Michaelmas Term

[2020] UKSC 43

On appeal from: [2018] EWCA Civ 1841

JUDGMENT

Ecila Henderson (A Protected Party, by her litigation friend, The Official Solicitor) (Appellant) v Dorset Healthcare University NHS Foundation Trust (Respondent)

before

Lord Reed, President

Lord Hodge, Deputy President

Lady Black

Lord Lloyd-Jones

Lady Arden

Lord Kitchin

Lord Hamblen

JUDGMENT GIVEN ON

30 October 2020

Heard on 11 and 12 May 2020

Appellant	Respondent
Nicholas Bowen QC	Angus Moon QC
Katie Scott	Cecily White
Duncan Fairgrieve	Judith Ayling
	James Goudkamp
(Instructed by Russell-Cooke LLP (Putney))	(Instructed by DAC Beachcroft LLP (Bristol))

LORD HAMBLEN: (with whom Lord Reed, Lord Hodge, Lady Black, Lord Lloyd-Jones, Lady Arden and Lord Kitchin agree)

I Introduction

1.
The appellant, Ms Ecila Henderson, suffers from paranoid schizophrenia or schizoaffective disorder. On 25 August 2010 she stabbed her mother to death whilst experiencing a serious psychotic episode.

She was charged with her mother's murder but, in view of the psychiatric evidence, the prosecution agreed to a plea of manslaughter by reason of diminished responsibility. That plea was accepted by the court and on 8 July 2011 Foskett J sentenced the appellant to a hospital order under section 37 of the Mental Health Act 1983 ("the 1983 Act") and an unlimited restriction order under section 41 of the 1983 Act. The appellant has remained subject to detention pursuant to the 1983 Act ever since and she is not expected to be released for some significant time.

2.
The respondent, Dorset Healthcare University NHS Foundation Trust, has admitted liability in negligence in failing to return the appellant to hospital on the basis of her manifest psychotic state. The tragic killing of her mother would not have occurred had this been done.

3.
The appellant advances various heads of damages against the respondent as a result of its admitted negligence. Liability for these heads of damages is denied on the grounds that the damages claimed by the appellant are the consequence of: (i) the sentence imposed on her by the criminal court; and/or (ii) her criminal act of manslaughter, and are therefore irrecoverable by reason of the doctrine of ex turpi causa non oritur actio/illegality.

4.
Similar claims for damages to those made by the appellant were held to be irrecoverable by the House of Lords in Gray v Thames Trains Ltd [2009] UKHL 33; [2009] AC 1339 ("Gray"), also a case of manslaughter on the grounds of diminished responsibility. The appeal raises the question of whether Gray can be distinguished and, if not, whether it should be departed from, in particular in the light of the Supreme Court decision concerning illegality in Patel v Mirza [2016] UKSC 42; [2017] AC 467 ("Patel").

II The factual background

5.
This is set out in detail in the agreed statement of facts appended to the judgments below.

6.
In outline, the appellant 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 admissions to hospital, including formal admissions under the 1983 Act. Between April 2006 and June 2008, she was detained in hospital under section 3 of the 1983 Act. She was then 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.

7.
In August 2010 the appellant was living in supported accommodation, Queensland Lodge, pursuant to the CTO. She had resided there since November 2009. During this period, she was under the care of the Southbourne community mental health team ("SCMHT"), managed and operated by the respondent.

8.
On or around 13 August 2010, the appellant began to experience a relapse of her psychiatric condition. She missed various appointments and, on 23 August 2010, when visited by a housing support worker, Ms Loynes, she appeared agitated and either would not make eye contact or would stare intensely. Concerns were expressed to SCMHT who decided to wait until 25 August 2010 to carry out an assessment, when the appellant's previous care co-ordinator would be available.

9.
On 25 August 2010, the appellant's mother arrived outside her flat, having tried to get hold of her for several days without success. She knocked on the door demanding to be let in and then went down the garden to make a phone call to Ms Loynes to express her concern about the appellant's mental health and to ask if she could be let into the flat. Whilst she was in the garden the appellant approached her with a kitchen knife and stabbed her 22 times.

10.
The appellant then walked out of the garden into an alleyway and onto the street. She was seen by several people, covered in blood and carrying the knife. She was described by witnesses as walking in an odd way with a detached crazy look. When she was approached by the police, she would not put the knife down. The police used an incapacitant spray on her and she was then taken into custody at Bournemouth police station, where she was charged with the murder of her mother.

11.
On the same day, the appellant was admitted to a high security mental health unit. On 28 August 2010 she was transferred to a medium secure unit. She was detained pursuant to section 2 and subsequently section 3 of the 1983 Act. After the first court hearing the appellant was detained pursuant to sections 48/49 of the 1983 Act.

12.
Medical evidence in the criminal proceedings was obtained from two consultant forensic psychiatrists, Dr Caroline Bradley and Dr Adrian Lord.

13.
Dr Bradley was asked her opinion as to whether the grounds for the defence of insanity had been established. She expressed the view that the appellant, 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 there was sufficient psychiatric evidence to establish the defence of diminished responsibility. Dr Bradley concluded that there was and expressed her opinion that the appellant's mental state impaired her responsibility for the alleged offence.

14.
Dr Lord's view in relation to whether the psychiatric evidence supported the insanity defence was that it was clear from all the evidence that the appellant 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.

15.

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

16.
The appellant'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, in what he described as "a desperately sad and tragic case", included the following:

"There has … 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 45(A) of the Mental Health Act 1983, however, on the material and evidence before me that issue does not arise.

The joint recommendation of Dr Bradley and Dr 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."

17.
The judge accordingly made a hospital order with restrictions pursuant to sections 37 and 41 of the 1983 Act.

III The criminal law background

18.
The offence of murder is committed when a person unlawfully kills another with intent to kill or cause grievous bodily harm.

19.
Insanity is a defence to murder. As established in M'Naghten's case (1843) 10 Cl & F 200, in order to establish the defence it must be proved on the balance of probabilities 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" - per Tindal CJ at p 210. If the defence is established, a special verdict of not guilty by reason of insanity is returned.

20.
Diminished responsibility is a partial defence to murder which was introduced by section 2 of the Homicide Act 1957 and amended by section 52(1) of the Coroners and Justice Act 2009. In summary, the defence applies where:

(1) the defendant suffers from an abnormality of mental functioning which;

(2) arises from a recognised medical condition;

(3) substantially impaired the defendant's ability (a) to understand the nature of his or her conduct; and/or (b) to form a rational judgment; and/or (c) to exercise self-control; and

(4) caused or significantly contributed to the defendant's killing of the deceased.

21.
Prior to the amendments introduced by section 52(1) of the Coroners and Justice Act 2009, the partial defence applied where an abnormality of mind substantially impaired the defendant's "mental responsibility" for the killing.

22.
The partial defence only arises where the defendant would otherwise be convicted of murder. As Lord Hughes explained in R v Golds [2016] UKSC 61; [2016] 1 WLR 5231, para 36:

"By definition, before any question of diminished responsibility can arise, the homicide must have been done with murderous intent, to kill or to do grievous bodily harm, and without either provocation or self-defence."

23.
If the partial defence is made out, then the defendant who would otherwise be convicted of murder will instead be convicted of manslaughter.

24.
Manslaughter by reason of diminished responsibility is a serious specified offence for the purposes of sections 224 and 225(2) (life sentences for serious offences) of the Criminal Justice Act 2003.

