and was seen by several people, covered in blood and carrying the knife. One witness described her as twirling the knife in her hand. Other witnesses described her as walking in an odd way with a detached crazy look as though she were mentally ill.

21. C was approached by the police. She would not put the knife down. The police used an incapacitant spray on her. She was then taken into custody at the Bournemouth police station.

22. Meanwhile, Ms Loynes again contacted the SCMHT. In particular she reported that she had received telephone calls from a friend of C and her mother, both reporting concerns.

23. At or about 14.27 on 25 August 2010 (at least one hour after C had killed her mother) the SCMHT agreed to Emer Kelly carrying out an assessment of C later that afternoon.

The aftermath

24. C was charged with the murder of her mother.

25. The police custody records show that C was acutely psychotic, muttering to herself, appearing vacant and preoccupied and drinking excessive amounts. On several occasions she attempted to drink from the toilet bowl (a symptom associated with schizophrenia). She was assessed in custody and deemed unfit for interview.

26. On 25 August 2010 C was admitted to a high secure mental health unit in Hampshire.

27. On 28 August 2010 C was transferred to Cygnet hospital, Beckton, a medium secure unit. She was detained pursuant to section 2 and subsequently section 3 of the 1983 Act. On admission and for several weeks afterwards Dr Lord, consultant forensic psychiatrist, describes C as very psychotic, pacing, responding to hallucinations hearing voices of friends and making stabbing gestures explaining she was stabbing her mother in the head. She showed no understanding of the gravity of what had happened and had a delusion that her mother had been resurrected as she herself had.

28. After the first court hearing C was detained pursuant to sections 48/49 of the 1983 Act.

29. Medical evidence in the criminal proceedings was obtained from Dr Caroline Bradley, consultant forensic psychiatrist and Dr Lord, consultant forensic psychiatrist.

30. Dr Bradley was asked to express an opinion as to whether or not the grounds for the defence of insanity had been established. In doing so she expressed the opinion that C, albeit floridly psychotic and under the influence of auditory hallucinations and delusions about her mother, nevertheless knew what she was doing was wrong in terms of the act of stabbing her mother and she knew that this was legally wrong. Dr Bradley also considered whether or not there was sufficient psychiatric evidence to establish the defence of diminished responsibility. Dr Bradley concluded that there was and expressed her opinion that C's mental state impaired her responsibility for the alleged offence.

31. Dr Lord expressed the view in relation to whether the psychiatric evidence supported the insanity defence that it was clear from all the evidence that C knew what she was doing when she inflicted the stab wounds on her mother, and that what she was doing was morally and legally wrong. He went on to say that she was nevertheless suffering from a profound abnormality of mental functioning at the time of the killing which at the material time substantially impaired her responsibility for the commission of the act and impaired her ability to form a rational judgement and exercise self-control, and so the defence of diminished responsibility was available to her.

32. Based upon their written evidence and the evidence at trial, the prosecution agreed to a plea of manslaughter by reason of diminished responsibility.

33. C's trial took place at the Crown Court at Winchester on 8 July 2011 before Foskett J who heard oral evidence from Dr Lord. His sentencing remarks read:

> "On whatever analysis is made, this is a desperately sad and tragic case. In August last year, shortly after your 39th birthday, you repeatedly stabbed your 69-year-old mother, as a result of which she died.
>
> "She had come to try to raise you in your flat when you had effectively locked yourself away for the previous few days. That she should die in these circumstances is the principal tragedy in this case, of course. What, however, is clear from all the evidence, expert and otherwise, is that when this awful event occurred you were in the midst of a serious psychotic episode, derived from the schizophrenia which has affected you for the best part of the last 15 years or so.
>
> "For much of that time the condition has been kept under control with the assistance, including medication, that you have received from the local psychiatric teams with whom you have been in contact. Unfortunately the team was unable to get to you in time to prevent the terrible tragedy last year.
>
> "There has, as Mr Grunwald has said, been a full review of the care being given to you at the time, and it is, I think, inappropriate for me to make any comment one way or the

other about that, save to say that it is plain that lessons have been learned from it, as I understand, having read the report.

