Middle Temple Rosamund Smith Mooting Competition 2024

IN THE SUPREME COURT OF JUSTICE

(1) MR A PATIENT

(2) MRS M PATIENT

(3) MRS CHRISTINE ZED on behalf of the estate of MR CARL ZED and as a dependant of MR CARL ZED)

Claimants

-and-

(1) WILD WEST RAILWAY COMPANY LIMITED
(2) ANEURIN BEVAN NHS TRUST

Defendants

BUNDLE ON BEHALF OF THE CLAIMANTS

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Date: Wednesday 12th June 2024
Leading Counsel: Erica Barker
Junior Counsel: Lucy Finney

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SKELETON ARGUMENT FOR THE CLAIMANTS

Facts:

1. On 14 November 2020, Mr Patient was involved in a serious rail crash. He was an innocent passenger, and the rail crash was wholly caused by the negligence of the Wild West Railway Company Limited, which it admitted soon afterwards. His medical history to 14 November 2020 was free from any serious physical or mental illness. Before the crash, he had worked for about 2 years as a well-known and well-paid TV actor.

2. After the rail crash he developed PTSD and could not work. The PTSD got worse despite treatment. He began to take illegal drugs. He returned to live with his mother, Mrs Patient. Following an incident where he threatened his mother with violence, he was detained for a short period under section 2 of the Mental Health Act 1983 and then released for treatment in the community.

3. From about 14 November 2022 his mother repeatedly rang the Trust to say that he was mentally unwell and needed to be assessed under the Mental Health Act 1983 or recalled and admitted to a psychiatric hospital. She repeatedly said that she feared for her own life and for the safety of others. The Trust failed to deal with the phone calls and no recall or treatment or assessment was arranged.

4. On 1 June 2023 he attempted to kill his mother and then he ran into the street and killed an innocent passer-by, Mr Zed, someone who was not known to him or the Trust before the killing. Mr Zed's wife came upon the horrifying scene of the attack and saw Mr Zed as he was put into an ambulance and taken to hospital. He died after some 10 hours.

5. Mr Patient was arrested and charged with the attempted murder of his mother and the murder of Mr Zed. He was transferred to a secure psychiatric hospital.

6. The Trust accepts that it should have arranged for Mr Patient to be assessed and that, had he been assessed, he would and should have been recalled to hospital so that he could not have attacked either his mother or Mr Zed.

7. Mr Patient was psychiatrically very unwell after the events. At the criminal trial, Mr Patient was found not guilty by reason of insanity (within the second limb of M'Naghten). He was therefore detained under sections 37 and 41 of the Mental Health Act 1983.

8. He now seeks damages from both the Wild West Railway Company Limited and the Aneurin Bevan NHS Trust, including general damages for pain, suffering and loss of amenity; damages for lost earnings, including before and after the killing; and for care from the point when he is released from psychiatric hospital.

9. Mr Patient also seeks an indemnity against any claim brought against him by Mrs Zed. Mrs Zed has made it clear that if her claim against the Trust fails, she will seek to recover her losses from Mr Patient.

10. It is accepted that had he not killed/attempted to kill, he would have been held for only 6 months whereas now it is likely that he will be held for at least 10 years.

11. His mother, Mrs Patient, sues the Trust for failing to recall and detain him, and for her own pain and suffering, and for the care she now needs because she remains very disabled by the injuries she suffered. She contends that the Trust owed her a duty of care.

12. Mrs Zed, the widow of Mr Zed, sues the Trust for the losses suffered by his estate under the Law Reform (Miscellaneous Provisions) Act 1934 ('LRMPA') and for her own loss of dependency (both services and earnings) under the Fatal Accidents Act 1976 ('FAA'). She contends that the Trust owed Mr Zed a duty of care.

Appeal:

13. The Wild West Railway Company Limited and the Aneurin Beven NHS Trust each applied to strike out Mr Patient's claim from the point of the attempted murder and murder, relying on the illegality defence. These applications failed and the Court of Appeal unanimously upheld those decisions. The Wild West Railway Company and the Trust now appeal to the Supreme Court.

14. The Aneurin Beven NHS Trust also applied to strike out:

    a. Mrs Patient's claim on the basis that it did not owe her a duty of care.

    b. Mrs Zed's claim on the basis that it did not owe Mr Zed a duty of care.

15. At first instance these further strike out applications succeeded on the basis that no duty was owed to Mrs Patient or Mr Zed to prevent Mr Patient attacking Mrs Patient or Mr Zed, and the Court of Appeal unanimously upheld those decisions. Mrs Patient and Mrs Zed now appeal.

The Supreme Court has directed that:

a. Leading counsel should address the primary question of whether Mr Patient should recover damages from the point of the attempted murder and murder or whether the strike out applications in relation to his claim should succeed. Leading counsel should address, if appropriate, whether he can recover all the heads of loss he seeks, or only some of them, and, if only some, which ones.

b. Junior counsel should (applying general principles) address the question of whether Mrs Patient and/or Mr Zed were owed a duty of care or whether the strike out applications in relation to their claims should succeed.

c. The Wild West Railway Company and the Trust are the appellants in the claim brought by Mr Patient, having lost their strike out applications and that decision having been upheld by the Court of Appeal. Mrs Patient and Mrs Zed are the appellants in the claims they bring, the strike out application brought by the Trust having succeeded and that decision having been upheld by the Court of Appeal.

On behalf of the Appeal, brought by the Wild West Railway Company Limited and the Aneurin Bevan NHS Trust, to strike out Mr Patient's claim from the point of the attempted murder and murder, Counsel for the Claimants respectfully submits:

First submission

16. **The illegality defence should not be relied upon in a case which pertains to insanity.**

17. Applying the second limb of *M'Naghten*, Mr Patient knew what he was doing but not that what he was doing was morally and legally wrong. The verdict of not guilty by reason of insanity is an acquittal; the law has not treated Mr Patient as criminally responsible for his actions. Therefore, Mr Patient would not profit from his own wrongdoing given that wrongdoing implies knowledge of wrongfulness.

18. Authority supports 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.

    Mr Patient was detained under sections 37 and 41 of the Mental Health Act 1983. Those orders are mandatory in the case of a verdict of not guilty by reason of insanity, but a matter of discretion in a diminished responsibility case. Although identical, it only means that there is a need both for treatment and rehabilitation, for the protection of the public (*Lewis-Ranwell v G4S Health Services (UK) Limited and others* [2024] EWCA Civ 138).

19. To apply the illegality defence, in circumstances where it has never previously been applied in England and Wales, and to move away from the *M'Naghten* approach, would introduce incoherence between the operation of the criminal and civil law (*Henderson v Dorset Healthcare University NHS Foundation Trust* [2020] UKSC 43).

20. Applying the illegality defence would run counter to the public interest in ensuring that the failings in the duty of care, owed by the Defendants, to Mr Patient, are appropriately addressed. In addition, the function of the law of tort is not only to compensate but to hold authorities to account. Exposing weaknesses within the mental

health sector serves an important public interest which may arguably advance such provisions.

Second submission

21. **Accordingly, there is no inconsistency in allowing Mr Patient to recover for the loss that he has suffered in consequence of the Defendants' negligence.**

22. It is appreciated that because of the Wild West Railway Company Limited's negligence, after which Mr Patient developed PTSD, the disorder worsened despite treatment and he began to take illegal drugs in direct result. However, adults of *sound mind* are autonomous beings; therefore, it is submitted that this cannot be deemed truly free, deliberate, and informed. Further, this was before Mr Patient was detained, in the first instance; subsequently, the Aneurin Bevan NHS Trust must then take the victim as he finds him.

23. Mr Patient's mother, Mrs Patient, repeatedly rang the Aneurin Bevan NHS Trust to say that he was mentally unwell and needed to be assessed under the Mental Health Act 1983 or recalled and admitted to a psychiatric hospital. In addition, saying that she feared for her own life and for the safety of others.

    A risk of harm was a reasonably foreseeable consequence of its negligence. If, on a balance of probabilities, the disorder was not bound to develop with the correct treatment and/or the correct contingencies were put in place, there is a case for permitting a recovery of damages that is proportionate to the increase in the chance of the adverse outcome (mental health deterioration).

    The occurrence of the very act (attempted murder and murder) which arguably would have been prevented ought not to negative the causal connection between the breach of duty and Mr Patient's claim for damages after this point.

24. The second Defendant's negligence does not eclipse the first Defendant's original negligent act and liability for damages is apportioned, or, in the alternative, each Defendant is severally liable. In any event, the test for remoteness, regarding the heads of damage claimed (paragraph 8) is satisfied.

On behalf of the Appeal, brought by Mrs Patient and Mrs Zed, Counsel for the Claimants respectfully submits:

First submission

25. **Mrs Patient was owed a duty of care by the Trust to prevent Mr Patient from causing her harm and so her appeal should succeed.**

i. It is recognised that English law does not as a general rule impose a duty of care on a defendant to prevent damage caused to the claimant by a third party.
ii. However, *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 recognised an exception to this general rule, whereby, where the Defendant was in a position of control over the third party and should have foreseen the likelihood of the third party causing damage to somebody in close proximity if the defendant failed to take reasonable care in the exercise of that control, then a duty of care can arise on the Defendant.
iii. Based upon this principle, it will be submitted that Mrs Patient falls into the category of a person who was exposed to a particular risk of damage and it was reasonably foreseeable that Mr Patient would harm her. Subsequently, the Trust did owe her a duty of care.
iv. *Hill v Chief Constable of West Yorkshire* [1987] UKHL 12 will be citied in support of these submissions.

Second submission

26. **Mr Zed was owed a duty of care by the Trust to prevent him from being harmed by Mr Patient, and thereby Mrs Zed's appeal should succeed.**

i. It will be submitted that reasonable foreseeability, as above, is satisfied because it was reasonably foreseeable that Mr Patient would cause harm to others due to his mental state, given Mrs Patient's repeated calls to the Trust.
ii. However, proximity is harder to establish on the facts as Mr Zed was unknown both to the Trust and Mr Patient, thereby failing the test in *Dorset*.
iii. Instead, it will be submitted that Lord Kerr's dissenting judgment in *Michael v Chief Constable of South Wales Police* [2015] UKSC 2 which discussed an alternative way of establishing proximity should apply. Based upon this, it will

be submitted that proximity is established and that Mr Zed was owed a duty of care by the Trust.

Date: Wednesday 12th June 2024
Leading Counsel: Erica Barker
Junior Counsel: Lucy Finney

MIDDLE TEMPLE ROSAMUND SMITH MOOTING COMPETITION 2024

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LIST OF AUTHORITIES CITIED ON BEHALF OF THE CLAIMANTS

Date: Wednesday 12th June 2024
Leading Counsel: Erica Barker
Junior Counsel: Lucy Finney

Neutral Citation Number: [2024] EWCA Civ 138

Case No: CA-2022-001259

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE HIGH COURT OF JUSTICE KING'S BENCH DIVISION
Mr Justice Garnham
[2022] EWHC 1213 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/02/2024

Before :

DAME VICTORIA SHARP
(President of the King's Bench Division)
LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
and
LADY JUSTICE ANDREWS

Between :

ALEXANDER LEWIS-RANWELL	**Claimant/ Respondent**
- and -	
(1) G4S HEALTH SERVICES (UK) LTD **(2) DEVON PARTNERSHIP NHS TRUST** **(3) DEVON COUNTY COUNCIL**	**Defendants/ Appellants**

Selena Plowden KC and **Christopher Johnson** (instructed by **Clarke Willmott**) for the **Claimant/Respondent**
Gurion Taussig (instructed by **G4S Legal Department**) for the **First Defendant/Appellant**
Judith Ayling KC and **James Goudkamp** (instructed by **DAC Beachcroft LLP**) for the **Second Defendant/Appellant**
Andrew Warnock KC and **Jack Harding** (instructed by **DWF Law LLP**) for the **Third Defendant/Appellant**

Hearing dates : 20-21 June 2023

Approved Judgment

This judgment was handed down remotely at 10.30am on 20 February 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Lord Justice Underhill :

INTRODUCTION

1. The Claimant in this case, who is the Respondent to this appeal, is aged 32. He was diagnosed with schizophrenia in his mid-twenties and had spells in psychiatric intensive care in 2016 and 2017. On 10 February 2019, in the course of a serious psychotic episode, he attacked and killed three elderly men in their homes in Exeter in the delusional belief that they were paedophiles. He was charged with murder but following a trial in Exeter Crown Court he was found not guilty by reason of insanity: as explained more fully below, that meant that because of his mental illness he did not know at the time of the killings that what he was doing was wrong. He was ordered to be detained in Broadmoor Hospital pursuant to a hospital order with restrictions under sections 37 and 41 of the Mental Health Act 1983.

2. In the two days before the killings the Claimant had twice been arrested by the Devon and Cornwall Police ("the Police") and detained for some time at Barnstaple Police Station before being eventually released. In short:

   (1) The first arrest, on 8 February 2019, was as a result of a suspected burglary. He was released on bail at about 2.30 a.m. on 9 February.

   (2) The second arrest, later on 9 February, was for assaulting with a saw an elderly man whom he believed (like those whom he went on to kill the following day) to be a paedophile. He was released on bail at about 10 a.m. on 10 February.

3. During both periods of detention the Claimant behaved violently and erratically and was apparently mentally very unwell. He was seen or spoken to by mental health professionals employed by G4S Health Services (UK) Ltd ("G4S") and Devon Partnership NHS Trust ("the Trust"). A face to face assessment by the mental health nurse employed by the Liaison and Diversion Service of the NHS Trust was discussed but did not take place. The need for a Mental Health Act Assessment was discussed with an Approved Mental Health Professional employed by the Council but was not arranged.

4. On 4 February 2020 the Claimant commenced proceedings in the High Court against G4S, the Police, the Trust and the Council. In broad terms it is his case that it should have been obvious to all concerned during both detentions that if he were released there was a real risk that he would injure other people, and that the necessary steps should have been taken to keep him in detention until it was safe for him to be released. The claims are advanced in negligence and under section 7 of the Human Rights Act 1998. The heads of damage pleaded in the Particulars of Claim are for personal injury, loss of liberty, loss of reputation, and "pecuniary losses". The Claimant also seeks an indemnity in respect of any claims brought against him "as a consequence of his violence towards others on 9-11 February 2019".

5. On 20 July 2021 the Council issued an application for the claim against it to be struck out, and similar applications were subsequently made by G4S and the Trust, though not by the Police. Those three Defendants are the Appellants in this appeal. In each case the ground for the application was, broadly speaking, that the Defendants were entitled to rely on "the illegality defence" – that is, the rule that the Court will not

entertain a claim which is founded on a claimant's own unlawful act – because the claim was based on the consequences of the Claimant's three unlawful homicides. The illegality defence is often described as depending on "the *ex turpi causa* principle" (or "rule"), referring to the maxim *ex turpi causa non oritur actio*; and I will in this judgment use both labels indifferently.

6. The applications were heard at Exeter Crown Court by Garnham J on 9 and 10 March 2022. By that time the Appellants had accepted that the applications could only be pursued as regards the claim in negligence and that the claim under the 1998 Act would continue in any event.[1]

7. By a judgment handed down on 20 May 2022 Garnham J dismissed the applications. The essence of his reasoning is that because the verdict of "not guilty by reason of insanity" meant that the Claimant did not know that what he was doing was wrong his conduct did not have the necessary element of "turpitude". As he put it at para. 135:

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

8. This is an appeal against that decision. G4S has been represented by Mr Gurion Taussig; the Trust by Ms Judith Ayling KC and Mr James Goudkamp; and the Council by Mr Andrew Warnock KC and Mr Jack Harding. The Claimant has been represented by Ms Selena Plowden KC and Mr Christopher Johnson. The representation was the same before Garnham J, except that Ms Ayling and Mr Warnock appeared without juniors. Mr Taussig did not advance any oral submissions but, in addition to relying on his skeleton argument, adopted the submissions of Mr Warnock and Ms Ayling.

9. The question whether the illegality defence operates in a case where the claimant was insane at the time that he or she did the unlawful act is not the subject of any binding authority. In *Clunis v Camden and Islington Health Authority* [1998] QB 978 this Court held that a mentally ill person who had been convicted of manslaughter by reason of diminished responsibility was barred by the *ex turpi causa* principle from bringing a claim against his doctors for negligent treatment which was said to have caused or contributed to his committing the offence; and that decision has since been upheld by the House of Lords in *Gray v Thames Trains Ltd* [2009] UKHL 33, [2009] 1 AC 1339, and by the Supreme Court in *Henderson v Dorset Healthcare University NHS Foundation Trust* [2020] UKSC 43, [2021] AC 563. However, the reasoning in those decisions, though clearly relevant to this case, is not determinative because diminished responsibility is not the same as insanity. The issue has been directly considered in some U.S. and Commonwealth cases, and also in a recent decision of the High Court, *Traylor v Kent & Medway NHS Social Care Partnership Trust* [2022] EWHC 260 (QB), [2022] 4 WLR 35.