25.
The Sentencing Council Guideline (effective 1 November 2018) for the offence ("the Guideline") directs the sentencing judge to consider whether the offender's degree of responsibility is high, medium or lower. In relation to harm the Guideline states that: "For all cases of manslaughter the harm caused will inevitably be of the utmost seriousness." Recommended custodial sentence starting points and category ranges are then set out.

26.
In appropriate cases a mental health disposal under the 1983 Act may be made. In such cases the court should first consider whether to order custody with a hospital and limitation direction under section 45A of the 1983 Act. Such a direction should be made "if a penal element is appropriate and the mental disorder can appropriately be dealt with" by a section 45A direction. If such a direction is not appropriate, then the court must consider whether to make a hospital order under section 37 of the 1983 Act. Such an order may be made with or without a restriction order under section 41 of the 1983 Act.

27.
A helpful explanation of orders under section 37 and section 41 of the 1983 Act is provided by Mustill LJ in R v Birch (Beulah) (1989) 11 Cr App R (S) 202, 210-211. As Mustill LJ there states, a section 37 order means that 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". By contrast, where a restriction order under section 41 is made the circumstances of his detention are fundamentally different:

"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."

IV The proceedings below

28.
The appellant claimed damages under six heads of loss:

(1)
General damages for personal injury (a depressive disorder and post-traumatic stress disorder ("PTSD")) consequent on her killing of her mother.

(2)
General damages for her loss of liberty caused by her compulsory detention in hospital pursuant to sections 37 and 41 of the 1983 Act.

(3)
General damages for loss of amenity arising from the consequences to her of having killed her mother.

(4)

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 Forfeiture Act 1982.

(5)
The cost of psychotherapy (by way of future loss).

(6)
The cost of a care manager/support worker (by way of future loss).

29.
In view of the respondent's position that the heads of loss were irrecoverable as a matter of law, on 17 February 2016 Master Cook ordered that there be a trial of a preliminary issue to determine that question.

30.
The preliminary issue was heard over two days by Jay J who decided the issue in the respondent's favour: Henderson v Dorset Healthcare University NHS Foundation Trust [2016] EWHC 3275 (QB); [2017] 1 WLR 2673. Jay J held that the facts were materially identical to those in Clunis v Camden and Islington Health Authority [1998] QB 978 ("Clunis") and Gray and that those decisions were binding on him.

31.
The Court of Appeal (Sir Terence Etherton MR, Ryder and Macur LJJ) dismissed the appellant's appeal against the order of Jay J: Henderson v Dorset Healthcare University NHS Foundation Trust [2018] EWCA Civ 1841; [2018] 3 WLR 1651. Like Jay J, the Court of Appeal held that the facts were materially identical to those in Clunis and Gray and that those decisions were binding on it.

V The issues

32.
The principal issues to be determined on the appeal are:

(1)
Whether Gray can be distinguished.

(2)
If not, whether Gray should be departed from and Clunis overruled.

(3)
If not, whether all heads of loss claimed are irrecoverable.

33.
On issue (2), the appellants contend that Gray should be departed from and Clunis overruled on a number of grounds, in particular:

(i)
The reasoning in Gray cannot stand with the approach to illegality adopted by the Supreme Court in Patel.

(ii)
Gray should be held not to apply where the claimant has no significant personal responsibility for the criminal act and/or there is no penal element in the sentence imposed.

(iii)
The application of the trio of considerations approach set out in Patel leads to a different outcome.

34.
It will be apparent that what was decided in Clunis, Gray and Patel is of central importance to the appeal.

35.
I shall consider first the House of Lords decision in Gray. Although it came after the Court of Appeal decision in Clunis, which it approved, as a decision of the House of Lords it is the case of most relevance to this court and Clunis stands or falls with it.

(i) Gray

36.
The claimant, Mr Gray, was a passenger on a train involved in a major railway accident as a result of which he suffered PTSD. Whilst suffering from that disorder he killed a man. He pleaded guilty to manslaughter on the grounds of diminished responsibility and he was ordered to be detained in a hospital under sections 37 and 41 of the 1983 Act. The claimant brought an action in negligence against the defendants, a train operator and the company responsible for the rail infrastructure. The defendants admitted negligence but claimed that public policy precluded the recovery of losses incurred after the date of the manslaughter by reason of the ex turpi causa doctrine. The claim for damages included damages which were the result of the sentence imposed on him, such as general damages for his detention and loss of earnings during it (“the narrow claim”). It also included damages which were the result of the killing, such as general damages for feelings of guilt and remorse consequent upon the killing and an indemnity against any claims which might be brought by dependants of the deceased (“the wide claim”). The House of Lords held that both the narrow and the wide claims were precluded by the operation of the ex turpi causa doctrine.

37.
The leading judgments were given by Lord Hoffmann and Lord Rodger, with both of whom Lord Scott agreed.

38.
Lord Hoffmann summarised the appellant defendants’ argument in the following terms at para 29:

“Their principal argument invokes a special rule of public policy. In its wider form, it is that you cannot recover compensation for loss which you have suffered in consequence of your own criminal act. In its narrower and more specific form, it is that you cannot recover for damage which flows from loss of liberty, a fine or other punishment lawfully imposed upon you in consequence of your own unlawful act. In such a case it is the law which, as a matter of penal policy, causes the damage and it would be inconsistent for the law to require you to be compensated for that damage.”

39.
Lord Hoffmann considered the narrower rule first. He held that it was well established by authority in this country and in the Commonwealth. He said that the rule was based on inconsistency. As he explained at para 37:

“The inconsistency is between the criminal law, which authorizes the damage suffered by the plaintiff in the form of loss of liberty because of his own personal responsibility for the crimes he committed,

and the claim that the civil law should require someone else to compensate him for that loss of liberty."

40.
He rejected the submission that the narrower rule did not apply because the sentence of detention in hospital under sections 37 and 41 of the 1983 Act was not a punishment but rather detention for treatment. As he stated at para 41:

"… it has been submitted in this case that the sentence of detention in a hospital reflected the fact that Mr Gray was not really being punished but detained for his own good to enable him to be treated for post-traumatic stress disorder. But the sentence imposed by the court for a criminal offence is usually for a variety of purposes: punishment, treatment, reform, deterrence, protection of the public against the possibility of further offences. It would be impossible to make distinctions on the basis of what appeared to be its predominant purpose. In my view it must be assumed that the sentence (in this case, the restriction order) was what the criminal court regarded as appropriate to reflect the personal responsibility of the accused for the crime he had committed. As one commentator has said 'Tort law has enough on its plate without having to play the criminal law's conscience': see EK Banakas [1985] CLJ 195, 197. …"

41.
He affirmed the narrower rule and held that it barred the narrow claim. As he stated at para 50:

"Mr Gray's claims for loss of earnings after his arrest and for general damages for his detention, conviction and damage to reputation are all claims for damage caused by the lawful sentence imposed upon him for manslaughter and therefore fall within the narrower version of the rule which I would invite your Lordships to affirm."