"The one thing that is clear, from the report, is a conclusion that there was little, if any, basis for believing that your mother would be a potential victim of any violence that you might display in a psychotic episode, and that conclusion and analysis seems to have been borne out by the two expert opinions that I have read in the context of this case.

"When you recovered from that psychotic episode, as you did, you appreciated fully what you had done, and you were distressed beyond measure.

"The very detailed and comprehensive reports I have seen from Dr Bradley and Dr Lord, to whom I express my appreciation, 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 to which I have referred, and to the extent that you had little, if any, true control over what you did.

"That means that the conviction for manslaughter by reason of diminished responsibility is obviously the appropriate verdict, and the prosecution has undoubtedly correctly accepted that is so.

"It is also that mental health background that informs and largely dictates how this case should be disposed of. It is quite plain that in your own interests, and in the interests of the public, if and when you are released, that the most important consideration is the successful treatment and/or management of your condition.

"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. Had there been any such suggestion I would have given serious consideration to making an order under section 45A of the Mental Health Act 1983 , however, on the material and evidence before me that issue does not arise.

"The joint recommendation of Drs Bradley and Lord is that you should be made the subject of a hospital order under section 37 of the Act, with an unlimited restriction order under section 41 of the Act.

"Dr Bradley says in her report that your illness is difficult to treat and monitor and that 'A high degree of vigilance and scrutiny of mental state will be needed to ensure successful rehabilitation'.

"Dr Lord says in his report that the effect of such an order would be that you would be 'detained in secure psychiatric

> services for a substantial period of time in order for such treatment and rehabilitation to be completed and to ensure the safety of the public'. The restrictions imposed by section 41, he says in his report and has repeated in what he has said to me, would be 'invaluable in protecting the public from the risk of serious harm in the future'.
>
> "Given those strong and firm recommendations from two experienced psychiatrists, who examined you and your psychiatric history with very considerable care, it seems to me that this is the order that I should make, and I will make it."

34. The judge made a hospital order with restrictions pursuant to section 37/41 of the 1983 Act.

35. C has remained subject to detention pursuant to the 1983 Act ever since. She is not expected to be released for some significant time.

36. An independent investigation into the care and treatment of C by D was commissioned by the NHS South West and the Bournemouth and Poole Adults Safeguarding Board. This report (running to over 200 pages) made a number of findings and recommendations including: (a) When C relapsed, the safety net of care that should have been provided failed to operate: p 195. (b) The plan in place, that any deterioration in C's mental health would be monitored and an instant recall to hospital would be made if her mental health relapsed, was not monitored: p 195. (c) The failure from the 23 August 2010 to send someone to assess C for 36 hours constituted neglect as defined in the local safeguarding policy: p 197. (d) Whilst the killing of C's mother could not have been predicted, a serious untoward incident of some kind was foreseeable based upon C's previous behaviour when experiencing a psychotic episode. The killing of C's mother was preventable and had a rapid response been forthcoming the tragic incident would probably not have occurred: p 203.

The claim

37. On 22 August 2013 the claim form was issued claiming damages for personal injury loss and damage pursuant to the common law and the Human Rights Act 1998 . This was served on 22 November 2013.

38. A pre-action letter of claim was sent on 28 January 2014. On 12 March 2014 D made admissions and consented to judgment being entered. The court approved a consent order dated 12 May 2014 entering judgment on the claim with damages to be assessed.

39. Particulars of claim were served in September 2014 together with a schedule of loss claiming general damages both for pain suffering and loss of amenity together with general damages for loss of liberty, and special damages for losses arising out of the operation of the Forfeiture Act 1982 , and for future losses for psychotherapeutic work, and a case manager/support worker.

40. D's defence was served in November 2014. This denied C's claim for loss and put her to proof as to her entitlement to damages. The defence also denied C's claim for "deprivation of liberty" on the grounds of public policy. In response to a CPR

Pt 18 request D expanded upon this by stating that any human rights claim had been brought outside the limitation period and also that they denied the claim for "deprivation of liberty" on the grounds of public policy. On 23 November 2016 the claimant was denied permission to amend her particulars of claim to plead a human rights claim.

41. The parties and the court have agreed that the issue of public policy should be tried as a preliminary issue.