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1 The concession was made on the basis of the decision of this Court in *Al Hassan-Daniel v HM Revenue and Customs* [2010] EWCA Civ 1443, [2011] QB 866.

10. In those circumstances it will be necessary to consider the case-law – both the cases identified above and the general authorities on the illegality defence – in some detail. But before I embark on that exercise I need first to summarise the law on the distinct though related question of the liability, both criminal and tortious, of persons who commit unlawful acts as a result of mental illness. Accordingly the structure of this judgment is:

    (A) Preliminary: Criminal and Tortious Liability of the Mentally Ill

    (B) The Illegality Defence: Review of the Authorities

    (C) The Judgment of Garnham J

    (D) Discussion and Conclusion.

11. Since the issue is one of legal principle, I do not believe that it is necessary to set out more of the facts than appears at paras. 1-3 above: those interested can find a fuller account at paras. 7-35 of Garnham J's judgment. I should emphasise that since this is a strike-out application the Claimant's allegations against the various Defendants have not yet been determined. But it is easy to see how it is a cause for concern that he should have twice been released when he was on any view mentally very unwell and had on the second occasion already committed a serious assault on a stranger. In the course of his criminal trial the jury sent a note to the Judge in the following terms:

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

(A) PRELIMINARY: LIABILITY OF THE MENTALLY ILL

CRIMINAL LIABILITY

12. Section 2 (1) of the Trial of Lunatics Act 1883, as originally enacted, provided that:

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

A special verdict in that form was generally referred to as a verdict of "guilty but insane".

13. The form of the special verdict provided for by the 1883 Act was amended by section 1 of the Criminal Procedure (Insanity) Act 1964 so as to read "that the accused is not guilty by reason of insanity". The term "insanity" and its cognates have rather fallen out of ordinary use since then, at least in a medical context, but I will in this judgment avoid the temptation to use more modern terminology because to depart from the language of the statute would risk inaccuracy and confusion.

14. The meaning of "insanity" for the purpose of the 1883 Act as amended is still governed by the opinion of the judges (Maule J dissenting) in *M'Naghten's Case* (1843) 10 Cl & F 200 [8 ER 718], at p. 210, namely that:

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

15. It will be noted that there are two alternative elements in the definition – (a) that the defendant did not know what he or she was doing or (b) that they did not know that it was wrong. The nature of the two elements is fully and helpfully analysed at paras. 34-49 of the judgment of the Divisional Court, given by Irwin LJ, in *Loake v Director of Public Prosecutions* [2017] EWHC 2855 (Admin), [2018] QB 998, but I need not set the passage out here. The finding of insanity in the Claimant's case was evidently on the second basis: that is, he must have known that he was killing (or at least seriously injuring) his victims – as Garnham J put it, he was acting deliberately – but because of his delusions he did not know that what he was doing was wrong. We were also referred to the recent decision in *R v Keal* [2022] EWCA Crim 341, [2022] 4 WLR 41, which considers in more detail what is involved in a finding that the defendant did not know that what they were doing was wrong; but it does not add anything relevant for our purposes.

16. Where a special verdict has been returned in a murder case and the court has the power to make a hospital order, the Court is obliged to make such an order combined with a restriction order. The effect of a combined order is shortly explained at para. 27 of the judgment in *Henderson* (with a cross-reference to the fuller explanation given by Mustill LJ in *R v Birch* (1989) 90 Cr App R 78); but in broad terms it is that the defendant will be committed to a special hospital for an indeterminate, and typically prolonged, period.

17. There was some discussion before us about how the special verdict should be characterised. In *Felstead v The King* [1914] AC 534 the House of Lords made clear, in the context of an issue about whether the defendant could appeal from the special verdict, that it was indeed "a verdict of acquittal of the accused"; and that characterisation is of course reinforced by the change in the statutory language. But that does not mean that the act itself can be described as lawful, and the Appellants submit that the Claimant's acts in the present case can properly be described as criminal, albeit that he has no criminal responsibility for them.

18. In support of that argument Mr Warnock pointed out that in cases of the present kind both the *actus reus* and the *mens rea* for murder are present – see para. 41 in *Loake*, where Irwin LJ says:

> "If a man intentionally kills his wife because of his deluded belief that he is under threat from a representative of Satan and has received a divine order to slay, and that it is lawful to comply with divine orders, then he possesses the *mens rea* for murder but is not guilty of murder because he does not know that what he is doing is unlawful."

He also referred us to *Attorney-General's Reference (no. 3 of 1998)* [2000] QB 401 in which it was held that, for the purposes of obtaining a special verdict under the 1883 Act the Crown had only to prove "that the defendant has caused a certain event or that responsibility is to be attributed to him for the existence of a certain state of affairs, which is forbidden by criminal law ..." (p. 411F).

19. For a similar purpose Ms Ayling referred us to passages from the academic literature which make the point in various ways that verdicts of insanity or diminished responsibility do not imply that the act is in any way lawful. For example, a passage in Professor Gardner's *Offences and Defences* (Oxford 2007) reads (pp. 88-89):

> "It is important to distinguish between actions that are not wrong at all, and actions that are wrong but are justified; between actions that are wrong but justified and those that are wrong and unjustified but excused; and between unjustified but excused wrongs and those which are neither justified nor excused but are nevertheless not punishable. The last category includes, but is broader than, the category of wrongs which are committed without responsibility [because the defendant was insane or his/her responsibility was diminished]."

And in his article *Diminished Mental Capacity as a Criminal Law Defence* (1974) 37 MLR 264, Professor Fingarette says (pp. 270-271):

> "An insane person who kills someone is doing what the criminal law is intended to deter men from doing. His defect with regard to criminal law is grave, notwithstanding the misleading 'Not Guilty' verdict. The point here is not that he is guilty, nor that he is innocent but that his radical incompetence is such that he should not be morally judged at all."

20. I have to say that I did not find this part of the Appellants' submissions helpful. It is no doubt a reasonable use of language to say that in a special verdict case there has been a criminal act (and likewise that the killer is doing something which the criminal law is intended to deter) even though no-one is criminally responsible for it; and Professor Gardner's analysis is highly persuasive for the purposes for which he deploys it. But the question which we have to decide is what the policy of the law is, or should be, as regards the recovery of damages for the consequences of an act of that kind; and for that purpose these characterisations do not advance the argument. I will in this judgment generally use the neutral term "unlawful act".

21. Importantly also, because it features in the cases of *Clunis*, *Gray* and *Henderson* referred to above, section 2 of the Homicide Act 1957 introduces a partial defence of diminished responsibility in cases of homicide where, in short, the defendant is not insane according to the *M'Naghten* definition but where his or her ability to understand the nature of their conduct, or form a rational judgment or exercise self-control, is "substantially impaired" as a result of a recognised medical condition. Where that is proved, a defendant who would otherwise have been guilty of murder is liable to be convicted of manslaughter. In such a case the Court will typically make an order under section 37 of the 1983 Act but may or may not make an order under section 41.

22. Finally, I should note that cases of insanity, where the defendant has done the unlawful act but without the knowledge that it is wrong, are distinct from cases of "automatism", where he or she has not consciously acted at all. That will be the case, for example, where a driver loses control of their car and kills someone as a result of a stroke or a hypoglycaemic episode. I mention automatism only because it, or something very like it, is identified as the only mental state giving rise to a defence to claims in tort: see para. 27 below.

LIABILITY IN TORT

23. The liability of the mentally ill in tort is more extensive than their liability in crime. This is clear from two decisions – *Morriss v Marsden* [1952] 1 All ER 925 and *Dunnage v Randall* [2015] EWCA Civ 673, [2016] QB 639 – which I consider in turn.

24. In *Morriss v Marsden* the defendant attacked the plaintiff while in a seriously psychotic state. He was sued for assault and battery. Stable J found (see pp. 926-927):

> "… that the defendant was not in a condition of automatism or trance at the time of the attack on the plaintiff, but that his mind directed the blows he struck, and that at the material time he was a catatonic schizophrenic and a certifiable lunatic who knew the nature and quality of his act, but whose incapacity of reason arising from the disease of his mind was of so grave a character that he did not know that what he was doing was wrong."

The defendant submitted that it followed from that finding, as it would in the case of criminal liability[2], that he was not liable. Stable J rejected that submission. He accepted that it was necessary to prove that the defendant had acted voluntarily[3] but not that it was necessary that he should have appreciated that what he was doing was wrong. At p. 927H he said:

> "... I accept the view that an intention – i.e., a voluntary act, the mind prompting and directing the act which is relied on, as in this case, as the tortious act – must be averred and proved. For example, I think that, if

[2] The defendant was in fact prosecuted but was found unfit to plead.

[3] The term "voluntary" can be used in more than one sense, but here Stable J is using it to connote a case where the defendant knows what they are doing, even if they may not know it is wrong.

> a person in a condition of complete automatism inflicted grievous injury, that would not be actionable."

After discussing, *obiter*, whether the position might be different where (unlike in the case before him) the nature of the tort required some mental element, he continued at p. 928 E-F:

> "The next matter to consider is whether, granted that the defendant knew the nature and quality of his act, it is a defence in this action that, owing to mental infirmity, he was incapable of knowing that his act was wrong. If the basis of liability be that it depends, not on the injury to the victim, but on the culpability of the wrongdoer, there is considerable force in the argument that it is, but I have come to the conclusion that knowledge of wrongdoing is an immaterial averment, and that, where there is the capacity to know the nature and quality of the act, that is sufficient although the mind directing the hand that did the wrong was diseased."

Accordingly he gave judgment for the plaintiff.

25. Stable J's observation that the basis of the defendant's liability was not his culpability but the injury to the victim reflects the principle that tort law is generally concerned with the compensation of a person who has suffered loss and not with the punishment of the person who has caused the loss, and that for that reason it is just that the person who has suffered the loss should recover from the person who caused it even if they cannot be regarded as culpable. This principle goes back at least to *Weaver v Ward*, (1616) Hob 134, 80 ER 284, where the Court of Common Pleas said that although there was no felony

> "… if a lunatick kill a man, or the like, because felony must be done *animo felonico*, yet in trespass, which tends only to give damages according to hurt or loss, it is not so; and therefore if a lunatick hurt a man, he shall be answerable in trespass".[4]

26. *Morriss v Marsden* was concerned with trespass. In *Dunnage v Randall* this Court (Arden, Rafferty and Vos LJJ) had to consider the question of liability of a mentally ill person in the context of negligence. In that case a visitor to the claimant's home, who was suffering from paranoid schizophrenia, set fire to himself and died. The claimant was badly burned when trying to intervene: there was no finding that the visitor was intending to injure him. He brought proceedings against the visitor's estate for negligence.

27. All three members of the Court delivered substantive judgments. There are some differences of approach between them but each expresses agreement with the others,

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4 I owe this citation to an interesting article by Mr Goudkamp (junior counsel for the Trust in this case) in the Oxford Journal of Legal Studies (vol. 31 (2011), pp. 727-754), from which it also appears that none of the major common law jurisdictions treats insanity as a defence to a claim in tort. It is fair to say that in the article he is critical of the various rationales offered for that position, but I need not consider his objections because English law on the point is clear, at least short of the Supreme Court.

and it seems clear that the essential reasoning is the same. In brief, they regarded the case as indistinguishable from *Morriss v Marsden* (see *per* Arden LJ at para. 146). All that was necessary was that the defendant's mind, however diseased or deluded, should direct their hand: in practice that means that the defendant will only escape liability in cases of automatism (see *per* Arden LJ at paras. 146-147 and Vos LJ at paras. 132-133).

28. Both Arden and Vos LJJ drew support for their conclusion from the decision of the House of Lords in *Corr v IBC Vehicles Ltd* [2008] UKHL 13, [2008] AC 884. In that case an employee who had suffered a serious accident at work as a result of the employer's negligence developed a severe depressive illness and committed suicide. His widow brought proceedings against the employer both as administratrix of his estate and under the Fatal Accidents Act 1976. The main issues in the House of Lords were whether the duty of care owed by the employer extended to the risk of suicide and whether the employee's suicide broke the chain of causation. But there was also an issue as to whether the damages could be reduced for contributory negligence. It was held that there was insufficient evidence to justify any such reduction; but Lord Scott, Lord Mance and Lord Neuberger all took the view that in principle a deduction might have been made, essentially because although the deceased's depression had "impaired" his mental state it had not necessarily wholly "overborne his personal autonomy" (Lord Neuberger's terminology) or reduced him to an "automaton" (Lord Scott's).

29. We were also referred to *Williams v Williams* [1964] AC 698, in which the House of Lords held that in matrimonial proceedings a husband's conduct towards his wife amounted to cruelty notwithstanding that it was the result of paranoid schizophrenia. The majority found that the application of the *M'Naghten* rules in this context was inappropriate because the court was concerned not with the respondent's culpability but with the effect of their conduct on the petitioner. This is effectively the same approach as is taken as regards liability in tort.

(B) THE ILLEGALITY DEFENCE: REVIEW OF THE AUTHORITIES

THE GENERAL LAW

30. The principles underlying the illegality defence generally and the correct approach to its application were authoritatively restated by the Supreme Court in *Patel v Mirza* [2016] UKSC 42, [2017] AC 467. At this stage I need only say that the majority rejected a so-called "rules-based approach" (and more particularly the "reliance-based approach" in *Tinsley v Milligan* [1994] 1 AC 340) in favour of a more flexible approach based on an assessment of the competing public policy considerations and proportionality factors in the particular case. The leading judgment for the majority was given by Lord Toulson. He summarised his conclusion at para. 120, as follows:

> "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."

The three questions identified at (a)-(c) in that passage had been described at para. 101 as "the trio of necessary considerations".

31. However, in its more recent decision in *Henderson* the Supreme Court emphasised that *Patel v Mirza* did not represent "year zero" and that earlier decisions addressing particular types of situation where the illegality defence was invoked remained of precedential value unless they were shown to be incompatible with the approach set out in it: see para. 77 of the judgment of Lord Hamblen (with which the other members of the Court agreed). Thus the appropriate lens through which to examine the issue in this appeal is not primarily the general principles enunciated in *Patel* but rather the comparatively limited number of cases, in this jurisdiction and other common law countries, which are specifically concerned with the case where the relevant illegal act has been done by a claimant who was mentally ill. I consider those cases at paras. 40-82 below.

32. Having said that, there is one aspect of the general law of illegality which, as will appear, is relevant to the analysis. There are a number of authorities which hold that the *ex turpi causa* principle has no application where the claimant was unaware of the unlawfulness in question. Two older cases in particular – *Adamson v Jarvis* (1827) 4 Bing 66, 130 ER 693, and *Burrows v Rhodes* [1899] 1 QB 816 – are regularly cited, but we were also referred to the judgment of Lord Sumption in *Les Laboratoires Servier v Apotex Inc* [2014] UKSC 55, [2015] 1 AC 430 and to some observations by Lord Toulson in *Patel v Mirza*. I should briefly review those cases.

33. In *Adamson v Jarvis* an auctioneer had in good faith sold goods on behalf of a dishonest vendor to whom they did not in fact belong and was obliged to pay their value to the true owner. He brought proceedings against the vendor for reimbursement. One of the issues was whether his claim was barred by the fact that he had participated in the dishonest sale. The Court of Common Pleas held that it was not. Best CJ said, at p. 73:

> "… [F]rom reason, justice, and sound policy, the rule that wrongdoers cannot have redress or contribution against each other is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act."

The "reason, justice and sound policy" behind that requirement is self-evident. The old-fashioned term "turpitude" connotes moral culpability; and it is not normally just that a person should be treated as having behaved culpably unless they were aware (or "must be presumed" to have been aware) that what they were doing was wrong.

34. In *Burrows v Rhodes* the plaintiff was injured while participating in the Jameson Raid. He brought proceedings against its promoters. It was objected that he could not recover because the Raid was unlawful. The Queen's Bench Divisional Court rejected that argument. Kennedy J said that no claim for damages could be founded on an act if it is "manifestly unlawful, or the doer of it knows it to be unlawful" but that that was not the

case where it "was not at the time apparently unlawful, and was done in honest ignorance of the particular circumstances which constituted its unlawfulness": see at pp. 828-829.

35. I should add that there are many other decisions, particularly in the context of claims under an insurance policy or the like, in which the *ex turpi causa* rule has been formulated by the court in terms that refer explicitly to knowing wrongdoing. Examples are *Hardy v Motor Insurers' Bureau* [1964] 2 QB 745 (p. 760), where Lord Denning MR refers to the conduct necessary to attract the defence as "wilful and culpable", and *Gray v Barr* [1971] 2 QB 554, where he uses the same phrase (p. 568H).

36. In *Les Laboratoires Servier* the issue was whether the *ex turpi causa* defence could apply where the claim was based on a civil wrong. Lord Sumption, with whom the majority agreed, held that it could not. Although that is a long way from the issue with which we are concerned in this case, we were referred to two passages in Lord Sumption's judgment.