42.
Lord Hoffmann then considered the wider rule which he noted had the support of the reasoning of the Court of Appeal in Clunis. In that case the claimant stabbed a man to death after he had been discharged from hospital where he had been detained for treatment for a mental disorder. He pleaded guilty to manslaughter on the grounds of diminished responsibility and he was ordered to be detained in a hospital under sections 37 and 41 of the 1983 Act. He sued the local authority for damages for loss of liberty as a result of its negligence in discharging him and failing to provide adequate after care. Although the claim fell within the narrower rule, the reasoning of the court in dismissing the claim was based on the wider rule, as made clear by Beldam LJ at pp 989-990:

"In the present case the plaintiff has been convicted of a serious criminal offence. In such a case public policy would in our judgment preclude the court from entertaining the plaintiff's claim unless it could be said that he did not know the nature and quality of his act or that what he was doing was wrong. The offence of murder was reduced to one of manslaughter by reason of the plaintiff's mental disorder but his mental state did not justify a verdict of not guilty by reason of insanity. Consequently, though his responsibility for killing Mr Zito is diminished, he must be taken to have known what he was doing and that it was wrong. A plea of diminished responsibility accepts that the accused's mental responsibility is substantially impaired but it does not remove liability for his criminal act … The court ought not to allow itself to be made an instrument to enforce obligations alleged to arise out of the plaintiff's own criminal act and we would therefore allow the appeal on this ground."

43.

Lord Hoffmann said at para 51 that the wider rule could not be “justified on the grounds of inconsistency in the same way as the narrower rule” but that it was justified on the policy 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.”

44.
He then held that the wider rule meant that, as a matter of causation, if the immediate cause of the damage was the claimant’s intentional criminal conduct then it was caused by it even if that conduct would not have occurred but for the defendant’s prior negligence. Such negligence was to be regarded as merely providing the occasion for the claimant’s conduct. In conclusion he stated as follows 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.”

45.
In his judgment, Lord Rodger considered various Australian and Canadian authorities, including the decision of the Supreme Court of Canada in British Columbia v Zastowny [2008] 1 SCR 27. That case concerned a claim for wage loss during time spent in prison as a result of various offences which were alleged to have been committed as a consequence of sexual assaults by a prison officer during an earlier period of incarceration. At para 68 Lord Rodger cited with approval from the unanimous judgment of the court delivered by Rothstein J:

“22. Zastowny’s wage loss while incarcerated is occasioned by the illegal acts for which he was convicted and sentenced to serve time. In my view, therefore, the ex turpi doctrine bars Zastowny from recovering damages for time spent in prison because such an award would introduce an inconsistency in the fabric of law. This is because such an award would be, as McLachlin J described in Hall v Hebert [1993] 2 SCR 159, 178, ‘giving with one hand what it takes away with the other’. When a person receives a criminal sanction, he or she is subject to a criminal penalty as well as the civil consequences that are the natural result of the criminal sanction. The consequences of imprisonment include wage loss. …

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

…

30. … In asking for damages for wage loss for time spent in prison, Zastowny is asking to be indemnified for the consequences of the commission of illegal acts for which he was found criminally responsible. Zastowny was punished for his illegal acts on the basis that he possessed sufficient mens rea to be held criminally responsible for them. He is personally responsible for his criminal acts and the consequences that flow from them. He cannot attribute them to others and evade or seek rebate of those consequences …”

46.
Lord Rodger emphasised the importance of preventing inconsistency in the law and thereby preserving the integrity of the legal system:

“77. In British Columbia v Zastowny [2008] 1 SCR 27, 38, para 23, Rothstein J treated the need to preserve the integrity of the justice system, by preventing inconsistency in the law, as a matter of judicial policy that underlay the ex turpi causa doctrine. In other words, in the circumstances of that case the application of the ex turpi causa doctrine helped to promote the more fundamental legal policy of preventing inconsistency in the law. That such a policy exists is beyond question. In Zastowny and the preceding cases, the need was to ensure that the civil and criminal courts were consistent in their handling of the plaintiff’s criminal conduct and its consequences. But that is simply one manifestation of a desirable attribute of any developed legal system. … Likewise, in the present case, when considering the claim for loss of earnings, a civil court should bear in mind that it is desirable for the criminal and civil courts to be consistent in the way that they regard what the claimant did. As Samuels JA observed in State Rail Authority of New South Wales v Wiegold 25 NSWLR 500, 514, failure to do so would generate the sort of clash between civil and criminal law that is apt to bring the law into disrepute.”

47.
He said that the court must proceed on the basis that the claimant’s conviction and sentence were appropriate, that he was responsible for what he did and that this was not altered by the fact that orders under section 37 and 41 of the 1983 Act did not involve punishment. As he stated at para 78:

“The civil courts must therefore proceed on the basis that, even though the claimant’s responsibility for killing Mr Boultwood was diminished by his PTSD, he nevertheless knew what he was doing when he killed him and he was responsible for what he did. Similarly, it must be assumed that the disposals adopted by the criminal courts were appropriate in all the circumstances, including the circumstance that he was suffering from PTSD. Rafferty J imposed a hospital order and a restriction order. While it is correct to say that a hospital order, even with a restriction, is not regarded as a punishment, this does not mean that the judge was treating the claimant as not being to blame for what he did.”

48.
He held that the narrow claim should be rejected on the grounds of inconsistency:

“79. By imposing the hospital order with a restriction, the judge was ensuring that, because he had committed manslaughter, the claimant would not be free to move around in the community unless and until authorised to do so by the Secretary of State. … In my view, it would be inconsistent with the policy underlying the making of the orders for a civil court now to award the claimant damages for loss of earnings relating to the period when he was subject to them.

…

81. In short, the civil court should cleave to the same policy as the criminal court.”

49.
He recognised that the wide claim was not a consequence of the sentence “and so cannot be disposed of on the ground of inconsistency” but said that it should be rejected on the public policy ground that the claimant should not be entitled to be indemnified for the consequences of criminal acts for which he has been found to be criminally responsible:

“85. In British Columbia v Zastowny [2008] 1 SCR 27, 41-42, para 30, quoted at para 68 above, Rothstein J observed that a person is not entitled to be indemnified for the consequences of his criminal acts for which he has been found criminally responsible. He cannot attribute them to others or seek rebate of those consequences. Yet that is precisely what the claimant is trying to do, both in

his claim for any sum he is found liable to pay in damages to Mr Boultwood's dependants and in his claim for his feelings of guilt and remorse.

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

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

50.
As an alternative he considered that "the claims can be treated as simply raising issues of causation and disposed of as Lord Hoffmann explains" (para 87).

51.
Lord Scott agreed that the appeal should be allowed for the reasons given by Lord Hoffmann and Lord Rodger.

52.
Lord Phillips also agreed that the appeal should be allowed for the reasons given by Lord Hoffmann and Lord Rodger and at para 7 specifically agreed with "Lord Hoffmann's identification of a wider and a narrower rule of public policy, applicable in this case". He said, however, that whilst Lord Hoffmann's comments at para 37 were correct in relation to the sentence imposed in Mr Gray's case, they would not always be true of a hospital order imposed under section 37 of the 1983 Act. He referred to the explanation of such orders given by Mustill LJ in R v Birch at p 210, as summarised above. Lord Phillips then drew attention to the fact that under section 45A of the 1983 Act it was now possible to combine a hospital order with a penal sentence.

53.
Against that background Lord Phillips expressed the following reservations in relation to the application of the ex turpi causa doctrine:

"14. The comments of both Mustill LJ and Lord Bingham recognised that a mentally disordered offender whose mental condition did not satisfy the test of insanity or render him unfit to plead might 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."

54.
The first reservation made by Lord Phillips in para 15 relates to a case where the offending behaviour plays no part in the decision to impose the hospital order. His 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".

55.
The reservation made by Lord Rodger at para 83 was as follows:

"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."