37. The first is at para. 25, where he says (I omit some parts in the interests of brevity):

> "The ex turpi causa principle is concerned with claims founded on acts which are contrary to the public law of the state and engage the public interest. The paradigm case is, as I have said, a criminal act. In addition, it is concerned with a limited category of acts which, while not necessarily criminal, can conveniently be described as 'quasi-criminal' because they engage the public interest in the same way. … [T]his additional category of non-criminal acts giving rise to the defence includes cases of dishonesty or corruption …; some anomalous categories of misconduct, such as prostitution, which without itself being criminal are contrary to public policy and involve criminal liability on the part of secondary parties; and the infringement of statutory rules enacted for the protection of the public interest and attracting civil sanctions of a penal character … ."

The Appellants sought to apply the terminology of "engagement of the public interest" and "quasi-criminality" to cases like the present where a criminal act is done albeit that the actor had no criminal responsibility. But Lord Sumption was not concerned in this passage with the issue of culpability. He was deploying those terms in order to make clear that the availability of the defence was limited to acts which were crimes, or which engaged the public interest in the same way as a crime, and did not therefore extend to civil wrongs. In fact all his examples of "quasi-criminality" involve conscious wrongdoing.

38. Lord Sumption does, however, address the question of unwitting wrongdoing in para. 29 of his judgment, where he considers "exceptional cases where even criminal and quasi-criminal acts will not constitute turpitude for the purposes of the illegality defence". One such class of case is where the acts in question are trivial and would not normally be regarded as morally culpable. More pertinently for our purposes, he observes that where the relevant unlawful act is an offence of strict liability "the fact that the claimant was not aware of the facts making his conduct unlawful may provide a reason for holding that it is not turpitude at all" because it lacked the necessary "moral culpability". That is in line with the older cases referred to above, and in fact he cites *Burrows v Rhodes*.

39. As for *Patel v Mirza*, the Appellants point out that in para. 93 of his judgment Lord Toulson set out a list of factors suggested by Professor Burrows as potentially relevant if a policy-based approach were adopted, and that these included, as (b), "whether the party seeking enforcement knew of, or intended, the conduct". At para. 107 Lord Toulson described that list as "helpful" but continued:

> "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 [emphasis supplied]."

The Appellants argue that that shows that knowledge or intentionality of wrongdoing on the part of the claimant is not to be regarded as a prerequisite for the operation of the illegality defence but simply as a factor to be taken into account. That is correct as far as it goes, but Lord Toulson himself emphasised that he was speaking at a level of extreme generality. What he says is not inconsistent with the usual position being in accordance with the cases identified above, and the reference to intentionality may well be directed principally to cases of the kind referred to by Lord Sumption in *Les Laboratoires Servier*. In any event, it is important to bear in mind the point made at para. 31 above: we are not starting from a clean slate, and, as will appear, the question of the need for knowledge of wrongdoing, and thus for culpability, are expressly considered in the context of the mental illness cases that I consider below.

RELEVANCE OF MENTAL ILLNESS

40. As noted above, the issue whether a person who has done an unlawful act – and, more specifically, who has committed homicide – while mentally ill and has suffered loss as a result can recover damages against others who have some causative responsibility for the act has been directly considered in the English case-law in *Clunis*, *Gray* and *Henderson*. But we were also referred to some U.S. and Commonwealth authorities. I will consider the cases in chronological order (subject to a couple of exceptions).

Beresford

41. In *Beresford v Royal Insurance Co Ltd* [1937] 2 KB 197 the estate of a man who committed suicide – which was then a criminal offence – was held to be precluded from recovering under a policy of insurance. The jury at the trial of the action found that the deceased was sane at the time that he killed himself. In the course of giving the judgment of the Court of Appeal Lord Wright MR said, at pp 210-211:

> "The question … is whether the felonious suicide of the assured is a bar to the present action. If the assured had taken his life while insane, the fact would not have constituted a defence. The act of an insane person is not in law his act – *Felstead v. the King*."

The same point was not made expressly in the House of Lords ([1938] AC 536), but at p. 594 Lord Atkin set out the jury's finding that the deceased was sane and went on to frame one of the issues in terms of "intentional suicide by a man of sound mind, which I will call sane suicide".

The U.S. Cases

42. In *Boruschewitz v Kirts* 554 NE 2d 1112 (Ill 1990) the plaintiff, who had been receiving treatment for mental illness, killed two people. She was charged with murder and pleaded "guilty but mentally ill". She was "sentenced to incarceration". She brought a claim in negligence against the doctor and the health centre responsible for her treatment. It seems clear that the losses for which she was claiming were the consequence of the killings. The claim was initially dismissed, but the decision was overturned on appeal by the Appellate Court of Illinois. The defendants argued that it was a principle of public policy that "a person should not be allowed to maintain an action if, in order to establish his cause of action, he must rely on his own violation of the criminal or penal laws or on his own immoral acts": that is in substance the *ex turpi causa* principle.

43. The plaintiff's answer was that the principle in question had no application in her case because she was insane at the time that she committed the killings. That was inconsistent with her plea of guilty but mentally ill, but the Court held that her plea was not conclusive. It continued (p. 1114):

> "Plaintiff has alleged in her complaint that she was insane, and we must accept this allegation as true. An insane person is not held to be responsible for his acts. ... Plaintiff is allowed an opportunity to rebut the *prima facie* case and prove that she was criminally insane. In other words, she should be allowed to demonstrate that she did not commit an intentional act and thus was not guilty of a crime. ... Defendants claim that even if [the plaintiff] is not criminally responsible for her actions, she has still committed an immoral or wrongful act. We reject this argument. Society cannot hold people who are insane to the same moral standards as people who are sane. Additionally, the term 'wrongful' must also take on a different meaning in the context of an allegation of insanity."

44. The Appellate Court referred to two decisions in other U.S. state jurisdictions in which claims on apparently similar facts had been summarily dismissed – *Cole v Taylor* 301 NW 2d 766 (Iowa) and *Glazier v Lee* 171 Mich App 216, 429 NW 2d 857 (Michigan); but it distinguished them on the basis that in both cases it appeared that the plaintiff had pleaded guilty, in the one case to manslaughter and in the other to murder, and had not raised a defence of insanity.

45. In *Lingle v Berrien County* 206 Mich App 528 (1994) the plaintiff had killed a man while insane. He was prosecuted and found "not guilty by reason of insanity". He sued the county mental health centre for damages for negligent treatment. It appears that the losses claimed were all consequences of the killing. The claim was summarily dismissed, and that decision was upheld by the Michigan Court of Appeals. The relevant part of the report reads only:

> "Although plaintiff Larry J. Lingle was found not guilty by reason of insanity in the shooting death of Robert Tollaksen the trial court did not err in granting defendants motion for summary disposition. A plaintiff cannot benefit from a cause of action founded upon an immoral or illegal act."

The Court cited its own earlier decision in *Glazier v Lee.* It is not clear whether the plaintiff advanced the distinction which was applied in *Boruschewitz.*

46. In *Traylor*, to which I refer below, Johnson J refers to the decision of the Court of Appeals of Indiana in *Rimert v Mortell* (1997) NE 2d 867. That decision was not cited to us, but the Court apparently said, at pp. 874–875:

> "A prohibition against imposing liability for one's own criminal acts to another through a civil action is simply not justified when a plaintiff is not responsible for the act or acts in question. Thus, if in this case [the claimant] had been found not guilty by reason of insanity, he would bear no criminal responsibility for his acts and his subsequent civil action for recovery … could not be barred by the public policy expressed above."

47. Finally, it is convenient to mention here, outside the strict chronological order, the only other U.S. authority to which we were referred. In *Bruscato v O'Brien*, 307 Ga App 452 (705 SE 2d 275) (2010), the plaintiff, who was mentally ill and had a history of violent behaviour, had killed his mother. He brought proceedings in Georgia against his psychiatrist alleging that he had done so as a result of negligent treatment. At first instance the claim was summarily dismissed on the basis that public policy would not permit him to benefit from his own wrongdoing – i.e. the illegality defence, albeit somewhat differently formulated. The Supreme Court of Georgia upheld a decision of the Court of Appeals overturning that decision. At the time of the decision the plaintiff, who was detained in a mental hospital, had not been tried in connection with the killing. The Supreme Court said:

> "In this case, a question of fact remains whether Bruscato knowingly committed a wrongful act. There is no question that Bruscato killed his mother. That much has been admitted. There is considerable question, however, regarding Bruscato's sanity and competency at the time the wrongful act was committed. At present, although Bruscato has been indicted, he has not been tried for the murder of his mother, and no jury has found him guilty of the crime. Therefore, as the Court of Appeals found: '[B]ecause no court has entered a judgment finding Bruscato legally responsible for his mother's murder and because the issue of his mental competence at the time of the crime has been disputed, a jury issue exists as to whether Bruscato had the requisite mental capacity to commit murder.' As a result, at this moment in time, it cannot be said that, should Bruscato's claim against O'Brien be successful, he might profit from *knowingly* [original emphasis] committing a wrongful act. Concomitantly, then, O'Brien's motion for summary judgment based on such an argument cannot succeed. The foreign cases relied upon by O'Brien, including *Cole v. Taylor*, 301 NW 2d 766 (Iowa 1981), do not alter this outcome, as those cases involved defendants who had already been convicted of the crimes forming the basis of their psychiatric malpractice claims."

In a footnote the Court described *Lingle v Berrien County* as "only a short per curiam decision which contains no reasoning and lacks any persuasive authority".

Clunis

48. In *Clunis* the plaintiff killed a stranger, a Mr Zito, while suffering from a schizoaffective disorder. He was charged with murder but the prosecution accepted a plea of guilty to manslaughter on the grounds of diminished responsibility. He had been receiving treatment for mental illness from the defendant authority. He brought proceedings against it alleging that it had negligently failed to assess his condition in the period immediately before the killing, and that if it had done so he would have been detained and would not have committed the offence. The authority applied to have the claim struck out on two bases, one of which was that it was "based substantially, if not entirely, upon his own illegal act which amounted to the crime of manslaughter: *ex turpi causa non oritur actio*" (p. 985 F-G).

49. The application was dismissed at first instance, but the Court of Appeal (Beldam and Potter LJJ and Bracewell J) allowed the authority's appeal. As regards the argument based on *ex turpi causa*, Beldam LJ, giving the judgment of the Court, pointed out that the plaintiff's claim fell within the terms of the rule to the extent that it arose out of his commission of a criminal offence. But he referred to *Adamson v Jarvis* and *Burrows v Rhodes* as authority for the proposition that its operation was restricted to "cases in which the person seeking redress must be presumed to have known that he was doing an unlawful act" (see p. 987C). Applying that approach to the facts of the case, he said, at p. 989 E-F:

> "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. [Emphases supplied]"

He goes on to consider the decisions of Woolf J in *Meah v McCreamer* [1985] 1 All ER 367 and *Meah v McCreamer (no. 2)* [1986] 1 All ER 943, and to refer to *Gray v Barr* (above). He concludes the judgment, at p. 990 D-E:

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

50. *Prima facie* it should follow from the reasoning of the Court of Appeal in *Clunis*, and specifically from the words which I have emphasised in the first of the two passages

quoted above, that if the plaintiff had been found not guilty by reason of insanity the illegality defence would have failed, because the necessary ingredient of knowledge of wrongdoing would have been missing.[5] However, that cannot be regarded as part of the *ratio*: see para. 85 below.

Presland

51. *Hunter Area Health Service v Presland* [2005] NSWCA 33, (2005) 63 NSWLR 22, is a decision of the Court of Appeal of New South Wales (Spigelman CJ, Sheller and Santow JJA). The plaintiff (the respondent to the appeal) had killed his brother's fiancée, a Ms Laws, while in an acute psychotic state. He was tried for murder but acquitted on the basis that his illness "so affected his capacity to reason that he did not know that what he was doing was wrong" (see per Sheller JA at para. 251); and he was committed to a psychiatric hospital as a "forensic patient". That verdict is evidently substantially the same as a verdict of not guilty by reason of insanity in English law and governed by the same principles. Only a few hours before he killed Ms Laws the plaintiff had been discharged from a psychiatric hospital to which he had been taken by the police following an episode of bizarre and violent behaviour. He brought proceedings for negligence against the body responsible for the hospital and the consultant who had discharged him, a Dr Nazarian, on the basis that he was evidently seriously psychotic and that he should have been detained.

52. The plaintiff's claim was upheld at first instance, and he was awarded damages in the sum of $369,300, comprising loss of income together with general damages of $225,000. The latter figure included compensation for the impact on the plaintiff of his detention on remand and in psychiatric hospital: the trial judge took into account the fact that if Dr Nazarian had acted properly he would have been detained for some time in any event, albeit that the period would have been shorter and the conditions less restrictive.

53. The Court of Appeal (Spigelman CJ dissenting) allowed the defendants' appeal. All three justices treated the essential issue as being, as Spigelman CJ put it at para. 4 of his judgment, "the scope of the duty of care, particularly whether it extends to encompass the effects of unlawful conduct", rather than whether what would otherwise have been a breach of duty was defeated by a supervening defence of illegality. As I understand it, this reflects the fact that binding Australian authority meant that the *ex turpi causa* principle as traditionally understood had no application. However, all three treated the underlying question as being one of policy, so that essentially the same considerations were in play as if the Court had been concerned directly with the illegality defence.[6]

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5 For what it is worth, I note that, although Beldam LJ does not refer to any U.S. authority, it appears from the report that *Boruschewitz* was cited to the Court (together with *Cole v Taylor*, *Glazier v Lee* and *Swofford v Cooper*). The potential implications of his reasoning are thus unlikely to have been lost on him.

6 In the case of *Hall v Hebert*, cited at para. 71 below, the Supreme Court of Canada rejected the submission that the *ex turpi causa* principle could be subsumed into the question of whether a duty of care was owed.

54. All three judgments are very lengthy. I need to summarise each of them, but I will do so as shortly as possible.

55. The essence of Spigelman CJ's reasons for his dissenting decision that the claim came within the scope of the defendants' duty is that the plaintiff's insanity meant that he was not morally culpable for his action. At paras. 42-77 of his judgment he carries out an exhaustive review of English, Australian and U.S. authority on the defence of illegality. He gives particular attention to *Boruschewitz* and *Clunis*, because of their closeness on the facts to the case before the court, but he also cites a number of other authorities to the effect that the defence only applies where the claimant knows that he or she is acting unlawfully: the English authorities cited are not only those cited in *Clunis – Adamson v Jarvis*, *Burrows v Rhodes* and *Gray v Barr* – but also *Beresford* and *Hardy*. At para. 78 he says:

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

His conclusion on this part of the case, at para. 95, reads:

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

56. Sheller JA's reasoning on this part of the appeal appears at paras. 285-300 of his judgment. I have not found the sequence of reasoning in that passage entirely easy to follow, but the key stages appear to be as follows.

57. At para. 292 he observes:

> "In general terms, two considerations may stand in the way of the plaintiff's success in the present case. Although he was acquitted on grounds of mental illness, his act was and remained an unlawful act. His was not justifiable homicide but an unlawful homicide for which he was not criminally responsible. ... Adams J recognised that the plaintiff's acts were deliberate acts of killing. His acquittal on the grounds of mental illness proceeded in the language of Dixon J in [*The King v Porter* (1933) 55 CLR 182] on the supposition that the plaintiff knew he was killing, knew how he was killing and knew why he was killing, but that he was quite incapable of appreciating the wrongness of the act. Although the plaintiff was acquitted and hence held not criminally responsible for the murder, what followed for which he now seeks

> compensation was the statutory response to the reason for his acquittal …. He was accordingly detained in strict custody in a psychiatric hospital. He claims damages for the consequence of that detention."

As I understand it, the two "considerations" are (1) that the killing of Ms Laws was an unlawful act deliberately done by the plaintiff, albeit without knowledge of its wrongness, and (2) that his detention was the consequence of that act required by the law. At para. 294 he quotes an observation of Gleeson CJ to the effect that "where there is a problem as to the existence and measure of legal responsibility, it is useful to begin by identifying the nature of the harm suffered by a plaintiff". He identifies the harm in question in para. 295 – in short, that the lawful detention which was the consequence of his killing of Ms Laws – and observes that "public policy must loom large in a court's consideration of whether the plaintiff be compensated for the harm so suffered".

58. The main public policy consideration which he goes on to consider is the risk that, if a claim lay in such a case, those responsible for making decisions about the care and treatment of mentally ill patients might be encouraged "to return to paternalistic practices, such as involuntary commitment, to protect themselves against possible medical malpractice liability" – in short, defensive medicine (see paras. 296-297). But he was also concerned by a different question. At para. 299 he refers to "the general rule … that one man is under no duty of controlling another man to prevent his doing damage to a third", but notes that there are exceptions where there is some special relationship, such as that of parent and child. He continues:

> "299. … If responsibility is limited to a particular period of time, in this case six hours, or to harm done to persons with some relationship to the attacker, in this case the fiancée of the plaintiff's brother, or otherwise, where is the line to be drawn either in the case of a claim by the attacker for the consequences of his attack (the present case) or a claim by the victim or the victim's representatives?
>
> 300. If, in the present case, instead of killing Ms Laws the plaintiff had come upon Dr Nazarian that night and killed or injured him, Dr Nazarian's estate or Dr Nazarian would by parity of reason, have been liable to compensate the plaintiff for the consequences of his detention as a result of the unlawful killing of or assault upon Dr Nazarian. In this case, identification of the nature of the harm suffered by the plaintiff points as a matter of commonsense against the existence of a legal responsibility in the defendants for that harm. In my opinion, the verdict and judgment in favour of the plaintiff must be set aside."

59. I understand the last two sentences of para. 300 to relate to the entirety of the reasoning from para. 285 onwards and not only to the point being made at the beginning of the paragraph and in para. 299. The essential point being made in that particular passage is that difficult questions would arise if the victim of the claimant's unlawful act were the very person who was responsible for not detaining him. The implication, though it is not spelt out, is that it would be anomalous if he could recover damages in such a case; and that casts doubt on the existence of a duty more generally.

60. Turning to Santow JA's reasoning, I have likewise not found it entirely easy to follow its detailed structure. He summarises his overall conclusion at the start of his judgment, from paras. 309-319. At para. 312 he says:

> "… [T]o paraphrase what was said by McHugh J in *Cole v South Tweed Heads Rugby* (2004) 78 ALJR 933 at [46] 'some minds may instinctively recoil' at the idea that a hospital authority and psychiatrist, however careless, may be liable for the loss of liberty lawfully suffered by a forensic patient, following his killing of another while insane, itself an unlawful act, but without criminal consequence. Such an instinctive recoil is no substitute for the objective application of tort principle, as McHugh J there points out. But that reaction may nonetheless be a reflection of more considered community values, not to be stigmatised as based merely on prejudice or emotion."

He goes on to acknowledge the "fundamental moral principle" that a person is not to be blamed for what he has done if he cannot help doing it, but he continues, at para. 313:

> "But it does not follow that such a person, as distinct from his victim, should be compensated for the lawful consequences to him that followed the hospital authorities' initial failure to detain him for treatment. This is for two possible reasons. The first is grounded in legal policy and the second relates to what would have happened if the supposed duty had been performed."

As to the first of those reasons, at para. 315 he says:

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

As to the second, at paras. 316-319 he says that there is real uncertainty as to whether, if the plaintiff had been detained when he should have been, he would not still have been released in due course and gone on to kill someone else, and he says that that uncertainty was itself a reason why the scope of the duty of care should not extend to the consequences of the killing which he in fact committed.

61. I need not follow through the detailed development of that reasoning in the following paragraphs. I will only quote a passage from para. 383, where Santow JA is dealing with what he describes (see para. 380) as "the normative aspects of causation". He says:

> "While I agree that the unlawfulness of an act of homicide committed while insane should not be an automatic bar to recovery, I respectfully disagree that it has no weight when it comes to determining what consequences of such actions should give rise to civil liability in negligence. Legal policy treats insanity as an 'excuse', though not justification, for what remains an unlawful act … .[7] But considerations of coherence as well as difficulties of causation lead it in my view to draw the line at permitting recovery by the person who committed that act for the non-physical consequences of his later detention in a mental hospital even though but for the hospital's failure to detain, Ms Laws would not have been killed. … "

His overall conclusion at para. 388 reads:

> "I am of the view that it would be unjust to render the appellants as defendants legally responsible for a non-physical injury suffered by the respondent from deprivation of his liberty, when traced back to his unlawful but not criminal conduct. This is because that homicidal conduct is excused but not justified by the law on the ground of the respondent plaintiff's insanity. That conduct nonetheless constituted wholly unreasonable action on the respondent's part, lacking moral culpability only by reason of his insanity. Such a normative conclusion is reinforced by the Act's[8] emphasis on serious physical harm when none eventuated to the respondent. The law in consequence should be reluctant to visit civil liability, more especially in such a novel area and for non-physical consequences. Civil liability attaching to a failure to restrain risks promoting a bias towards detention, when the statutory scheme calls for an impartial exercise of discretion compulsorily to detain, taken only when fully justified, if not as a last resort. Therefore to introduce civil liability, which logically must also apply to decisions to restrain, is likely to induce a detrimentally defensive frame of mind on the part of the decision-maker in either context, so undermining coherence of the statutory scheme."

62. As I read it, the principal thread in Santow JA's reasoning is that it is repugnant to "community values" that the plaintiff should recover damages for the lawful consequences of his own unlawful act in killing Ms Laws, notwithstanding that the act was done while he was insane. But he also refers to "considerations of coherence as well as difficulties of causation". The difficulties of causation appear to be those identified at paras. 316-319, summarised above. The reference to coherence appears to be to the risk that allowing a claim such as that advanced by the plaintiff would act as a discouragement to release and thus be contrary to the objectives of the Act – again, defensive medicine.

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[7] The omitted passage is a reference to an article, *Insanity, Automatism and the Burden of Proof on the Accused* in (1995) 111 LQR 475, which in turn cites Hart *Punishment and Responsibility*.

[8] The reference to "the Act" is to the applicable New South Wales legislation, which Santow JA had analysed at paras. 327-376. This authorises the detention of mentally ill persons only where it is necessary in order to protect them or others from serious physical harm.

63. I should note, finally, that the Court unanimously agreed that the trial judge's assessment of general damages should be reduced to $100,000. I am not sure that Spigelman CJ's reasons for the reduction were the same as Sheller JA's (with which Santow JA agreed); but I need not pursue the point.

Ellis

64. In the New Zealand case of *Ellis v Counties Manukau District Health Board* [2006] NZHC 826, [2007] 1 NZLR 196, the plaintiff killed his father in the course of a psychotic episode. He was subsequently acquitted by reason of insanity but was detained in a mental hospital. For some time before the killing he had been exhibiting psychotic symptoms and had been assessed by doctors employed by the defendant Board. He brought proceedings for negligence and breach of statutory duty on the basis that if he had been properly assessed he would have been detained and the killing would never have occurred. The defendant applied to strike the action out on the basis that there was no duty of care to prevent damage of the kind claimed for. Potter J struck the action out on that basis. As in *Presland*, however, his reasoning involved him considering the *ex turpi causa* rule. He agreed that the rule had no application, stating:

> "Mr Ellis was held not guilty by reason of insanity of killing his father. He has been acquitted of criminal responsibility for that act. This is not a factor which should be taken into account."

Gray and *Henderson*

65. In both *Gray* and *Henderson* the claimants pleaded guilty to manslaughter on the basis of diminished responsibility and were ordered to be detained in a hospital under sections 37 and 41 of the 1983 Act. In *Gray* the claimant killed a man in a road rage incident while suffering from PTSD as a result of injuries sustained in a train crash, and the defendants were the companies whose negligence had caused the crash. In *Henderson* the claimant, who had a history of paranoid schizophrenia, killed her mother during a psychotic episode, and the defendant was the NHS Trust responsible for the claimant's psychiatric care: it was her case that if she had been properly treated she would not have committed the killing. It has not been suggested that that difference in the nature of the causative link in the two cases is relevant in this context.

66. The House of Lords in *Gray* held that the claimant's claims were barred as a matter of public policy and upheld the decision in *Clunis*. On the face of it that decision applied equally to the claim in *Henderson*, and the claimant's case was dismissed both at first instance and in this Court. But in the Supreme Court the claimant argued that *Gray* could be distinguished, alternatively that it was inconsistent with *Patel v Mirza* and that the Court should depart from it. Both arguments were rejected and the dismissal of the claim was accordingly upheld.

67. The principal opinions in *Gray* were delivered by Lord Hoffmann and Lord Rodger, with whom the other members of the Committee agreed. I take them in turn.

68. Lord Hoffmann's starting-point is that the rule which excluded the claimant's claim had both a wider and a narrower form, identified at para. 32 of his opinion as follows:

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

69. As regards the narrower rule, Lord Hoffmann identifies the rationale as being based on "inconsistency". He refers to *Clunis* and to the decision of this Court in *Worrall v British Railways Board* (unrep, 29.4.99). In that case the Court struck out a claim for loss of earnings by a plaintiff who had been imprisoned for serious offences which he blamed on a change of personality following an accident at work for which his employer was liable. Mummery LJ said:

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

He goes on to quote a statement from Law Commission paper no. 160 (2001) *The Illegality Defence in Tort* that "it would be quite inconsistent to imprison or detain someone on the grounds that he was responsible for a serious offence and then to compensate him for the detention". He refers also to the decisions of the New South Wales Court of Appeal in *State Rail Authority of New South Wales v Wiegold* (1991) 25 NSWLR 500 and of the Supreme Court of Canada in *British Columbia v Zastowny* [2008] 1 SCR 27, which involved claims of essentially the same character. At para. 39 he quotes from the judgment of Rothstein J in *Zastowny* as follows:

> "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'."

70. As regards the wider version of the rule, Lord Hoffmann says, at para. 51, that it differs from the narrower version in at least two respects:

> "[F]irst, it cannot, as it seems to me, be justified on the grounds of inconsistency in the same way as the narrower rule. Instead, the wider rule has to be justified on the ground that it is offensive to public notions of the fair distribution of resources that a claimant should be compensated (usually out of public funds) for the consequences of his own criminal conduct. Secondly, the wider rule may raise problems of causation which cannot arise in connection with the narrower rule. The sentence of the court is plainly a consequence of the criminality for which the claimant was responsible. But other forms of damage may

> give rise to questions about whether they can properly be said to have been caused by his criminal conduct."

The reference to "public notions of the fair distribution of resources" has been glossed in *Henderson*: see para. 58 (3) of Lord Hamblen's judgment quoted at para. 72 below.

71. Lord Rodger's approach was differently structured but essentially to the same effect. After reviewing the reasoning in *Clunis*, *Wiegold* and *Zastowny*, he says, at para. 69:

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

I should note that he quotes rather more fully from *Zastowny* than Lord Hoffmann, including a statement that "[p]reserving the integrity of the justice system by preventing inconsistency in the law is a matter of judicial policy that underlies the *ex turpi* doctrine": that formulation too derives from the influential judgment of McLachlin J in *Hall v Hebert* [1993] 2 SCR 159.

72. At para. 58 of his judgment in *Henderson* Lord Hamblen, with whom the other members of the Court agreed, made the following observations about *Gray*:

> "(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' (para 51). 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."

73. Since in neither case was there any question of the claimant being insane, or therefore of their not knowing that what they were doing was wrong, it was unnecessary for either the House of Lords in *Gray* or the Supreme Court in *Henderson* directly to consider the application of the illegality defence in such a case. However, Lord Hoffmann did refer to it at para. 42 of his opinion in *Gray*, where he said:

> "It should be noticed that in *Hunter Area Health Service v Presland* [2005] NSWCA 33; (2005) 63 NSWLR 22 the New South Wales Court of Appeal (again by a majority: Sheller and Santow JJA, Spigelman CJ dissenting) went even further and applied the rule when the plaintiff, who had been negligently discharged from a psychiatric hospital, was acquitted of murdering a woman six hours later on the ground of mental illness but ordered to be detained in strict custody as a mental patient. There are dicta (for example, in the passage I have quoted from *Clunis's* case [i.e. the passage from p. 989 quoted at para. 49 above]) which suggest that the rule does not apply when the plaintiff, by reason of insanity, is not responsible for his actions. But the majority regarded compensation even in such a case as contrary to public policy. Sheller JA made the pertinent observation (at para 300) that if the rule did not apply and the plaintiff had killed the negligent psychiatrist who discharged him, the latter's estate would have been liable to pay the plaintiff compensation for his consequent detention. This case, which Sheller JA (at para 294) described as 'unusual if not unique' raises an interesting question about the limits of the rule which it is not necessary to decide for the purposes of this appeal."

It is clear, therefore, that Lord Hoffmann did not regard the application of the illegality defence in such a case as having been decided by necessary implication in *Clunis*. Although *Presland* was cited in *Henderson* Lord Hamblen makes no reference to it.

74. The structure of Lord Hamblen's judgment in *Henderson* is that, having analysed the reasoning in *Gray* and *Patel v Mirza*, he goes on to address three issues: (1) whether *Gray* could be distinguished (paras. 79-86); (2) whether *Gray* should be departed from (and *Clunis* over-ruled) because it was inconsistent with *Patel v Mirza* (paras. 87-145);

and (3) whether all the heads of loss claimed were irrecoverable (paras. 146-149). We are only concerned with issues (1) and (2).

75. As to issue (1), the claimant's case that *Gray* should be distinguished was based on the proposition that on the particular facts of their respective cases Mr Gray had "significant personal responsibility" for the killing whereas she had none: he had been suffering from PTSD but unlike her was not psychotic. Lord Hamblen rejects that contention, on the basis that, even if the premise were correct, the crucial consideration for the majority in *Gray* "was the fact that the claimant had been found to be criminally responsible, not the degree of personal responsibility which that reflected" (para. 83).

76. As to issue (2), Lord Hamblen addresses the claimant's case of incompatibility with *Patel v Mirza* under three headings, which I take in turn.

77. Heading (i) is "whether the reasoning in *Gray* cannot stand with the approach to illegality adopted by the Supreme Court in *Patel*" (paras. 89-96). Lord Hamblen holds that the reasoning in *Gray* is consistent with the approach adopted by the majority in *Patel v Mirza*. That point is irrelevant for our purposes, and I need not summarise his reasoning.

78. Heading (ii) is "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" (paras. 97-112). Lord Hamblen answers that question in the negative. His essential point is that the claimant had been convicted of a criminal offence which necessarily involved both "blame" and "responsibility" (see in particular paras. 109 and 112). In that context, he repeats and evidently endorses the reasoning in *Clunis* and *Gray*, saying (at para. 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'."

As I have already noted at para. 50 above, the apparent implication is that if *Henderson* had been an insanity case, so that the claimant had no knowledge of what he was doing and no criminal responsibility, the illegality defence would not have applied; but, as I also say, an implication of that kind cannot constitute binding authority.

79. Heading (iii) is "whether the application of the trio of considerations approach set out in *Patel* leads to a different outcome". Lord Hamblen addresses those considerations in turn.

80. The first consideration is "the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim". As to that, Lord Hamblen says:

"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."

81. The second consideration is "any other relevant public policy on which the denial of the claim may have an impact". The claimant had suggested four public policies which weighed in favour of recovery: I need not set them out. Lord Hamblen examines these at paras. 133-136. At para. 137 he acknowledges that at least some of them have some force but he says they do not begin to outweigh the considerations supporting denial of the claim.

82. The third consideration is "whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is for the criminal courts". Paras. 138-143 read:

> "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.
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> 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.
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> 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."

Traylor

83. In *Traylor* the claimant suffered a severe psychotic episode during which he injured his daughter and was himself shot by police officers. He was prosecuted for attempted murder but found not guilty by reason of insanity. He brought proceedings for negligence against the NHS Trust from whom he had been receiving treatment prior to the injury. Johnson J dismissed the claim on the basis that although the Trust had been negligent its breaches of duty had not caused the losses in respect of which he claimed. However he went on to hold, albeit obiter, that if the claim had otherwise succeeded the Trust would not have been able to rely on the illegality defence.

84. The relevant part of his judgment is at paras. 105-119. His reasoning can be sufficiently summarised as follows:

(1) He rejects a submission that the claimant should be treated as having "committed a criminal act". As he put it at para. 110, "the common law background and legislative history show that those who satisfy the test in the *McNaughten* rules are not regarded in law as having committed the act or having any responsibility for the act".

(2) He relies on the authorities referred to at paras. 33-35 above[9] as establishing that "the illegality defence only applies where the claimant knew that he was acting unlawfully" and points out that that was not the case where the claimant had been found to be insane (paras. 111-112).

(3) He relies on the implications of the dicta of Lord Wright in *Beresford* and of Beldam LJ in *Clunis* (para. 113).

(4) He says that to allow the defence to apply in the case of a claimant who was insane at the relevant time would run contrary to the emphasis placed by Lord Hamblen in *Henderson* (see paras. 139 and 142) on the fact that "the claimant knew what she was doing and that it was legally and morally wrong": the claimant in *Traylor* did *not* know that what he was doing was wrong (para. 114).

(5) He relies on the U.S. decisions – *Boruschewitz*, *Rimert* and *O'Brien* (para. 115).

(6) He acknowledges that the majority in *Presland* went the other way, but he says that neither Sheller JA nor Santow JA "relied on an orthodox application of the common law illegality defence" (para. 116).

OVERVIEW

85. It will be apparent from that survey that, as I have said, there is no binding authority on the question whether the illegality defence applies where the unlawful act in question

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9 He also referred to two other cases – *James v British General Insurance Co Ltd* [1927] 2 KB 311 and *Pitts v Hunt* [1991] 2 QB 24 – which before us the Appellants were at pains to seek to distinguish; but the extent to which they are relevant is not a question which we need to consider in view of the other authorities referred to.

was done when the claimant was insane – in Beldam LJ's phrase, an "insanity case". As far as English appellate authority is concerned, it is fair to say that the implication of the reasoning in *Clunis*, and in *Henderson* insofar as it adopts that reasoning, might be thought to be that the defence should not apply in an insanity case: see paras. 50 and 78 above. But it does not follow that those decisions are authoritative since they were not themselves concerned with an insanity case. We were reminded of Lord Halsbury's statement in *Quinn v Leathem* [1901] AC 496, at p. 506, that

> "… a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it."