56.
This reservation relates to a more specific example of Lord Phillips' first reservation, being a case where (i) the offence is trivial; (ii) the offender's involvement in the offence reveals that he is suffering from a mental disorder attributable to the defendant's negligence and (iii) that disorder makes a hospital order appropriate.

57.
Lord Brown gave a judgment of his own which he said was "in substantial agreement" with those given by others, including Lord Phillips' reservations at para 15. Like others, he rejected the narrow claim on the grounds of what he described at para 93 as the consistency principle:

"…the integrity of the justice system depends upon its consistency. The law cannot at one and the same time incarcerate someone for his criminality and compensate him civilly for the financial consequences. I shall refer to this henceforth as the consistency principle. It is the underlying rationale for the application of the ex turpi causa non oritur actio doctrine in the present context."

58.
So far as relevant to the present appeal, I would make the following observations on the judgments given in Gray in so far as they relate to public policy.

(1)
Both the narrow claim and the wide claim failed on the grounds of public policy.

(2)
All judges considered that the relevant policy in connection with the narrow claim was the need to avoid inconsistency so as to maintain the integrity of the legal system - "the consistency principle".

(3)
Lord Hoffmann did not consider that this applied to the wide claim but held that a related policy did, namely 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.” I understand this to mean that allowing a claimant to be compensated for the consequences of his own criminal conduct risks bringing the law into disrepute and diminishing respect for it. It is an outcome of which public opinion would be likely to disapprove and would thereby undermine public confidence in the law - “the public confidence principle”.

(4)
The public confidence principle is also applicable to the narrow claim. It is related to the consistency principle since one of the reasons that the public would be likely to disapprove of the outcome is the inconsistency which it involves between the criminal law and the civil law.

(5)
Although Lord Rodger appeared to consider that the consistency principle did not apply to the wide claim, the policy reasons he gives for rejecting the claim reflect that principle. The reason that a person cannot “attribute … to others” acts for which he has been found criminally responsible, or “seek rebate” of the consequences of those acts, is that it would be inconsistent with that finding of criminal responsibility. If a person has been found criminally responsible for certain acts it would be inconsistent for the civil courts to absolve that person of such responsibility and to attribute responsibility for those same acts to someone else.

(6)
Whilst the consistency principle more obviously applies to the narrow claim, on analysis it applies to the wide claim as well. In relation to the narrow claim the inconsistency is with both the criminal court’s finding of responsibility and the sentence it has imposed. In relation to the wide claim it is with the former only.

59.
That the consistency principle applies to both the narrow and the wide claims in Gray is supported and explained by Lord Sumption in his dissenting judgment in Patel at para 232:

“… the inconsistency of awarding damages representing loss arising from a criminal sentence is more obvious and direct than it is when the claimant is claiming other damages causally flowing from his commission of a crime. But it seems to me, as it did to McLachlin J and those who have adopted her approach more generally, that the internal coherence of the law is also the reason why it will not give effect in a civil court to a cause of action based on acts which it would punish in a criminal court. As Lord Hughes put it in Hounga v Allen [2014] 1 WLR 2889, para 55, a dissenting judgment but not on this point, ‘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’.”

(ii) Clunis

60.
The facts of Clunis and the essential reasoning of the Court of Appeal in reaching its decision have been summarised above. On the facts of the case it concerned a narrow claim and, as the courts below held, was authority binding on them in relation to such a claim. As Lord Hoffmann observed at para 35 in Gray, however, the reasoning of the court in Clunis would have applied to a wide claim - “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": [1998] QB 978, 990.

(iii) Patel

61.
In Patel a panel of nine justices sat to consider what was the proper approach to the defence of common law illegality. The background to the decision was that there had been a divergence of views between different constitutions of the court as to whether the appropriate test was the reliance-based approach, applied by the House of Lords in Tinsley v Milligan [1994] 1 AC 340, or an approach based on the balancing of public policy considerations. In Hounga v Allen (Anti-Slavery International intervening) [2014] UKSC 47; [2014] 1 WLR 2889 the majority of the court, Baroness Hale, Lord Kerr and Lord Wilson, had adopted a policy-based approach, as set out in the judgment of Lord Wilson. In Les Laboratoires Servier v Apotex Inc [2014] UKSC 55; [2015] AC 430 the majority of the court, Lord Sumption, Lord Neuberger and Lord Clarke, had adopted the reliance-based approach, with the leading judgment being given by Lord Sumption.

62.
Patel involved a claim in restitution for unjust enrichment. The claimant, Mr Patel, had paid Mr Mirza £620,000 for the purpose of investing in Royal Bank of Scotland shares using insider information which Mr Mirza expected to obtain in advance of an anticipated government announcement. In the event, no announcement was made, and so no insider information was provided and the money was not invested. Mr Mirza refused to repay the money. The agreement between them was a conspiracy to commit an offence of insider dealing contrary to section 52 of the Criminal Justice Act 1993. The issue was whether the illegality of the agreement meant that Mr Patel's claim for restitution for unjust enrichment, based on the total failure of consideration under that unlawful agreement, should fail. All the justices agreed that the defence of illegality failed and that the claim succeeded.

63.
The majority, Lord Neuberger, Baroness Hale, Lord Kerr, Lord Wilson, Lord Toulson and Lord Hodge, held that the reliance-based approach was wrong, and that Tinsley v Milligan should not be followed. A policy-based approach should be adopted based on an assessment of relevant competing public policy considerations and proportionality factors. The minority, Lord Mance, Lord Clarke and Lord Sumption, considered that the reliance-based approach should continue to be applied.

64.
The leading judgment of the majority was given by Lord Toulson. At para 99 he identified two main policy reasons for the defence of illegality:

"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."

65.
At para 100, in reliance on the "valuable insight" provided by McLachlin J's judgment in Hall v Hebert [1993] 2 SCR 159, Lord Toulson stated the underlying policy question to be:

"…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."

66.

At para 101 Lord Toulson addressed how the court is to determine that question, and held that it required:

“(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.”

67.
He described these as a “trio of necessary considerations” and set out how they could be found in the case law at paras 102-106. In relation to consideration (c), proportionality, he stated as follows at para 107:

“107. In considering whether it would be disproportionate to refuse relief to which the claimant would otherwise be entitled, as a matter of public policy, various factors may be relevant. Professor Burrows’ list is helpful but I would not attempt to lay down a prescriptive or definitive list because of the infinite possible variety of cases. Potentially relevant factors include the seriousness of the conduct, its centrality to the contract, whether it was intentional and whether there was marked disparity in the parties’ respective culpability.”

68.
Lord Toulson’s conclusion is set out at para 120:

“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.”

69.
Baroness Hale, Lord Wilson and Lord Hodge agreed with the judgment of Lord Toulson as did Lord Kerr, who gave a judgment of his own. Lord Neuberger also gave a judgment, concluding at para 186 that:

“… although my analysis may be slightly different from that of Lord Toulson JSC, I do not think that there is any significant difference between us in practice. I agree with his framework for arriving at an outcome …”

70.
Lord Sumption, with whom Lord Clarke agreed, delivered a trenchant dissenting judgment, as did Lord Mance, for reasons which he considered corresponded with those of Lord Clarke and Lord Sumption.

71.
In his judgment Lord Sumption agreed with the majority that the rationale of the illegality doctrine is the consistency principle. He considered that the reliance test was the best method of determining whether this principle applied because (i) “it gives effect to the basic principle that a person may not derive a legal right from his own illegal act”; (ii) “it establishes a direct causal link between the illegality and the claim” and (iii) “it ensures that the illegality principle applies no more widely than is necessary to give effect to its purpose of preventing legal rights from being derived from illegal acts” (para 239).