It is also fair to observe that in *Gray* Lord Hoffmann clearly did not regard *Clunis*, as endorsed by him, as necessarily meaning that the defence would not apply in an insanity case: see para. 73 above. In *Beresford* Lord Wright's statement that a person who committed suicide when insane would not have been debarred from claiming is explicit; but, again, that case concerned a claim under a life insurance policy, and what he said cannot be treated as necessarily applying to a claim of the kind with which we are concerned.

86. As regards other jurisdictions, the cases go both ways. The fullest discussion is in *Presland*, which holds that public policy would preclude recovery in an insanity case. But its persuasive authority is reduced by the fact that it is only a majority decision and by the rather different reasoning adopted by the two members of the majority. The preponderance of U.S. authority favours recovery, but the persuasive weight of *Boruschewitz*, *Rimert* and *Bruscato* is also limited since the issue is one of policy, and public policy in this country would not necessarily be the same as in the United States.[10]

87. Having said that, I believe that the general tendency of the authorities can fairly be said to be against the illegality defence applying in an insanity case. There is a consistent focus on the simple proposition that it is wrong – or, in Best CJ's words in *Adamson v Jarvis*, contrary to "reason, justice, and sound policy" – to treat an otherwise good claim as barred because it depends on an unlawful act done by a claimant who had no knowledge that he or she was acting unlawfully and therefore is not morally culpable; and that proposition is applied in several cases where the relevant lack of knowledge was the result of mental illness.

(C) THE JUDGMENT OF GARNHAM J

88. Without intending any disrespect to Garnham J's careful judgment, I need not, since the issue which we have to decide is one of pure law, summarise his reasoning in any detail. After a thorough review of the authorities which I have considered above, at para. 127 he summarises the principles which he believed emerged from them in ten propositions. At paras. 128-142 he applies those principles to the facts of the case. His essential reasoning is that the illegality defence only applies where the claimant knew that he was acting unlawfully, and that the special verdict conclusively established that that was not the case (see paras. 129 and 131). The distinction between the present case

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10 Lord Atkin made this point in *Beresford* – see at p. 600. I would add that the legal culture of the United States, at least in the relevant respects, may tend to be more favourable to plaintiffs than that of this jurisdiction.

and *Henderson* was "not arbitrary but fundamental, turning as it does on the presence or absence of criminal responsibility" (para. 134). I have already quoted his conclusion on this aspect at para. 135 (see para. 7 above). He addresses various other particular arguments advanced by the Defendants. I need not quote the passages in question.

(D) DISCUSSION AND CONCLUSION

89. Each of the three Appellants pleads a number of grounds of appeal, although there is considerable overlap between them. I do not believe that the most helpful course is to go through each in turn. Instead I will address directly the issue of law raised by this appeal, namely whether the Claimant's claims are barred by the illegality defence, while making sure that in doing so I cover the various pleaded grounds.

90. In considering this issue we must proceed on the basis that unless the illegality defence applies the Claimant has a good claim for negligence against the Appellants: if he did not, the issue would not arise. That means that we must proceed on the basis that it was evident during at least his second period of detention that he was seriously mentally ill and liable to commit violence against others (having already assaulted one man and behaved violently in the police station); that the medical professionals negligently failed to take the necessary steps to ensure that he was detained and thus prevented from attacking anyone else; that the killings which he went on to commit immediately following his release were a direct and foreseeable consequence of that negligence; and that he has in consequence suffered loss of the various kinds claimed.[11] In short, he has suffered a serious injury (in the technical sense) from the failures of others who owed him a duty to protect him from harm of the kind that he in fact suffered. If we are using the language of public policy, it is clearly the policy of the law – reflected in the law of negligence – that people in that position should be compensated for the loss which they have suffered. The question is whether that public policy is outweighed by the other considerations of public policy relied on by the Appellants.

91. The public policies on which the Appellants rely are described in various ways in their skeleton arguments and oral submissions, but it is most convenient to start with the two broad headings considered in *Gray* and described by Lord Hamblen in *Henderson* as "the consistency principle" and "the public confidence principle" (see para. 58 (2) and (3) of his judgment, quoted at para. 72 above).

THE CONSISTENCY PRINCIPLE

92. The inconsistency considered in *Gray* and *Henderson* is between, on the one hand, treating the claimant's conduct as criminal and, on the other, allowing them to claim damages for the consequences of that conduct. But before us the Appellants also argued that allowing the Claimant to recover compensation would be inconsistent with the approach taken by the civil law. I take the two kinds of inconsistency in turn.

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11 This summary focuses, for simplicity, on the Claimant's second release, on 10 February 2019. The issues about liability, and perhaps causation, will in principle be different as regards the first release; but that does not affect whether the illegality defence applies.

Inconsistency with the Criminal Law

93. The Claimant's case is straightforward. The verdict of not guilty by reason of insanity was an acquittal. Accordingly the law has not treated him as criminally responsible for his actions, and there is no inconsistency in allowing him to recover for the loss that he has suffered in consequence of them.

94. The Appellants' primary answer to that case is that although the Claimant might not be criminally liable he had nevertheless committed a criminal act, in the sense that he had committed the *actus reus* of murder, and with the necessary *mens rea* (see para. 18 above); and that that was enough to engage the public interest and constitute the necessary "turpitude". This is the same point that Sheller JA makes in *Presland*, where he emphasises that the plaintiff's killing of Ms Laws remained an unlawful act notwithstanding his insanity: see para. 57 above.

95. I would accept the Claimant's case on this issue. It is in my view sufficiently clear from Lord Hoffmann's opinion in *Gray* that the inconsistency with which he was concerned was based on the claimant's criminal liability, or responsibility, for the act in question and not simply on the fact of his having done what could be characterised as a criminal act. That is the implication both of a number of the passages which he quoted with evident approval as set out at para. 69 above – from the Law Commission ("*responsible for* a serious offence") and from the judgments of Mummery LJ in *Worrall* ("inconsistent with his *criminal conviction*") and Rothstein J in *Zastowny* ("the illegal acts for which he was *convicted*"). The same goes for Lord Rodger: see his conclusion quoted at para. 71 that a claimant could not recover compensation for an injury or disadvantage imposed "by way of *punishment* for a criminal act for which he is *responsible*". It would, I suppose, be possible to account for that language on the basis that the claimants had in fact been found criminally liable, so that it was unnecessary to distinguish between the criminal act and the claimant's responsibility for it; but I believe that the focus on the latter properly reflects the policy in play. It is only if it has imposed a criminal sanction on the claimant that, in McLachlin J's words in *Hall v Hebert*, the state would be "giving with one hand what it takes away with the other" – that is, to spell it out, compensating the claimant for the consequences of the penalty which it has itself imposed.

96. That approach also seems to me to accord with the fundamental justice of the matter. At a superficial level you could still say that it was inconsistent to allow a person to recover for the consequences of an unlawful act which they have done. But at a more fundamental level the criminal law is concerned not with acts as such but with personal responsibility for those acts, and a difference in treatment based on differences in personal responsibility cannot be said – again, to quote McLachlin J – to undermine "the integrity of the justice system". This reflects the basic perception reflected in the authorities which I refer to at paras. 33-38 above based on the requirement of moral culpability.

97. The Appellants make the point that the orders under sections 37 and 41 of the 1983 Act under which the Claimant was detained are the same as those often made in the case of defendants who are convicted of manslaughter by reason of diminished responsibility and in fact made in both Mr Gray's and Ms Henderson's cases. On that basis it is said to be inconsistent for the illegality defence to be available in the one case but not the other. I do not accept that argument. Quite apart from the fact that the making of those

orders is mandatory in the case of a verdict of not guilty by reason of insanity but a matter of discretion in a diminished responsibility case, the fact that identical orders may be made does not mean that the nature of the claimant's responsibility is the same: it only means that in both cases there is a need both for treatment and rehabilitation and for the protection of the public.

98. The Appellants also emphasised the point made by the majority in *Presland* that it was inconsistent for the claimant to claim damages for detention pursuant to an order lawfully made by the Court. I do not see this as a distinct consideration. If the detention has no punitive element – which in the case of a verdict of not guilty by reason of insanity it does not – its lawfulness is an irrelevance. If, say, a patient had been negligently prescribed a drug which caused a psychotic state and had to be sectioned it would be no answer to a claim against the prescriber for damages for the loss of liberty and distress caused by their detention to say that the detention was lawful.

99. I should emphasise that I am dealing here only with the inconsistency principle. The Appellants' argument that the Claimant should not be entitled to recover compensation for the consequences of his criminal act (albeit one for which he had no criminal responsibility) can still be deployed in the context of the public confidence principle, and I consider it in that context below.

Inconsistency with the Civil Law

100. As identified at paras. 23-27 above, insanity is no defence to an action in tort. If the estates, or the dependants, of the Claimant's victims chose to sue him for damages for their deaths he would be liable notwithstanding that he acted while insane: the law would treat him as responsible for his acts as long as, in Stable J's words in *Morriss v Marsden*, his mind directed his hand. The Appellants contend that it would be incoherent if the law took a different approach to his responsibility for his acts in the context of a claim brought by him for damages against a third party.

101. Although I have for convenience included this point under the heading of the consistency principle, it is a rather different kind of inconsistency from the inconsistency with the criminal law identified in *Gray* – "incoherence" might be a better label. But I need not trouble with that taxonomic question because I do not believe that there is any incoherence about the different approaches. The question of the liability of the Claimant to his victims for the injury which he caused them is self-evidently different from the question of the liability of the Appellants for the loss which they have caused him. In the former case justice requires that the interest of the victim in receiving compensation comes before any question of moral culpability: see para. 25 above. In the latter it is the Claimant who is the victim of wrongdoing and the question whether he should nevertheless be denied recovery because his loss was the result of a criminal act has to be considered in that quite different context. Again, I am not saying that it has to be answered in his favour, only that to allow recovery would not be inconsistent with the rule that his insanity does not preclude his liability to his victims.

THE PUBLIC CONFIDENCE PRINCIPLE

102. In *Henderson* Lord Hamblen defined "the public confidence principle" as being 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" because

that is "an outcome of which public opinion would be likely to disapprove" (see para. 58 (3) quoted at para. 72 above).

103. In my view it is this principle which is at the heart of this appeal, as it was for Santow JA in *Presland*, and I have not found it easy to decide whether it should operate in this case. I do not doubt that it would – at least as a first reaction – stick in the throats of many people that someone who has unlawfully killed three innocent strangers should receive compensation for the loss of liberty which is a consequence of those killings, however insane he was and however negligent his treatment had been. To the extent that that reaction reflects, in Santow JA's language, "considered community values", we should be very slow to disregard it: the law ought so far as possible to give effect to such values.

104. However, I have come to the conclusion that, although that first reaction is entirely understandable, the values of our society are not reflected by debarring a claimant from seeking compensation in this kind of case. It is necessary, as Santow JA accepted, to go beyond "instinctive recoil" and to consider what justice truly requires in a situation which most humane and fair-minded people would recognise as far from straightforward. Taking that approach, although of course those who are killed or injured must always be treated as the primary victims, it is fair to recognise that the killer also may be a victim if they were suffering from serious mental illness and were let down by those responsible for their care. I rather suspect that some such view underlies the observations of the jury at the Claimant's trial which I quote at para. 11 above. But, whether it does or not, I believe that the considered view of right-thinking people would be that someone who was indeed insane should not be debarred from compensation for the consequences of their doing an unlawful act which they did not know was wrong and for which they therefore had no moral culpability. As we have seen, the law does not generally apply the illegality defence where the claimant does not know that what they are doing is wrong and has no moral culpability; and in my view that reflects ordinary and comprehensible principles of fairness. I do not believe that it is rational, or would accord with community values, that the position should be different where the claimant's lack of knowledge or culpability was the result of insanity. In short, I would align myself with the approach taken by Spigelman CJ at para. 95 of his judgment in *Presland*: see para. 55 above.

105. Having reached that conclusion as a matter of principle, I think it is reinforced by the consideration that, as I believe, it reflects the tendency of the authorities and the implications of the reasoning in *Clunis*, and thus also of *Gray* and *Henderson* in which that reasoning was approved.

106. In support of their contention that to allow claimants to recover in circumstances such as those of the present case would bring the law into disrepute, the Appellants relied on two apparent anomalies about the rights of the victims of the relevant unlawful acts which would arise if the illegality defence did not operate. One is general, the other more specific. I take them in turn.

107. The general anomaly relied on is that whereas claimants would be entitled to claim compensation from their doctors for what they had lost as a result of not being prevented from committing their unlawful acts, the victims of those acts (or their estates or dependants) would have no claim against the doctors. Mr Warnock said that that was the inevitable result of the principle recently restated by the Supreme Court in *Robinson*

v Chief Constable of West Yorkshire Police [2018] UKSC 4, [2018] AC 736, that "the common law imposes no liability to protect persons against harm caused by third parties, in the absence of a recognised exception such as a voluntary assumption of responsibility": see para. 69 (1) of the judgment of Lord Reed. Ms Ayling differed from Mr Warnock inasmuch as she accepted that there might be particular circumstances in which the duty would be owed, because of Lord Reed's reference to the existence of recognised exceptions to the rule; but she agreed with him to the extent that the victims would be unable to recover in the generality of cases.

108. I am prepared to assume that at least in the generality of cases victims in a situation such as the present would have no right to recover against the authorities whose negligence had allowed the attack to take place. But I do not accept that that gives rise to an anomaly. Victims may not have a right to compensation against the doctors, but they have a straightforward claim against their assailant, whose insanity would be no defence to a civil claim for assault.[12] It is true that, unlike a doctor or health authority, the assailant may not be in a position to meet a substantial award of damages. However, as we have seen, one of the heads of damage claimed by the Claimant in this case is an indemnity against any liability to his victims. I can see no reason why that would not be an admissible head of claim; and, if it is, it would afford a route by which victims could be assured of payment of any damages that they were awarded[13]. However, Ms Ayling did not accept that a claim for such an indemnity would lie, though she did not advance any developed reason for that position. In the absence of full argument I am not prepared definitively to decide the point. But even if the claimant were not entitled to such an indemnity, the fact that they might not be able to meet any award of damages to the victim does not seem to me to be a principled reason for denying them recovery for their own loss.

109. The more specific anomaly arises only in a case where the victim of the claimant's unlawful act is also the defendant, as in the example given by Sheller JA where a mentally ill patient attacks the negligent doctor: see para. 58 above. Can it be right that the claimant could in such a case sue their victim? Lord Hoffmann in *Gray* described this concern as "pertinent" (see para. 73 above). Such cases will no doubt only occur rarely, but they are not wholly implausible. In addition to Sheller JA's example, there could be cases where the claimant's mental illness was the result of the negligence of a family member whom they subsequently attack (they might, say, have been the passenger in a car which crashed due to the careless driving of a parent and have suffered a brain injury).

110. I fully accept that it is seems unjust that someone who has suffered unlawful injury at the hands of another can be required to pay damages to them for the consequences that they have suffered as a result of inflicting that injury. Of course the victim would have a cross-claim, but even if that exceeded the value of the claimant's claim, so that there

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12 If, as here, the victim were killed rather than simply injured the claim would of course be by their estates and/or their dependants. But for simplicity I will refer simply to the victims themselves.

13 Of course the award of damages to the claimant under other heads would mean that even a claimant who was impecunious beforehand would have a fund of some kind from which the award could be met, even in the absence of an indemnity. But it would not necessarily be enough to cover the full award even if it were all available to be enforced against.

was no net liability, their net recovery would necessarily be less than the full compensation for their loss. The position would be worse still if the claimant, as in this case, claimed an indemnity against any such liability: that would on the face of it reduce the victim's recovery to nil while still leaving them liable for the claimant's loss. (It is true that they might be insured against their liability to the claimant – in my two examples, both the doctor and the driver would almost certainly be insured – but that ought not to affect the position in principle.)

111. I do not, however, believe that the problems that would arise in that scenario are a reason for barring a claim in the typical case where, as here, the defendant is not a victim of the claimant's unlawful act. I ought not to seek to determine in advance how the Court would address such a situation; but since we are concerned with questions of public policy, it would have the tools to produce a just outcome.

OTHER PUBLIC POLICY CONSIDERATIONS

112. The Appellants relied on some other public policy considerations referred to in the part of Lord Hamblen's judgment in *Henderson* where he is considering the compatibility of *Gray* with *Patel v Mirza*. It is worth repeating that an important part of the message of *Henderson* is that a full *Patel v Mirza* analysis is not necessary where the courts have already determined how the relevant public policies play out in a particular kind of case. In my view *Gray* has identified the key considerations in a case where the unlawful act was done by a claimant who was mentally ill, and that is why I have given priority to the public policy considerations considered above. But of course the present case is not identical to *Gray*, and I accordingly accept that the analysis cannot stop there.

113. The further public policy considerations in question are identified by Lord Hamblen at paras. 125-129 of his judgment, which I have set out in full at para. 80 above. They can be summarised as (a) the impact on NHS funding of allowing a claim of the present kind (para. 126); and (b) deterring unlawful killing and providing protection to the public, there being no more important right to protect than the right to life (para. 129). (I note in passing that the concern about defensive medicine which weighed with Sheller and Santow JJA in *Presland* was not relied on in *Henderson* or before us.)

114. As to the impact on NHS funding, since Lord Hamblen identified this as a relevant public policy consideration in the context of potential claims by persons convicted of manslaughter it must equally be a relevant consideration in the case of claims by persons who commit homicide while insane. There is no way of quantifying the amounts concerned. In the context of the NHS budget generally, and indeed the NHS budget for meeting negligence claims, they must be tiny, since cases of the present kind must be very rare; but the same would be true for cases of the kind under consideration in *Henderson*, and the point is evidently one of principle.

115. As to deterring unlawful killing, it is hard to see that the denial of compensation to claimants who commit homicide while insane is likely in practice to have any deterrent effect. In *Henderson* Lord Hamblen acknowledged the force of that point but said that it was wrong to consider the question solely at that granular level and that, viewed more broadly, there might be some deterrent effect in a clear rule that unlawful killing never pays and it would also support "the public interest in public condemnation and due punishment" (paras. 130-131). I am not sure that his final point applies in the context of persons who are acquitted of homicide by reason of insanity, because in their case it

would not seem that condemnation or punishment are appropriate; but the point about a universal rule having a general deterrent effect would in principle apply to insanity as well as diminished responsibility cases.

116. Broadly, therefore, these public policy considerations would appear to be in play. But the question is whether it is proportionate to treat them as outweighing the public interest in claimants in insanity cases receiving due compensation for the wrong that they have suffered. I do not believe that it is. The balance is quite different from in the diminished responsibility cases because the claimant has no moral culpability. That point is clearly made if one looks at how Lord Hamblen struck the balance at paras. 138-143 in *Henderson*. In those paragraphs he emphasises the importance of the fact that the claimant knew that what she was doing was legally and morally wrong: see paras. 139 and 142. In the absence of that element, and where, essentially for that reason, the consistency and public confidence principles are, as I would hold, not engaged, I do not believe that either the impact on NHS resources or the general deterrent effect of a rule against recovery could justify the denial of the claim in these proceedings.

117. Finally, I should note a point made by Ms Ayling that there is no sharp distinction between a finding of diminished responsibility and a finding of insanity: the distinction is one of degree only. That may be so, but the criminal law proceeds on the basis that the distinction is nevertheless real and that in any given case it will be possible to say on which side of the *M'Naghten* line the defendant falls. That being the case, there is nothing irrational about the application of the illegality defence depending on the selfsame distinction. If I had any unease about this aspect, it would, rather, be about the possibility that in some cases the distinction may reflect not a finding by a court but a forensic choice by the defendant or their advisers. Pleas of not guilty by reason of insanity are in practice rare; and there must be cases where a defendant tenders, and the Crown accepts, a plea of manslaughter by reason of diminished responsibility where the facts might arguably have justified a special verdict (*Henderson* may be an example). But if that results in the illegality defence being unavailable in some cases where it might have been available if the defendant had made a different choice I do not think that can affect the decision in principle which we have to make.

DISPOSAL

118. For those reasons I would hold that the illegality defence advanced by the Appellants is unavailable as a matter of law, and I would accordingly dismiss the appeal.

119. Andrews LJ would allow the appeal. I see the force of the points which she makes, and, as I have already said, I do not regard the question as an easy one. But I hope it is clear from the foregoing reasoning why I have in the end come to the conclusion that I have, and which I respectfully maintain.

120. Since the President is of the same view as I am, the action will now proceed against the Appellants, subject to any further appeal, as regards the claim in negligence as well as the claim under the 1998 Act. There are pleaded issues not only about whether any of the Defendants, and if so which, were negligent but also about causation, contributory negligence and quantum. None of those are in any way affected by our decision.

Lady Justice Andrews:

121. I have had the advantage of reading in draft the judgment of Lord Justice Underhill. There is nothing I can usefully add to his masterly analysis of the relevant case law, both domestic and foreign. I agree with him that, to the extent that it is possible to discern it, the general tenor of the authorities in which the matter has been considered seems to be against allowing the illegality defence in a case where the claimant satisfies the *M'Naghten* test for insanity. However, in most of them the issue was not fully argued, as it has been before us, and in *Presland* (where it was fully argued) the decision went the other way, albeit with a strong dissenting judgment.

122. The denial of the defence was a result which I initially found to be more attractive than the result for which the Appellants contended, which would potentially leave a person who has been wronged without a remedy, or at least severely circumscribe the heads of loss for which he could claim. Yet on further reflection, and with the greatest respect, I find myself unable to agree with my Lord and my Lady that a lack of knowledge or understanding by a person who intentionally takes the life of another human being that what he was doing was wrong is a sound and principled basis for allowing that person to make a claim in negligence against someone for putting them in a position which enabled them to commit an act which was both deliberate and tortious.

123. I agree with Underhill LJ that in an era where there is much greater understanding of mental health issues, it is fair to recognise that, as well as the primary victims, the killer also may be a victim, if they were suffering from serious mental illness and were let down by those responsible for their care. However, I am not persuaded that an absence of the state of knowledge of wrongdoing, which would afford the mentally ill perpetrator of a deliberate fatal assault a complete defence to criminal liability for murder or manslaughter, justifies drawing a bright line between the present case and similarly tragic cases such as *Clunis*, *Gray* and *Henderson*.

124. There are all kinds of reasons why a defendant suffering from a serious mental illness who faces a charge of murder might prefer to opt for running the partial defence of diminished responsibility rather than pleading insanity, even though it may be open to them to do so. The most obvious of these is the prospect of indefinite incarceration in a secure mental health unit. Moreover, it is not difficult to conceive of examples of situations where a person who is guilty of the criminal offences of murder or manslaughter, or causing death by careless driving, might be regarded by the public as less blameworthy for the death than a person in the position of the Claimant, who intended to kill his victims. Yet such a person would be precluded by their conviction from making a claim of this nature even if they were seriously mentally unwell at the time.

125. For me, the starting point in the analysis is that the killings were unlawful acts, therefore any claim against the Appellant would involve pleading and relying upon acts which were illegal and to which civil liability attaches. As Santow JA observed in *Presland* at [383], legal policy treats insanity as an excuse for homicide, but it does not treat it as a justification. The Claimant would be liable in tort for battery, because the fatal assaults were deliberate rather than accidental, notwithstanding that because of the state of his mental health he did not know that what he was doing was wrong: see *Morriss v Marsden* and *Dunnage v Randall*. Indeed, were that not so, there would be nothing for which he could seek an indemnity from the Appellants. He therefore bears legal

responsibility for his unlawful actions, notwithstanding that he is excused from criminal liability and may not be regarded as morally culpable for them.

126. That is equally true of tortfeasors who are sane. If someone does a deliberate act which amounts to an assault, and which injures another, even if they had no intention of harming that other person, let alone of causing them death or serious injury, civil liability will flow from that deliberate act. So if someone deliberately pushes someone sideways in order to get out of a confined space, because they are feeling claustrophobic, or having a panic attack, and that person falls over and hits their head, with fatal consequences, the person who did the pushing would be regarded by many as morally blameless, or at least as bearing no greater moral culpability for the death than someone who deliberately pushes someone under a train in the delusional belief that they are the Devil. But as Stable J recognised in *Morriss v Marsden*, the absence of moral blame is irrelevant in that context. The law of tort is concerned with compensating the victim rather than with punishing the wrongdoer.

127. Given that liability in tort attaches to the deliberate wrongful act, then even if the claim in negligence in the present case were held to be actionable, the Claimant might face formidable obstacles when it came to establishing causation. At one time I thought that this might provide a more satisfactory answer than reliance on the illegality principle. However, on reflection it seems to me that, as the Supreme Court recognised in *Henderson*, there are wider principles of public policy at play.

128. Of course, as Underhill LJ has rightly pointed out, the question of the liability of the Claimant to his victims' estates for the injury which he caused them is different from the question of the liability of the Appellants for any loss which they have caused him. The question with which we are concerned is whether the Claimant should be denied recovery for loss that he has suffered by reason of the Appellants' alleged negligence, in consequence of the deliberate commission by him of acts which are undoubtedly unlawful, but for which he bore no criminal responsibility because he did not know that they were wrong. However, unlike Underhill LJ, I do perceive a lack of coherence between on the one hand, making the Claimant liable in tort to pay compensation to his victims or their estates, and, on the other, permitting him to avoid the consequences of such liability, by passing responsibility for his actions to someone else, on the basis that he would not have committed those intentional and tortious acts had it not been for the Appellants' negligence.

129. Taking the example I have given above of the person who deliberately pushes someone out of the way, causing them to lose their balance and hit their head with fatal consequences, suppose that person has been negligently prescribed medication with a known side-effect of causing panic attacks. Would they be able to make a claim against the GP or NHS trust in negligence seeking a full indemnity in respect of the compensation they had to pay the deceased's estate? I suggest that the answer would be no, because they deliberately did something that the law recognises to be an actionable wrong, (irrespective of why they did it, or what their mental state was at the time) and that legal wrong would be an essential ingredient of their claim for compensation. I very much doubt whether the answer would depend on whether, if prosecuted, they would be found guilty of manslaughter or some other criminal offence, or on whether they intended to hurt the person they pushed.

130. If the correct analysis of where the policy lines are to be drawn depends on the deliberate nature of the tortious act, as I consider it does, then the Claimant's behaviour falls as much on the wrong side of the line as the behaviour of the hypothetical panic-stricken pusher. Both might be regarded as morally blameless but neither can rely on their own deliberate tortious act as a necessary ingredient of a claim against a third party. Denial of the claim cannot be regarded as disproportionate in circumstances where such a claim could not be made by a sane individual who was at least as morally blameless. Of course, that would not prevent the Claimant from claiming in negligence for any loss that did not require him to rely on his own tortious acts.

131. There is no justification for deciding this issue in favour of the Claimant because the deceased's estates are unlikely to have a direct claim against the Appellants, whose pockets (or those of their insurers) are likely to be deeper than those of the Claimant himself.

132. I also part company with my Lord in his interpretation of what Lord Hamblen was saying in *Henderson*, and in particular with his view that the fact that the defendant knew that what she was doing was morally and legally wrong was central to Lord Hamblen's reasoning.

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

134. In paragraph 119, when discussing the consistency principle and the public confidence principle, Lord Hamblen said this:

> "..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 criminal *or otherwise unlawful* would tend to produce inconsistency and disharmony in the law and so cause damage to the integrity of the legal system". [Emphasis added].

135. He went on to say in paragraph 120 that the closer the connection between the claim and the illegal act, the greater and more obvious may be the inconsistency and consequent risk of harm to the integrity of the legal system. In this case the deliberate unlawful act is central to the claim against the Appellants. There is a well-established distinction between criminal responsibility and civil/tortious responsibility in cases such as the present. However, a failure to apply the illegality defence in a case such as this would, in practical terms, enable the Claimant's mental health to enable him to

place the legal responsibility for deliberately taking the lives of three people at someone else's door.

136. It seems to me that all the public policy considerations identified by Lord Hamblen in *Henderson* as supporting denial of the claim are equally present here. The unlawful acts were of the same nature and gravity as the offence in *Henderson*. Funds would be taken from the NHS budget to compensate the Claimant for the consequences of his deliberate conduct in killing three people, even though there was and could be no criminal conviction. The unlawful acts are the immediate and/or effective cause of the main heads of loss claimed. Whilst Lord Hamblen saw the force of the argument that it was absurd to suppose that a person suffering from diminished responsibility for a killing 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, he thought that 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." I respectfully agree.

137. I have not reached this conclusion lightly. However it does seem to me that there is nothing disproportionate about precluding someone who intended to kill, and did so, from bringing a claim in negligence in reliance on that deliberate and unlawful act, and that the policy rule preventing such claims from being made should not rest on nice distinctions between having little or no personal responsibility for the killing because of the state of the claimant's mental health at the time. For those reasons, I would have allowed this appeal.

Dame Victoria Sharp, P:

138. For the reasons given by Lord Justice Underhill with which I entirely agree, I would dismiss this appeal. In view of the comprehensive nature of his judgment, I add only a few words of my own.

139. The criminal law draws a clear and principled distinction between homicide cases where responsibility is diminished, and those where it is extinguished. Where such matters are in issue, a scrupulous exercise is undertaken to distinguish between them. This was the task of the jury at the trial of Alexander Lewis-Ranwell, the Claimant in this appeal.

140. The Claimant had killed three elderly men on 10 February 2019 by bludgeoning them to death with a hammer in their own homes. He had also injured two other individuals with a saw. The Claimant was 27 at the time of these events. He was charged with three counts of murder, and with two counts of wounding with intent contrary to section 18 of the Offences Against the Person Act 1861. The Claimant raised the defence of insanity. The ultimate issue for the jury at his trial was whether he was guilty of manslaughter on the grounds of diminished responsibility or not guilty by reason of insanity (a special verdict).

141. If on a charge of murder, an accused wishes to rely on the partial defence of diminished responsibility and so be convicted of manslaughter not murder, it is for him to establish on the balance of probabilities, that he was suffering from an abnormality of mental functioning, which arose from a recognised medical condition, and which substantially impaired his ability to (1) understand the nature of his conduct; (2) to form a rational

judgment or (3) to exercise self-control (section 2(1) and (1A) and (2) of the Homicide Act 1957, as amended). An abnormality of mental functioning will provide an explanation for the accused's conduct only if it causes, or is a significant contributory factor in causing, the accused to carry out that conduct (section 2(1B) of the 1957 Act).

142. As Lord Hughes pointed out in *R v Golds* [2016] UKSC 61; [2016] 1 WLR 5231, at [48] it is an important part of the Crown's function where the charge is murder and a case of diminished responsibility is advanced, to assess the expert evidence and its relationship to any dispute of fact and quite a large proportion of verdicts of manslaughter on the grounds of diminished responsibility arise because the Crown accepts as it is entitled to do, that the correct verdict is guilty of manslaughter. Such a plea can be accepted by the court without a jury having to return the verdict: *R v Cox*, [1968] 1 WLR 308 subject to the approval of the court, which will consider whether it is fair and in the interests of justice: Criminal Procedure Rules PD 9.3.

143. The insanity defence is set out in *M'Naghten's* case. The *M'Naghten* rules were laid down by the House of Lords in 1843 in the response given by Tindal CJ, on behalf of all the other judges except for Maule J:

> "Jurors ought to be told in all cases that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes until the contrary be proved to their satisfaction and to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know what he was doing was wrong."

144. Where the issue is one of insanity, the prosecution is required to prove that the defendant committed the actus reus of the crime charged.[14] The burden of proving insanity lies on the defendant, on the balance of probabilities. The prosecution cannot accept a plea of insanity: *R v Crown Court at Maidstone, ex p. London Borough of Harrow* [2000] 1 Cr. App. R. 117, DC. Instead, a verdict must be reached by the court: by a jury in the Crown Court pronouncing the special verdict, or by an acquittal in the youth or magistrates' court. A jury cannot return a special verdict except on the written or oral evidence of two or more registered practitioners at least one of whom is duly approved by the Secretary of State as having special experience in the diagnosis or treatment of mental disorder (sections 1 and 2 of the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991; and section 54(1) Mental Health Act 1983).

145. The Claimant's trial took place in November 2019 before May J and a jury and lasted two weeks. There was no dispute that the Claimant had killed the three men, or injured the two other individuals, and the charges remained ones of murder.[15] The only issue

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[14] Trial of Lunatics Act 1883, section 2(1) and *AG's Ref (No 3) of 1998*; [2000] QB 401.

[15] The section 18 counts were not pursued before the jury so the jury could focus on the three counts of murder. After the verdicts of the jury had been returned, the trial judge ordered that the section 18 counts be left on the file. This means the counts cannot be proceeded with without the leave of the court.

as I have said was whether he was guilty of manslaughter on the grounds of diminished responsibility or was not guilty by reason of insanity. What determined that issue was the Claimant's mental state at the time of the killing. The single question left to the jury by the trial judge was in these terms: "Are we satisfied that it is more likely than not that when he killed…Mr Lewis-Randall did not know that what he was doing was against the law?" The trial judge went on to direct the jury that if their answer to that question was yes, the jury would return a verdict of not guilty by reason of insanity. If their answer to the question was no, their verdict would be not guilty of murder, but guilty of manslaughter.