72.
He considered that the trio of considerations approach favoured by the majority (which he referred to as the “range of factors test”) would wrongly “transform the policy factors which have gone into the development of the current rules, into factors influencing an essentially discretionary decision about whether those rules should be applied” (para 261) and made four particular criticisms of it (para 262):

“(i) Whatever rationale one adopts for the illegality principle, it is manifestly designed to vindicate the public interest as against the interests and legal rights of the parties. That is why the judge is required to take the point of his own motion even if the parties have not raised it, as the deputy judge did in this case. The operation of the principle cannot therefore depend on an evaluation of the equities as between the parties or the proportionality of its impact upon the claimant.

(ii) The ‘range of factors’ test largely devalues the principle of consistency, by relegating it to the status of one of a number of evaluative factors, entitled to no more weight than the judge chooses to give it in the particular case. …

(iii) … If the application of the illegality principle is to depend on the court’s view of how illegal the illegality was or how much it matters, there would appear to be no principle whatever to guide the evaluation other than the judge’s gut instinct.

(iv) The ‘range of factors’ test discards any requirement for an analytical connection between the illegality and the claim, by making the nature of the connection simply one factor in a broader evaluation of individual cases and offering no guidance as to what sort of connection might be relevant. …”

(iv) The application of Patel

73.
An important issue which arises on this appeal concerns the width of the application of Patel and how it applies in relation to existing case law.

74.
First, it should be emphasised that Patel concerned common law illegality rather than statutory illegality. Where the effects of the illegality are dealt with by statute then the statute should be applied. As Lord Toulson stated at para 109 of Patel: “The courts must obviously abide by the terms of any statute”.

75.
In relation to contractual illegality, this is explained by Underhill LJ in Okedina v Chikale [2019] EWCA Civ 1393; [2019] ICR 1653, para 12, drawing on the formulations set out in Burrows: A Restatement of the English Law of Contract:

“(1) Statutory illegality applies where a legislative provision either (a) prohibits the making of a contract so that it is unenforceable by either party or (b) provides that it, or some particular term, is unenforceable by one or other party. The underlying principle is straightforward: if the legislation itself has provided that the contract is unenforceable, in full or in the relevant respect, the court is bound to respect that provision. That being the rationale, the knowledge or culpability of the party who is prevented from recovering is irrelevant: it is a simple matter of obeying the statute.

(2) Common law illegality arises where the formation, purpose or performance of the contract involves conduct that is illegal or contrary to public policy and where to deny enforcement to one or other party is an appropriate response to that conduct …”

76.
Secondly, Patel concerned a claim in unjust enrichment, but there can be little doubt that it was intended to provide guidance as to the proper approach to the common law illegality defence across civil law more generally. The cases it discusses include tort cases, such as Gray and Hounga v Allen, as well as a number of Commonwealth tort law authorities. The case of Hall v Hebert, on which particular reliance was placed, was a tort case. Tinsley v Milligan, which was not followed, concerned trusts and property rights. At para 99, Lord Toulson identifies the policy reasons for the doctrine of illegality “as a defence to a civil claim”. The approach set out in paras 101 and 120 is expressed in general and unqualified terms.

77.
Thirdly, that does not mean that Patel represents “year zero” and that in all future illegality cases it is Patel and only Patel that is to be considered and applied. That would be to disregard the value of precedent built up in various areas of the law to address particular factual situations giving rise to the illegality defence. Those decisions remain of precedential value unless it can be shown that they are not compatible with the approach set out in Patel in the sense that they cannot stand with the reasoning in Patel or were wrongly decided in the light of that reasoning. Lord Toulson made it clear in Patel that the principles he identified were to be found in the existing case law - see, for example, paras 42, 99 and 102-106.

78.
This is well illustrated by the decision of the Court of Appeal in Okedina v Chikale. In employment law the touchstone for the availability of the defence of common law illegality to employee claims has long been recognised as being whether the employee has knowingly participated in the illegal performance of the contract, as stated in the Court of Appeal decision in Hall v Woolston Hall Leisure Ltd [2001] 1 WLR 225, paras 31-32 per Peter Gibson LJ. In Okedina v Chikale that approach had been followed by the Employment Tribunal and the Employment Appeal Tribunal. It was submitted on appeal that this was inadequate and that the matter should have been addressed by going through the Patel trio of considerations. The Court of Appeal rejected the submission that it was “necessary for the tribunal on the facts of this case to carry out an elaborate analysis by reference to the particular factors enumerated”. As Underhill LJ explained at para 62:

“In his judgment in Patel v Mirza [2017] AC 467 Lord Toulson was attempting to identify the broad principles underlying the illegality rule. His judgment does not require a reconsideration of how the rule has been applied in the previous case law except where such an application is inconsistent with those principles. In the case of a contract of employment which has been illegally performed, there is nothing in Patel v Mirza inconsistent with the well-established approach in Hall v Woolston Hall

Leisure Ltd [2001] ICR 99 as regards [common law illegality] cases. As Mr Reade put it, Hall is how Patel v Mirza plays out in that particular type of case."

VI Issue (1) - Whether Gray can be distinguished

79.
The argument unsuccessfully advanced by the appellant below was that Lord Phillips' second reservation in Gray at para 15, concerning cases where the defendant has no significant personal responsibility, was agreed with by both Lord Brown and Lord Rodger, and therefore reflects a majority view. Reliance was placed on Lord Phillips' reference to taking "the same stance as Lord Rodger", and Lord Rodger's statement at para 83 that: "Like my noble and learned friend, Lord Phillips of Worth Matravers, I therefore reserve my opinion on it." In oral submissions, this argument was maintained on the appeal. In agreement with the courts below, I reject it.

80.
As explained above, whilst both Lord Phillips and Lord Rodger were agreeing that a reservation should be made, they were not in agreement as to the nature of that reservation. In particular, Lord Rodger's reservation at para 83 did not relate to a case where there was no significant personal responsibility, but rather to a more specific example of Lord Phillips' first reservation. There was therefore no agreement between them on Lord Phillips' second reservation.

81.
As the Court of Appeal concluded at paras 74 and 75:

"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 para 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 para 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 para 15 of his speech, at the very least in so far as those observations were intended to apply to a serious crime such as manslaughter."

82.
Even if Lord Phillips' second reservation does not reflect a majority view, the appellant submits that it demonstrates that Gray concerned a claimant who did have significant personal responsibility. By contrast, in the present case Foskett J found in terms that the appellant did not bear a significant degree of responsibility for what she did, which was the reason the judge gave for not considering an order under section 45A of the 1983 Act.

83.
Although there does not appear to have been any specific finding by the trial judge in Gray as to the degree of his responsibility, I am prepared to assume that he was regarded as bearing a significant degree of responsibility. The difficulty for the appellant, however, is that the degree of responsibility involved forms no part of the reasoning of the majority. The crucial consideration for the majority was the fact that the claimant had been found to be criminally responsible, not the degree of personal responsibility which that reflected.

84.
At para 41 of his judgment Lord Hoffmann rejected the argument that the narrower rule does not apply in cases where the claimant's conduct "had not been as blameworthy as all that". At para 51 he explained that "the sentence of the court is plainly a consequence of the criminality for which the claimant was responsible". In the same paragraph, he explained the wider rule as being justified on the grounds that a claimant should not be compensated "for the consequences of his own criminal conduct" (emphasis added).