146. The three experienced psychiatrists who gave evidence for the defence at the trial, had each independently concluded after their examination of the Claimant, and with the benefit of their long experience of psychotic illness, that the Claimant was suffering from severe paranoid schizophrenia when he killed the three men and injured two others; and that the likelihood was that the Claimant would not have known that what he was doing was wrong. The prosecution invited the jury to reject their evidence on knowledge of legality. As the trial judge reminded the jury, the issue was one for them to decide. By their verdict, reached after more than six hours deliberation, the jury unanimously concluded that on the three counts of murder, the Claimant was not guilty by reason of insanity. The jury sent the trial judge a note before delivering their verdicts.
This said: "We, the Jury, have been concerned at the state of psychiatric health service provision in our county of Devon. Can we be reassured that the failings in care for ALR will be appropriately addressed following this trial?"

147. Following the return of the special verdict, the trial judge did not pass any sentence. A person found not guilty by reason of insanity is not culpable because of their mental disorder; they have not been convicted of any crime and cannot be sentenced. They are, as Lord Bingham described them in *R v H* [2003] UKHL 1; [2003] 1 WLR 411 at p 413, "irresponsible in the eyes of the law". For reasons of public protection however there are statutory powers which are triggered by a special verdict. These include the power to detain such a person in a secure hospital (a hospital order) with a restriction that he or she is not to be released until permission is given by the Secretary of State (a restriction order [16]): see sections 37 and 41 of the Mental Health Act 1983. The medical evidence before the court meant the Claimant could be made the subject of a hospital order; and the return of the special verdict in respect of the murder charges (a charge where the sentence on conviction is fixed by law) meant that this had to be coupled with a restriction order: see section 5(1)(a) and (2) of the Criminal Procedure (Insanity) Act 1964 as amended by the Domestic Violence, Crime and Victims Act 2004.

148. The Claimant was made the subject of a hospital order and a restriction order. He will remain in detention until the Secretary of State considers it is safe to release him or he is discharged by a Mental Health Tribunal: see section 41(3)(c)(iii) of the Mental Health Act 1983. In thanking the jury for their note, the trial judge said this: "It has been a disturbing case on so many levels, three dead, two badly injured whose cases lie on the file, at the hands of somebody whom you have found on strong psychiatric evidence was grossly, floridly psychotic at the time and therefore not criminally responsible for his actions on 10 February last year. The result, as you have heard, is the same. He will be cared for in hospital with a Restriction Order, which means he will not be allowed

16 Where a restriction order is made, permission for release will depend on the person's mental health and the risk to the public that he or she poses.

into the community, even in a step by step way, until the agencies are absolutely content that it is safe for him to be released."

149. In February 2021, the Claimant brought these civil proceedings in negligence and under section 7 of the Human Rights Act 1998 (for breaches of articles 3 and/or 8 of the European Convention on Human Rights) against four parties: G45 Services (UK) Limited, the Chief Constable of Devon and Cornwall Police, Devon Partnership NHS Trust and Devon County Council. The claim under the Human Rights Act is proceeding, as it is conceded by the defendants that the doctrine of *ex turpi causa non oritur actio* (no claim arises from a dishonourable cause of action, or the common law defence of criminality as Sedley LJ describes it in *Al Hassan-Daniel v Revenue and Customs Commissioners* [2010] EWCA Civ 1443; [2011] QB 866 at para 6) does not operate as a defence to such a claim.

150. The facts pleaded by the Claimant in support of his claim and which we are required to accept as correct for the purposes of this appeal, relate to events which occurred in the days prior to and on the day of the killings.

151. The Claimant had a known history of mental illness and had been compulsorily detained in 2016 and 2017 under the Mental Health Act 1983. He was diagnosed with schizophrenia and psychosis and received treatment in a psychiatric intensive care unit. On 7 February 2019, the Claimant interfered with electrical and security equipment at a farm in Ilfracombe. He opened animal enclosures and left the farm with a bicycle and a drill. No arrests were made but the police were called following reports of his strange behaviour. On 8 February 2019, the Claimant stole a pony from its enclosure at a farm. He was arrested at 8.41 am that day on suspicion of burglary and detained at 10.04 at Barnstable Police Station. At 2.49 am on 9 February 2019 the Claimant was released on bail and taken to the Freedom Centre. On 9 February 2019, the Claimant let animals out of their enclosure at a small holding in Barnstaple. He went on to assault the owner, who was 84 years old with a long double handed saw. The Claimant released more animals from their enclosure on a neighbouring farm. The Claimant was arrested on suspicion of grievous bodily harm and re-detained at Barnstaple Police Station at 10.06. At 11.05 am, whilst at that police station, the Claimant tried to grab an officer's taser gun. He was restrained and taken to his cell where his clothing was removed and he was given a self-harm suit. At 9.38 am on 10 February 2019 the Claimant was released on bail for a second time. The killings and assaults occurred within hours of his release. The Claimant was arrested on 11 February 2019, following an assault on a night manager of a hotel in Exeter and taken to Exeter police station. During the medical examination in his cell, he punched the examining nurse in the face. He was detained under the Mental Health Act 1983 later that afternoon.

152. The Particulars of Claim set out in detail what was done or not done by various police officers, medical and other health care professionals during this period. They describe the increasingly bizarre, delusional, psychotic and violent behaviour of the Claimant. They also describe his mother's grave concerns, communicated to the police, about what might happen were he to be released on bail. These pleaded events are recorded in paragraphs 9 to 31 of the judgment of Garnham J, which is the subject of this appeal.

153. The Claimant alleges that all four of the defendants were negligent in their treatment of him during the period 8 to 10 February 2019 and acted in breach of his rights under articles 3 and 8 of the European Convention on Human Rights. He seeks damages for

personal injury, loss of liberty, loss of reputation and loss of dignity; and an indemnity in respect of any claim brought against him as a consequence of his violence towards others in the period 9 to 11 February 2019.

154. In relation to negligence, the Claimant's claim in summary is this. There was inadequate provision of mental health services when he was in police custody between 8 to 10 February 2019; as a consequence of systemic and individual failings, he was not assessed under the Mental Health Act; despite warnings that he posed a risk to the safety of others he was released from custody (twice) and within hours of his second release, whilst in a psychotic state and acting under delusions, he went on to kill the three men. It is alleged that had he been assessed, he would have been detained under the Mental Health Act and would not have gone on to kill the three men. On his pleaded case, the Claimant was the victim of a high order of negligent conduct on the part of the defendants.

155. The criminal law provides a defence for people who as a result of their mental condition should not be held responsible for what would otherwise be criminal conduct. The fundamental rationale for this is that it is unjust to hold people criminally responsible who could not have avoided committing the alleged crime, through no fault of their own. The defence of insanity is difficult to establish and as the Law Commission noted in 2013, it is little used. There is no reason to think things are different now. One of the psychiatrists at the Claimant's criminal trial described the defence as difficult to establish and very rare.

156. The Claimant might have avoided a trial by entering a partial defence of manslaughter on the grounds of diminished responsibility to the charges of murder. But he did not do so. Instead, he proved on the balance of probabilities that he was not guilty of the charges of murder. Though he had committed the *actus reus* of the crime charged, his mental state meant he was not responsible in the eyes of the law, for what he had done. His acts were not quasi criminal. They were not criminal at all.

157. It is against this background that the application of the doctrine of *ex turpi causa* to this civil claim needs to be considered.

158. In *Clunis*, after a review of the authorities, Lord Justice Beldam, giving the judgment of the court, concluded that the illegality defence was restricted to cases in which the person seeking redress must be presumed to have known that what they were doing was unlawful. He drew a clear distinction between cases of manslaughter on the grounds of diminished responsibility and insanity cases (at p. 989):

> "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 conduct."

159. The subsequent case of *Gray* decided in 2009, was considered by the Supreme Court in *Henderson* in 2020. In *Henderson,* at [105] Lord Hamblen (with whom Lord Reed, Lord Hodge, Lady Black, Lord Lloyd Jones, Lady Arden and Lord Kitchin agreed) said:

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

160. He went on to say at [142]:

> "As to whether there was a marked disparity in the parties' respective wrongdoing the appellant [Ms Henderson] 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."

161. Each of these cases draws a coherent and bright line distinction for the purposes of the *ex turpi causa* doctrine, between those who are criminally responsible for their acts whether fully or partially, and those who are not responsible for their acts because they do not know what they are doing is morally and legally wrong. In my judgment, this common thread running through the criminal and civil law, is consistent with principle, a proper understanding of the true implications of acute mental illness and is one that would not offend the sensibilities of ordinary right-thinking members of the public or undermine public confidence in the law.

Neutral Citation Number: [2022] EWHC 260 (QB)

Case No: QB-2018-000526 and QB-2021-000914

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice Strand, London, WC2A 2LL

Date: 10 February 2022

Before :

MR JUSTICE JOHNSON

- -

Between :

(1) MARC TRAYLOR
(2) KITANNA TRAYLOR **Claimants**

- and -

KENT AND MEDWAY NHS SOCIAL CARE PARTNERSHIP TRUST **Defendant**

- -
- -

Sebastian Naughton and Rachael Gourley (instructed by Hodge Jones & Allen) for the Claimant Marc Traylor
Alison Gerry (instructed by Hodge Jones & Allen) for the Claimant Kitanna Traylor
Edward Bishop QC and Susanna Bennett (instructed by Bevan Brittain) for the Defendant

Hearing dates: 18 January 2022 – 24 January 2022

- -

Approved Judgment

Mr Justice Johnson:

1. On 8 February 2015 Marc Traylor suffered a psychotic episode. He threatened to stab his daughter, Kitanna Traylor. Police officers, and Marc Traylor's father, attended. In the early hours of 9 February, he stabbed Kitanna several times, causing serious injuries. He was shot three times by armed police officers. He was subsequently prosecuted for attempted murder. The jury found that he was not guilty by reason of insanity.

2. Marc Traylor brings a claim against Kent and Medway NHS Social Care Partnership Trust ("the Trust"). He says that the Trust was negligent in its treatment of his mental illness, and this caused what happened on 9 February 2015 and his resulting injuries. The Trust accepts that a decision on 3 December 2014 to discharge Marc Traylor from secondary psychiatric care "was not handled correctly" but denies other allegations of negligence. It also says:

   (1) Any breach of duty did not cause what happened on 9 February 2015. The cause of those events was Marc Traylor's decision to stop taking his medication.

   (2) Marc Traylor voluntarily accepted the risk that he might act as he did on 9 February 2015 because he stopped taking his medication, against medical advice.

   (3) Marc Traylor's claim must fail because the events on 9 February 2015 resulted from his own criminal acts.

   (4) Alternatively, any damages should be reduced on account of Marc Traylor's fault ("contributory negligence") when he stopped taking his medication.

3. Kitanna Traylor brings a separate claim against the Trust. She says that it failed to take positive steps to protect her right to life and her right not to be subject to inhuman or degrading treatment, and that these failings resulted in the events of 9 February 2015. The Trust responds that it was not required to take steps to protect Kitanna Traylor's Convention rights, and that in any event it acted compatibly with those rights. It says that even if it did act incompatibly with her rights, this was not the cause of the events of 9 February 2015. Accordingly, any damages should be limited to an award for non-pecuniary loss to reflect a breach of her Convention rights, rather than compensation for the injuries she sustained.

4. Directions were made for the two claims to be heard at the same time, and for preliminary issues to be determined (broadly whether the Trust is liable to each of the defendants, including questions of causation but not the assessment of damages). The issues requiring determination are:

   <u>Marc Traylor's claim:</u>

   (1) Whether, and in what respects, the Trust breached a common law duty of care owed to Marc Traylor.

   (2) Whether any established breach of duty caused the events of 9 February 2015.

   If so:

(3) Whether Marc Traylor voluntarily accepted the risks that flowed from the Trust's breach of duty.

(4) Whether Marc Traylor's claim is defeated on the ground of illegality.

(5) If the claim otherwise succeeds, by what proportion should Marc Traylor's damages be reduced on account of his contributory fault in not taking his medication.

Kitanna Traylor's claim:

(6) The scope of the Trust's obligations under articles 2 and 3 of the European Convention on Human Rights ("ECHR").

(7) Whether the Trust knew or ought to have known that there was a real and immediate risk to Kitanna Traylor's life or physical safety.

(8) If so, whether it took reasonable steps to avert that risk.

(9) If not, what, if any, heads of loss should be awarded.

5. At the outset of the trial I directed, with the parties' consent, that the evidence in each case would stand as evidence in both of the cases. Evidence was given by Marc Traylor, Nicole Traylor (Marc Traylor's wife) and Peter Traylor (Marc Traylor's father). Kitanna Traylor provided a witness statement which was not challenged, so she did not give oral evidence. Dr Marcos Pisaca, a consultant psychiatrist employed by the Trust, gave factual evidence for the Trust. Expert evidence was given by Dr Stephen Ginn, instructed on behalf of Marc Traylor and Kitanna Traylor, and by Dr Boris Iankov, instructed on behalf of the Trust.

The agreed facts

6. Most of the facts are not in dispute. The primary factual issues concern what was said between Dr Marcos Pisaca and Marc Traylor on 4 June 2014.

7. Marc Traylor was born on 4 September 1974. He has been married to Nicole Traylor since 1995. They have three daughters. Kitanna Traylor was born in 1998. Her sisters were born in 1995 and 2001. The family lived in Kent, apart from a period between 2004 and 2007 when they were in Cumbria.

8. In November 1994 Marc Traylor was convicted of dangerous driving and affray. When police officers sought to apprehend him, he threatened them with a knife.

9. In 1999 Marc Traylor threatened Nicole Traylor with a shotgun. The police were called. He was convicted and was sentenced to a community penalty.

10. In June 2002 police attended at the family home. Marc Traylor had kicked Nicole Traylor in the face causing bruising and swelling.

11. In July 2002 Marc Traylor was convicted of possession of what is described as "a small firearm". He was sentenced to a community penalty.

12. In October 2006, Marc Traylor was about to drive away from a pub after drinking all day. His mother took the car keys. He returned to the pub, grabbed a sword that was hanging on the wall, and smashed a window. He was convicted of affray and possession of a bladed article in a public place. There is a record that during the incident he said that he would "stab someone and kill the kids." He denied saying that.

13. In September 2008 Nicole Traylor reported previous incidents of violent attacks carried out by Marc Traylor, including "binding and gagging her, threatening her with knives, handcuffing her to the bed, taking her out to sea in a dinghy and then letting the air out whilst holding a knife to her throat." Nicole Traylor cannot swim.

14. On 29 October 2012 Marc Traylor made a 999 call to the police. He said that someone was trying to kill him and that he had just been poisoned. A community psychiatric nurse spoke to him. He attended at Kent and Canterbury Hospital. He was reviewed and discharged with arrangements for him to be seen the following day by the mental health crisis team. On 30 October 2012 Marc Traylor was seen by a community psychiatric nurse. He maintained that his wife was having an affair and that she and her partner were plotting to kill him. There was no rational basis for these fears. Nicole Traylor said that there had been 6 times in the last 20 years where something similar had happened. On these occasions Marc Traylor had taken possession of a knife so that he could defend himself. There was a strong history of mental illness in Marc Traylor's family. When the possibility of treatment was discussed, Marc Traylor said that he had never taken tablets and that he never would. He also refused voluntary admission to hospital for assessment.

15. Marc Traylor remained at home, but matters deteriorated, reaching a crisis point on 7 November 2012. He was assessed by a consultant psychiatrist. He was fixed on the idea that his wife was having an affair, that an attempt had been made on his life, and that it would happen again. He was detained under s2 Mental Health Act 1983. An entry in the notes says, "he didn't accept nor was going to accept his risperidone [antipsychotic medication] - he explained that he only planned to accept his medication one day prior to his tribunal "so that it looked good.""

16. In a report dated 14 November 2012 a differential diagnosis was made of morbid jealousy, paranoid personality disorder and persistent delusional disorder. Marc Traylor was discharged from hospital with medication on 23 November 2012, with ongoing input from the crisis team. Over the following days he claimed that he was taking the medication that had been prescribed. Nicole Traylor reported that he was improving due to the risperidone. Later, however, Marc Traylor said that he had not taken his medication during this period, and that he had stopped taking it as soon as he had been discharged from hospital.

17. In December 2012 Nicole Traylor reported that she had received threatening messages from Marc Traylor. The messages accused her of having an affair. On 28 December 2012 Nicole Traylor reported a text to the mental health crisis team in which Marc Traylor had said she should contact police "before he [the man with whom he thought she was having an affair] kills them all". Later that day, Marc Traylor climbed on to the roof of a hotel and claimed that two men were trying to kill him. Police were called. He was re-admitted to hospital pursuant to s2 of the 1983 Act.

18. On 29 December 2012 Marc Traylor assaulted a female member of hospital staff. He later explained that he did so to try and get the keys to the unit so that he could escape from people who were going to kill him. He was described as having a "very disturbed mental state". Six police officers were required to restrain him. He was transferred to another unit under s3 of the 1983 Act. There was a hearing before the First-tier Tribunal (Health, Education and Social Care Chamber (Mental Health)) ("the Tribunal") on 9 January 2013. Nicole Traylor presented evidence which she hoped would lead to a decision to discharge Marc Traylor. She said he would be better recovering at home. She described the family as a successful stable family "with no problems whatsoever". She said that Marc Traylor could return home without any significant stresses on him. After the hearing she said that she had "put in her papers to her solicitor so that Marc could be discharged and would not require another tribunal."