85.
At para 69 Lord Rodger endorsed the narrow rule, explaining 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". At para 85 he endorsed the wider rule on the basis that "a person is not entitled to be indemnified for the consequences of his criminal acts for which he has been found criminally responsible" (emphasis added).

86.
In my judgment Gray cannot be distinguished. It involved the same offence, the same sentence and the reasoning of the majority applies regardless of the degree of personal responsibility for the offending.

VII Issue (2) - Whether Gray should be departed from and Clunis overruled

87.
If Gray is to be departed from it is necessary for the appellant to show that it is an appropriate case in which to do so under the 1966 Practice Statement: Practice Statement (Judicial Precedent) [1966] 1 WLR 1234. As this court has recently emphasised, it will be "very circumspect before accepting an invitation to invoke the 1966 Practice Statement" - Knauer v Ministry of Justice [2016] UKSC 9; [2016] AC 908, para 23. It is important not to undermine the role of precedent and the certainty which it promotes. Circumstances in which it may be appropriate to do so include where previous decisions "were generally thought to be impeding the proper development of the law or to have led to results which were unjust or contrary to public policy" - per Lord Reid in R v National Insurance Comr, Ex p Hudson [1972] AC 944, p 966. Even then the court needs to be satisfied that a departure from precedent "is the safe and appropriate way of remedying the injustice and developing the law" - per Lord Scarman in R v Secretary of State for the Home Department, Ex p Khawaja [1984] AC 74, p 106.

88.
It is against this high hurdle that the appellant's suggested reasons for departing from Gray fall to be assessed.

(i) Whether the reasoning in Gray cannot stand with the approach to illegality adopted by the Supreme Court in Patel.

89.
The appellant argues that the decision in Gray is an example of the now discredited rule-based approach to illegality and is contrary to the flexible policy-approach endorsed in Patel. It does not allow for the court to take into account the particular circumstances of the case, such as the degree of the claimant's personal responsibility. Nor does it allow for consideration of proportionality.

90.

In my judgment, the essential reasoning in Gray is consistent with the approach adopted in Patel. Gray did not involve the reliance-based approach, nor did it follow or apply Tinsley v Milligan. Indeed, at para 30 of his judgment Lord Hoffmann stated that such an approach was not helpful in that case, that it had “nothing to do with whether there is the rule of law for which the appellants contend” and that the maxim ex turpi causa expresses a policy.

91.
The court in Gray examined whether the narrower and the wider rules were, as was contended, “a special rule of public policy”. As already explained, both Lord Hoffmann and Lord Rodger considered the policy reasons for the rules and concluded that they were justified as a matter of public policy. Even though Lord Hoffmann endorsed a causation approach to the application of the wider rule, that involved a causal rule based on policy considerations. As the Court of Appeal said at para 64 of its judgment, it was a “combination of public policy and causation”.

92.
In Patel Lord Toulson stated at para 28 that in Gray the House of Lords “held that public policy precluded him from recovering damages”. As he further observed at para 32:

“The Law Commission drew from the various judgments a readiness on the part of the judges to examine the policy reasons which justified the application of the illegality defence and to explain why those policies applied to the facts of the case.”

93.
Gray was correctly seen in Patel as being an example of a decision on illegality based on policy considerations rather than reliance. It was cited with apparent approval not only by Lord Toulson at paras 28-32, but also by Lord Kerr at para 129 and Lord Neuberger at paras 153 and 155.

94.
In addition, 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.

95.
It is correct to observe that Gray involved no express consideration of proportionality. In Patel that did not, however, cause any doubt to be cast on the correctness of the decision and, for reasons explained below, the factual circumstances in Gray do not give rise to any issue of proportionality.

96.
The approach adopted by the House of Lords in Gray therefore provides no reason why it should be departed from. If anything, it points to the contrary conclusion.

(ii) Whether it should be held that Gray does not apply where the claimant has no significant personal responsibility for the criminal act and/or there is no penal element in the sentence imposed.

97.
As already explained, the majority decided that the narrower and wider rules applied regardless of the degree of personal responsibility. The appellant contends that they were wrong so to do and that this part of the decision should be departed from. It is submitted that this case raises on the facts the second reservation expressed by Lord Phillips because the trial judge accepted that the appellant did not bear a significant degree of personal responsibility for her crime, and that this court should accept and apply that reservation.

98.
The appellant's fundamental point is that there is no inconsistency or incoherence between the civil and the criminal law in a case in which the claimant has no significant personal responsibility for a criminal act.

99.
It is pointed out that the bar for lack of criminal responsibility is a high one, being the M'Naghten rule of insanity. The defence dates from 1843 and has often been criticised as being out of date and failing to reflect modern medical understanding and practice. As the Law Commission stated at para 1.2 of its July 2013 Discussion Paper, "Criminal Liability: Insanity and Automatism": "The existing law has long been the subject of academic criticism for being unfair, out of date and failing to reflect advances made in medicine, psychology and psychiatry". The appellant places particular emphasis on the Law Commission's conclusion that lack of responsibility should be extended not only to those who are unable to think rationally, but also to those who are unable to control their actions. As stated in the Law Commission's principal conclusions:

"A.5 Our principal conclusion is that people should not be held criminally responsible for their conduct if they lack the capacity to conform their behaviour to meet the demands imposed by the criminal law regulating that conduct. This lack of capacity might consist in an inability to think rationally, or in an inability to control one's actions. The reason for that lack of capacity might lie in a mental disorder, or in a physical disorder."

100.
Given what the appellant says is the unsatisfactory state of the law governing criminal responsibility, it is submitted that no incoherence would be introduced into the law if tort law was to adopt a different approach to responsibility. It is pointed out that in any event civil law approaches issues of responsibility differently, focusing more on the question of capacity. Moreover, the purposes of the criminal law (focusing on the person's wrongdoing) and tort law (the connection between the wrongdoing and the claimant's injury) are different. Given the divergent functions of tort law and the criminal law, it is submitted that there is nothing incoherent or inconsistent about tort law and criminal law having different tests for responsibility.

101.
That there is no inconsistency is said to be further borne out in this case by the fact that the sentence imposed on the appellant involved no penal element. A sentence under the 1983 Act only contains a penal element if an order under section 45A is made - see, for example, R v Edwards [2018] 4 WLR 64, paras 12 and 34. To decide whether a penal element to the sentence is necessary, the judge should assess the offender's degree of responsibility together with the harm caused by the offence. In this case, the judge declined to make such an order precisely because of the appellant's lack of significant personal responsibility.

102.
In such circumstances, it is submitted that the denial of the tort claim by means of illegality would constitute a punishment meted out in the civil law when the criminal law had declined to punish. If anything, the need for coherence would best be served by tort law declining to do what the criminal law has refused to do.

103.
As to how it should be determined whether a claimant bears no significant personal responsibility, it is submitted that this is essentially a matter of fact for the trial judge hearing the civil claim. If, however,

a test is required then it should be: “did the claimant lack capacity to conform his/her behaviour to the demands imposed by the criminal law?”.

104.
These are formidable arguments persuasively presented by Mr Bowen QC on behalf of the appellant and supported by some academic commentary, in particular the writings of Dr Dyson. I am, however, unable to accept that they meet the high hurdle of justifying departure from the House of Lords’ relatively recent decision in Gray.

105.
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”.

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.

107.
Whilst the wider rule may not involve, as the application of the narrower rule does, the law giving with one hand what it takes away with the other, it does involve, as Lord Hughes said in Hounga v Allen at para 55, the law condoning “when facing right what it condemns when facing left”.

108.
If, as the appellant submits, the degree of personal responsibility is a matter for the trial judge to determine in the civil claim there is a clear risk of inconsistent decisions being reached in the criminal and the civil courts, both as to the degree of responsibility involved and as to how that is to be determined. If, as is further submitted, it is appropriate for the civil court to move away from the M’Naghten approach to insanity, and to develop its own approach to such issues, then the inconsistencies will be heightened.

109.
Nor does the fact that there may be no penal element to the sentence imposed by the criminal court alter matters. As Lord Rodger observed at para 78 of Gray, even if the sentence is not regarded as being a punishment, “this does not mean that the judge was treating the claimant as not being to blame for what he did”. A conviction for manslaughter by diminished responsibility still involves blame. The defendant would otherwise have been convicted of murder and some responsibility for the unlawful killing necessarily remains. Moreover, the fact of a criminal conviction for manslaughter is itself punitive.

110.
A further difficulty with the appellant’s argument is why significant personal responsibility is to be regarded as the threshold, precisely what that means and how it is to be determined. Whilst a

sentencing judge will be concerned with the level of responsibility involved, he or she will not be specifically addressing the issue of significant personal responsibility. If, for example, in accordance with the Guideline an offender is found to bear medium responsibility, how does that relate to the threshold of significant personal responsibility? In any event, any findings which may be made by the trial judge in the criminal proceedings will be solely for the purpose of sentencing.

111.
It is not sufficient simply to say that this will be a matter of fact for the trial judge to determine in the civil claim. As the Law Commission's Discussion Paper illustrates, the issue of responsibility raises questions of great complexity and difficulty. This fundamental building block of the appellant's case was barely addressed in the appellant's written case or in the 77-page speaking "note" provided on the first day of the hearing, a clear abuse of the written case procedure and its required page limits. Instead, the court was provided with a five-page insert to the speaking note which put forward the test of whether the claimant lacked capacity to conform their behaviour to the demands imposed by the criminal law. What the justification is for that proposed test was not really explained, nor was its meaning. Not only is it a recipe for uncertainty, but it risks being tantamount to judicial legislation.

112.
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 stated at para 23 that: "The paradigm case of an illegal act engaging the defence is a criminal offence." As Lord Sumption 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.

(iii) Whether the application of the trio of considerations approach set out in Patel leads to a different outcome.

113.
The trio of considerations set out by Lord Toulson at para 120 of his judgment are:

(a) the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim ("the first stage" or "stage (a)");

(b) any other relevant public policy on which the denial of the claim may have an impact ("the second stage" or "stage (b)"); and

(c) 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 ("the third stage" or "stage (c)").

114.
The issues and the arguments in the present case have raised a number of questions as to the proper understanding and application of the trio of considerations.

115.
First, the appellant contends that the case should be remitted so that evidence can be adduced as to the suggested policy considerations, as to which there were various factual disputes. It is neither necessary nor desirable that consideration of the relevant policy considerations should give rise to a mini trial. They should usually be capable of being addressed as a matter of argument and at a level of generality that does not make evidence necessary, as is well illustrated by this court's decision in Hounga v Allen.

116.
Secondly, questions arise as to exactly how under the trio of considerations approach relevant policy considerations are to be weighed. It appears that this must involve a balancing between considerations arising at the first and second stages; the third stage relates to proportionality and factors specific to the case rather than general policy considerations. Stage (a) is directed at policy reasons which support denial of the claim and stage (b) is directed at policy reasons which support denial of the illegality defence. As Lord Toulson makes clear at para 101, stage (b) is meant to operate "conversely" to stage (a).

117.
This is consistent with the approach of Lord Wilson in Hounga v Allen from which Lord Toulson had drawn support (at para 76). Lord Wilson described the balancing exercise in the following terms at para 42:

"So 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 the application of the defence would run counter?'"

118.
It also reflects the broad way in which Lord Kerr expressed his understanding of stage (a) at para 124:

"By this, I understand Lord Toulson JSC to mean the reasons that a claimant's conduct should operate to bar him or her from a remedy which would otherwise be available."

119.
It follows that stage (a) 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. In the present case, for example, that would encompass the public policy considerations identified in Gray, namely the consistency principle and the public confidence principle. Similarly, whilst preventing someone from profiting from his own wrong is not the rationale of the illegality defence, it is a relevant policy consideration, which is linked to the need for consistency and coherence in the law. 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, as is recognised in Patel (at paras 99 to 101). In cases where it features, it too is a factor to be taken into account, even though it may not reflect the purpose of the prohibition transgressed.

120.
In considering the issue of consistency and coherence in the law, the closeness of the connection between the claim and the illegal act may well be of relevance. The closer that connection is, the greater and more obvious may be the inconsistency and consequent risk of harm to the integrity of the legal system. The rejection by the majority in Patel of reliance as the test of illegality did not mean that reliance was thereby rendered irrelevant to the policy-based approach. It may not provide a satisfactory test of illegality, but it will often be a relevant factor.

121.
Thirdly, questions arise as to the weight it may be appropriate to give to different policy considerations. At para 99 Lord Toulson recognised the importance of the policy considerations that a person should not be allowed to profit from his own wrongdoing and that the law should be coherent. Where either or both of these considerations are engaged it would seem appropriate that they are given great weight. This was a point made by Lord Kerr in his judgment at para 143 where he stated as follows:

“143. Lord Toulson JSC’s solution to this question also permits readier access to investigation of the traditional justifications for the ex turpi causa maxim - preservation of the integrity of the legal system and preventing profit from wrongdoing. If, on examination of the particular circumstances of the case, these can be shown to weigh heavily in the balance, it is more likely that the defence will be upheld.”

122.
I would respectfully agree with that approach.

123.
Fourthly, questions arise as to whether proportionality always has to be considered and as to how it is to be addressed. In some cases, of which Hounga v Allen is an example, it may be apparent that the balancing of policy considerations comes down firmly against denial of the claim. If so, it will not be necessary to go on to the third stage and the issue of proportionality. This is consistent with Lord Toulson’s statement at para 107 that these factors relate to “whether it would be disproportionate to refuse relief to which the claimant would otherwise be entitled” and at para 101 that they fall to be considered to avoid “the possibility of overkill”. In other words, they are a disproportionality check rather than a proportionality requirement.

124.
In relation to proportionality, at para 107 Lord Toulson identified four factors which were likely to be of particular relevance, namely: “the seriousness of the conduct, its centrality [to the transaction], whether it was intentional and whether there was marked disparity in the parties’ respective culpability.” Lord Toulson refrained from saying anything about the potential weight of such factors, no doubt to avoid being prescriptive. I would, however, suggest that centrality will often be a factor of particular importance. When considering the circumstances relating to the illegality, whether there is a causal link between the illegality and the claim, and the closeness of that causal connection, will often be important considerations.

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

125.
As explained above, this stage involves identification of policy reasons which support denial of the claim. Considering first general policy considerations rather than the purpose of the prohibition, for

the reasons explained in Gray, the consistency principle is engaged in this case. There is a need to avoid inconsistency so as to maintain the integrity of the legal system. Whilst that most obviously applies to the narrower rule, it also applies to the wider rule. As Patel makes clear, this is a central and very weighty public policy consideration.

126.
For the reasons given by Lord Hoffmann in Gray, the public confidence principle is also engaged. Again, this applies to both the narrower and the wider rule.

127.
In the present case, the gravity of the wrongdoing heightens the significance of the public confidence considerations, as does the issue of proper allocation of resources. NHS funding is an issue of significant public interest and importance and, if recovery is permitted, funds will be taken from the NHS budget to compensate the appellant for the consequences of her criminal conviction for unlawful killing.

128.
This is also a case in which there is a very close connection between the claim and the illegality, thereby highlighting and emphasising the inconsistencies in the law which would be raised were the claim to succeed. The appellant's crime was the immediate and, on any view, an effective cause of all heads of loss claimed. Indeed, applying Lord Hoffmann's approach to causation in Gray, with which Lord Rodger and Lord Scott agreed, it was the sole effective cause of such loss.

129.
In relation to the underlying purpose of the prohibition transgressed, an important purpose is to deter unlawful killing thereby providing protection to the public. As far as the public is concerned there could be no more important right to be protected than the right to life. It is clearly in the public interest that everything possible is done to enhance protection of that fundamental right. There is also a public interest in the public condemnation of unlawful killing and the punishment of those who behave in that way.

130.
On behalf of the appellant it is submitted that it is absurd to suppose that a person suffering from diminished responsibility will be deterred from killing by the prospect of not being able to recover compensation for any loss suffered as a result of committing the offence. Indeed, more generally it is submitted that a person who is not deterred by a criminal sanction is unlikely to be deterred by being deprived of a right to compensation.

131.
There is force in these points, but the question should not be considered solely at the granular level of diminished responsibility manslaughter cases. Looking at the matter more broadly there may well be some deterrent effect in a clear rule that unlawful killing never pays and any such effect is important given the fundamental importance of the right to life. To have such a rule also supports the public interest in public condemnation and due punishment.

(b) Stage (b) - Any other relevant public policy on which the denial of the claim may have an impact

132.
The appellant suggests four countervailing public policies.

133.

The first is the policy of encouraging NHS bodies to care competently for the most vulnerable. It is said that it is recognised that imposing a duty of care can enhance standards. There is, however, no issue that a duty of care was owed. Indeed, liability for damages up to the date of the killing is admitted. It is unlikely that limiting the extent of the liability to the victim will affect the exercise of due care. In any event, there is a potential exposure in such cases to claims on behalf of victims as well as to regulatory sanctions. Focusing on the specific factual situation in the present case, there is no ready means of judging the likely consequences of removing the illegality defence from NHS bodies in claims by mental health patients who kill others. As the respondent submits, it does not seem likely that NHS staff or organisations need any encouragement to try to do their best to stop patients killing people.

134.
The second is the policy of providing compensation to victims of torts where they are not significantly responsible for their conduct. It is not clear that there is any such general policy and the example of suicide cases which is relied upon raises different considerations, not least because suicide is not a crime.

135.
The third is the policy of ensuring that public bodies pay compensation to those whom they have injured. This may be said to beg the question since it assumes that it was the respondent's negligence which injured the appellant rather than her own criminal act. Even if it was, this is not one of those cases where the injury was the very thing which the respondent was engaged to prevent and it is agreed that the killing by the appellant of her mother could not have been predicted.

136.
The fourth is the policy of ensuring that defendants in criminal trials receive sentences proportionate to their offending. That is consistent with the purpose of the narrower rule which is to avoid giving back with one hand what has been taken by the other.

137.
I recognise that there is force in at least some of the policy considerations relied upon by the appellant, but I do not consider that they begin to outweigh those which support denial of the claim. In particular, as Gray makes clear, the resulting inconsistency in the law is such as to affect the integrity of the legal system. The underlying policy question identified in Patel is accordingly engaged. As stated by McLachlin J in Hall v Hebert [1993] 2 SCR 159 at 182, "concern for the integrity of the legal system trumps the concern that the defendant be responsible".

(c) 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

138.
It is not suggested that there were factors relevant to proportionality aside from the four factors identified by Lord Toulson at para 107 of his judgment in Patel, namely: (i) the seriousness of the conduct; (ii) the centrality of the conduct to the transaction; (iii) whether the conduct was intentional; and (iv) whether there was a marked disparity in the parties' respective wrongdoing.

139.
As to the seriousness of the conduct, this was a very serious offence. It involved culpable homicide committed with murderous intent. As was acknowledged on behalf of the appellant, unlawful killing is

the most serious conduct imaginable. The appellant knew what she was doing and that it was legally and morally wrong.

140.
As to the centrality of the conduct to the transaction, the offending is central to all heads of loss claimed and, as held in Gray, is the effective cause of such loss.

141.
As to whether the conduct was intentional, there was intent to kill or to do grievous bodily harm. Whilst there may have been no significant personal responsibility, there was nevertheless murderous intent.

142.
As to whether there was a marked disparity in the parties' respective wrongdoing, the appellant was convicted of culpable homicide. Whilst she may not bear a significant degree of responsibility for what she did, she knew what she was doing and that it was morally and legally wrong. The respondent has admitted negligence in the appellant's treatment. It is not the case, however, that the respondent's staff did nothing in response to the appellant's mental health relapse.

143.
In all the circumstances I do not consider that denial of the claim would be disproportionate. It would be a proportionate response to the illegality, bearing in mind that punishment is for the criminal court. The same would apply to the materially similar facts of Gray, even more clearly in so far as the offending in that case involved significant personal responsibility. The fact that proportionality was not specifically addressed in Gray does not therefore undermine the approach taken or the decision reached in that case.

144.
For all these reasons, the application of the trio of considerations approach set out in Patel does not lead to a different outcome.

(iv) Conclusion on issue (2)

145.
The appellant has not shown that Gray should be departed from and Clunis overruled. On the contrary, I consider that the decision in Gray should be affirmed as being "Patel compliant" - it is how Patel "plays out in that particular type of case". The clearly stated public policy based rules set out in Gray should be applied and followed in comparable cases.

VIII Issue (3) - Whether all heads of loss claimed are irrecoverable

146.
In the appellant's written case it was accepted that all heads of loss are irrecoverable pursuant to the ratio in Gray, save for (as was common ground) any losses for pain and suffering or loss of amenity that arose prior to the killing. The claim for general damages for loss of liberty was accepted as being barred by the narrower rule, the other heads by the wider rule.

147.
In oral submissions there appeared to be some retreat from this position, although the only head of loss addressed in any detail was that relating to the Forfeiture Act.

148.

In my judgment, the appellant’s concession was properly made. Damages for loss of liberty (head (ii)) and loss of amenity during her detention (part of head (iii)), are barred by the narrower rule. The other heads of loss are barred by the wider rule; indeed, two of them are expressly stated to be the consequence to the appellant of the killing of her mother (heads (i) and (iii)).

149.
As to the Forfeiture Act claim, the reason that the appellant is unable to recover the full share of her mother’s estate is because an order to that effect was made by the court pursuant to the provisions of the Forfeiture Act. In deciding what order to make the court has regard to the conduct of the offender and of the deceased, to such other circumstances as appear to the court to be material and to the justice of the case. It would be entirely inappropriate to subvert the operation of the specific and bespoke Forfeiture Act regime, and the court order made thereunder, by permitting the appellant to recover from the respondent what she was not permitted to recover under the Forfeiture Act.

IX Conclusion

150.
For all the reasons outlined above, I consider that the appeal should be dismissed.