19. Marc Traylor was diagnosed with paranoid schizophrenia with morbid jealousy. Antipsychotic medication was started by depot injection on 25 February 2013. This is a slow-release form of administration, meaning that fewer injections are necessary, and adherence can be certain. Uncontested expert evidence suggests that it results in better outcomes than medication that is administered by tablet, even where compliance with the medication is assured. It also requires less resource (because it is only administered once a month). It also avoids an obvious risk associated with oral medication: that the patient may not take the tablets. Marc Traylor was engaged and compliant with medical staff whilst he was receiving antipsychotic medication during his admission.

20. On 28 February 2013 Marc Traylor's children, including Kitanna Traylor, were placed on a child protection plan. They were removed from the plan in November 2013 because it was thought that other agencies, including the mental health care team, could keep them safe.

21. A detailed risk assessment (running to 15 pages of mostly closely typed text) was carried out at some point between March and June 2013. It sets out the previous history of violence and convictions, the "definite" diagnosis of a major mental illness, specifically paranoid schizophrenia manifesting in the form of morbid jealousy syndrome, a "definite/serious lack of insight", and reports of refusal of medication from November 2012. Under the heading "risk formulation & scenarios" the document states:

> "Mr Traylor has presented with morbid jealousy with delusional intensity and risk behaviour over a long period of 20 years with the impression of psychopathic emotional responses.
>
> This places Mrs Traylor at risk from stalking, threats, repeated accusations, agitation, reported threats to life, reported hostage taking…
>
> Mr Traylor has also assaulted a member of his care team and this seems to be in the context of a deterioration in his mental health. Therefore, when he is unwell, the risk to people in his general vicinity is increased.…
>
> Mrs Traylor and her children at risk of psychological difficulties as a consequence of her husband/their fathers behaviour.

> As Mr Traylor has used both a knife and a gun in a threatening manner, there is a risk of death for Mrs Traylor…
>
> Whilst [detained in hospital] this risk is low, however once in the community then the risk to Mrs Traylor is high should her husband began to suffer from mental health difficulties…
>
> Signature risk signs involve:
>
> Persistent unrelenting accusations towards his wife
>
> Stalking behaviour towards his wife
>
> Wearing inappropriate clothing
>
> Abstract, bizarre text messages or notes to family members
>
> Insomnia…
>
> Early symptoms of deteriorating mental state would be enhanced by sleep deprivation. In relation to self neglect Mr Traylor's sister… has reported that when unwell there is evidence of self neglect, for instance, Mr Traylor impulsively arrived at her house, there was evidence that Mr Traylor had lost weight, was wearing inappropriate clothing for the weather and was anxious due to being convinced that he was being persecuted. Should Mr Traylor begin to behave in this manner, then a reassessment of risk should be undertaken…
>
> Mrs Traylor should be provided with access to a crisis team. In the past where she has been vulnerable from Mr Traylor, she has successfully managed to contact the police.
>
> To continue to monitor warning signs in relation to Mr Traylor's mental health deterioration and to ensure that she seeks support immediately should he become mentally unwell."

22. Marc Traylor was discharged on 26 June 2013 on a Community Treatment Order ("CTO"), on the condition that (among other things) he attend for administration of psychiatric medication as directed by his treating consultant psychiatrist, with ongoing input from a Community Care Worker.

23. A Discharge Summary psychiatric report dated 12 July 2013 states:

> "[Marc Traylor] has a history of non-compliance with his medication. This is significant as if he decides not to comply with his psychotropic medication, he is likely to have a relapse of his mental illness, thereby increasing his risk to self and others."

24. Marc Traylor was compliant with his depot injections (albeit he expressed a wish to try to manage his condition without medication). He was reviewed on 12 November 2013

and 18 December 2013 by Dr Aleksandra Szpak (a locum consultant psychiatrist). On 18 December 2013 Dr Szpak reported that Marc Traylor had asked about the length of time for which he would need to take the medication. He expressed the hope that the dose could be reduced. Dr Szpak assessed Marc Traylor's current risk level as "low" whilst he was adequately medicated and abstained from substance misuse. She recommended an extension of the CTO.

25. On 16 January 2014 Nicole Traylor spoke to the Trust's forensic psychiatry service and indicated that Marc Traylor wished to challenge the CTO. She said that Marc Traylor "has told [her] that he is going to come off medication with the help of his care team or not. Apparently, he would like to establish whether he can manage his illness without medication".

26. On 24 January 2014 Nicole Traylor served a notice stating that she wanted Marc Traylor to be discharged from the CTO. The continuation of the CTO was authorised.

27. On 29 January 2014 Marc Traylor was reviewed by Dr Szpak. She reported that Marc Traylor wished to come off his medication and manage his condition without it. The notes record:

> "Given the long term history of morbid jealousy (20 years) with the subsequent onset of florid psychotic symptoms of schizophrenic nature in late 2012, my recommendations are that he should continue the depot medications long-term."

The notes re-iterated that the risk remained low "whilst he receives appropriate treatment".

28. In a psychiatric report dated 13 February 2014, prepared for a hospital managers' hearing to consider the CTO, Dr Szpak reviewed Marc Traylor's mental health history, and wrote:

> "Should Mr Traylor be discharged from the [CTO], there is a potential risk that he would decide to reduce and eventually cease the pharmacological treatment, which puts him at significantly heightened risk of relapse. Recent information revealed makes it evident that such a plan may be considered by Mr Traylor in the nearest future.
>
> In considering the risks that Mr Traylor may present without appropriate treatment, clearly, without such treatment it would seem almost inevitable that his mental state and health will deteriorate to a point where his behaviour becomes driven by paranoid persecutory beliefs and concerns about his partner's unfaithfulness. This is likely to lead to chaotic behaviour where he is likely to put himself at risk (as evident prior to the last admission).
>
> As his mental state deteriorates, the risk to others will also increase. This may be as a result of him perceiving that others are involved in his persecution, specifically his wife. The

> presence of a morbid jealousy syndrome, combined with a schizophrenia-type psychotic illness, combined with poor insight and with extra stressors in terms of his partner's health difficulties, would almost inevitably lead to a very significant deterioration in mental state. In addition it has been recorded that Mr Traylor has kept implements such as knives and an axe in close proximity in order to feel safer from his perceived persecutors. He has a previous conviction in relation to the possession of an offensive weapon… I consider that Mr Traylor suffers from a mental disorder of both a nature and also a degree (recently reduced insight) which makes it appropriate and necessary that he receives treatment under the CTO conditions in the interests of his health, safety and the protection of others. I can confirm that appropriate treatment is available in the community setting at this stage.
>
> It is therefore important that any signs of relapse are addressed quickly and appropriately… Mrs Traylor is clearly committed to seeking help for her husband should he require it as soon as she notices any signs of relapse. She has often stated she is not prepared to allow her family to go backwards. Mr Traylor has given permission via his relapse plan for Mrs Traylor and other family members to make contact with services on his behalf should he be unable to recognise that he is becoming unwell.
>
> I do believe that the conditions of the Community Treatment Order can contribute positively to maintaining his stable mental health in the community. The legal framework allows for prompt interventions, including recall to hospital at early stages of relapse or disengagement, thus hopefully preventing full destabilisation, which would obviously take longer to treat and more importantly, increase the risk level in all the above mentioned contexts.
>
> I would therefore respectfully ask the Hospital Managers panel to uphold the Community Treatment Order and the current conditions."

29. A psychology report dated 14 February 2014 records that Marc Traylor was highly motivated to engage in work aimed at understanding the development of his illness and how to manage it. Both Marc Traylor and Nicole Traylor had positively engaged in therapy. On 24 February 2014 the notes record that Marc Traylor was hoping to be discharged from the CTO and "would like a trial period of not taking his depot medication".

30. On 10 March 2014 Marc Traylor reported that he wished to reduce his medication before stopping it. Nicole Traylor reported some concerns about this. The hospital managers' hearing took place on 20 March 2014. The CTO was upheld. These reasons were given:

> "After considering the reports and discussing with the professionals we were agreed that Marc still meets criteria for detention under a CTO inasmuch that he has a mental disorder of a nature which makes it necessary for his health that he receives treatment and the RC has the power of recall. We are convinced that he would stop taking his medication if discharged and does not have full insight, without the depot injection he would quickly deteriorate.
>
> We would like to recommend that before the expiry of the current CTO that consideration is given to reducing his medication under close monitoring."

31. On 15 April 2014 Marc Traylor was seen by Dr Szpak. She recorded that his mental state was stable, with no psychotic symptoms, that he had "insight" and that he wished to come off the medication completely at some stage. The decision was made to reduce the depot injection to 75 mg monthly (but with close monitoring so that the dose could be increased if there was a deterioration in his mental health). Dr Szpak recorded that Marc Traylor needed to be on antipsychotic medication long term.

32. In June 2014 Dr Szpak's locum position came to an end, and Dr Pisaca took up a substantive position with the Trust as a consultant psychiatrist. There was a handover meeting at the end of May 2014.

33. On 4 June 2014 Marc Traylor was reviewed for the first time by Dr Pisaca. The outcome of the meeting was that it was agreed that Marc Traylor would have one further depot injection the following day, and that he would thereafter take his medication orally. The contemporaneous notes of the review state:

> "Seen for a review with wife and care coordinator Carol Eccleshare.
>
> In remission with treatment that was recently reduced.
>
> Insightful and enjoying increased support from his wife and family that are now more aware of his mental health problems.
>
> Said he has benefitted from the input of our services and would like ongoing support.
>
> Agrees that medication has been beneficial to address his paranoid ideas but insisted that he would also like to have the opportunity to see how he does without medication now that he feels well. He agrees to have his next injection tomorrow but would like to come off it.
>
> We discussed his CTO and agreed in principle that after 1 year we should aim at a less restrictive way to manage his illness and improve his self management. We are going to meet again in 15 days to confirm decision.

> Even if he decides to come off his medication against advice, we have to allow him to take responsibility and the risks have been substantially mitigated with his engagement with services and increased awareness and support in his family.
>
> Our services are now in a position to intervene early [if] concerns are raised.
>
> Marc has agreed to go back on medication if he discontinues it and he experiences paranoid ideas.
>
> We discussed and agreed risperidone tablets to replace injection in a month's time.
>
> Mrs Traylor requested that Mark is given the opportunity to try oral and come off medication given the increased supervision he is under, what he has learned attending sessions with TGU and care coord and his increased insight.
>
> Paliperidone injection to be stopped after next inj tomorrow and replaced with risperidone oral tablets 4mg od nocte in a months time."

34. Dr Pisaca dictated a letter to the GP but did not send it at this point.

35. On 18 June 2014 Marc Traylor was again seen by Dr Pisaca. His father, Peter Traylor, was present. According to the notes, his father reported a major improvement in Marc Traylor's mood and involvement with the family. Marc Traylor agreed to take the medication and agreed that if he changed his mind and decided to come off the medication, he would inform the mental health clinicians so that he could be closely monitored. Both Marc Traylor and his father were said to be happy with this arrangement. The CTO was discharged. Dr Pisaca amended and sent the letter that he had previously dictated. It states:

> "I saw Marc with his wife and his care coordinator, Carol Eccleshare for a review at Laurel House. Marc's mental health problems have remained in remission with treatment; he showed good insight into his condition and told us that he has learned a lot about his illness, anger management and relationships in recent months. He told us that after a year he wanted to reduce and come off of his medication if possible. He told us that he knows his relapse indicators and he was prepared to receive treatment as required. We had a long discussion, including his wife who told us that she believes that now Marc will be safe if he tries to come off of his medication with the support of our services, herself and Marc's family who is now more aware of his mental health problem and supportive.
>
> I advised Marc to have his paliperdone injection due tomorrow to which he agreed. We also discussed alternative treatment with risperidone tablets to replace the injection in a month's time. We

> agreed to meet in 2 weeks time to discuss his CTO and dose of risperidone tablets;
>
> We met again for a follow up on the 18th of June. He came with his father who has noticed that Marc's mood has been brighter in recent days. Marc remained insightful and in remission.
>
> We agreed that the CTO was no longer needed.
>
> Treatment with paliperidone injection was discontinued. Marc agreed to continue treatment with risperidone 2mg od nocte starting in 2 weeks' time (when the next injection was due), I prescribed for 2 weeks.
>
> Marc can increase treatment to 4mg of risperidone od nocte in the case of paranoid ideas, agitation or other relapse signs.
>
> I discharged CTO."

36. Entries in the medical notes record that Marc Traylor was visited by members of the mental health care team on 4 July 2014, 7 July 2014, 16 July 2014, 17 July 2014 and 30 July 2014. Some of these were lengthy visits, lasting more than an hour. He said he was taking his medication. No concerns were raised. On 6 August 2014 Dr Picasa saw Marc Traylor, with Nicole Traylor present. There was a note of a report by Marc Traylor's father that he had deteriorated. Both Marc Traylor and Nicole Traylor denied any deterioration. Marc Traylor said that he was taking his medication but that he wanted to try to stop it. Dr Pisaca said that he should wait for at least 6 months before doing that. It was agreed that there would be a review in 6 months' time.

37. Marc Traylor was visited by members of the mental health care team on 28 August 2014, 10 September 2014 and 5 November 2014. On 3 December 2014 Carol Eccleshare carried out a review. Marc Traylor said that he felt well and that he wanted to be discharged from secondary care. Nicole Traylor said that she felt that he was much better. Carol Eccleshare decided that he should be discharged from secondary mental health care.

38. On 8 February 2015, Marc Traylor was at home during the day. Peter Traylor went to the house in the morning. He says he thought that Marc was behaving oddly and that he "wasn't right", but that Nicole disagreed. She thought he seemed fine for most of the day. He was painting some fence panels in the kitchen. At 9pm Nicole Traylor asked him if he wanted to watch television, and he said that he wanted to finish painting. An hour later Nicole Traylor saw him standing in the same position he had been in at 9pm and it was clear he had not done any painting and had been brooding. She kissed him goodnight and he said he would be up in a minute. Then, after Nicole Traylor went upstairs, he armed himself with two knives and went to Kitanna Traylor's bedroom. Kitanna Traylor's sister went to Peter Traylor's house to seek help. She said he needed to come around straight away because her father was having a psychotic episode. By the time Peter Traylor got there, police officers were in the house. Peter Traylor spoke to his son and tried to calm him down. He persuaded his son to put the knives down.

39. Peter Traylor gives the following account of what happened next:

> "a number of police armed with guns had arrived and were standing on the stairs behind me. I instructed Kitty to move further into the corner of the room by the radiator and asked the firearms police to stay back. Marc said that he was scared.
>
> A police officer then put a hand on my shoulder and Marc burst out saying 'don't hurt my dad'. He picked up the knives again and then as I turned to tell the officer to get back I felt a sharp pain in my head. I fell to the floor with the force of the pain. I heard three shots and the next thing I remember I was being carried downstairs before being taken to hospital. The police had attempted to taser Marc, but had hit me instead.
>
> I have since learned that the three gun shots that I heard were from when Marc was shot, once in the jaw and then a further two times in his stomach. Before he was shot he managed to stab his own daughter."

40. Kitanna Traylor sustained significant physical and psychiatric injuries.

41. Marc Traylor suffered a cardiac arrest and a hypoxic brain injury. He was tried for attempted murder and was found not guilty by reason of insanity. A hospital order was made with restrictions, under ss37 and 41 of the 1983 Act. Marc Traylor is wheelchair dependent, fed through a gastric tube, and has considerable ongoing physical needs, requiring 24-hour nursing care.

The statutory framework

Mental Health Act 1983

42. Sections 2 and 3 of the Mental Health Act 1983 provide for compulsory admission to hospital. By s2, a patient may be admitted to hospital and detained there for up to 28 days on the grounds that:

> "(a) he is suffering from mental disorder of a nature or degree which warrants the detention of the patient in a hospital for assessment (or for assessment followed by medical treatment) for at least a limited period; and
>
> (b) he ought to be so detained in the interests of his own health or safety or with a view to the protection of other persons."

43. By s3, a patient may be admitted to hospital and detained there for up to 6 months 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."

44. A patient detained under s3 may be discharged from hospital under a CTO for a 6-month period, subject to extension. While the patient is subject to the CTO, the power to detain him under s3 is suspended. There is no power to treat a patient under a CTO without his consent unless he lacks capacity under the Mental Capacity Act 2005 - *Welsh Ministers v PJ* [2018] UKSC 66 [2020] AC 757 *per* Lady Hale at [16(iv)].

45. Discharge under a CTO is subject to a limited power to recall to hospital under s17E, if in the opinion of the responsible clinician:

> "(a) the patient requires medical treatment in hospital for his mental disorder; and
>
> (b) there would be a risk of harm to the health or safety of the patient or to other persons if the patient were not recalled to hospital for that purpose."

or if the patient fails to attend certain examinations connected with the CTO. A recalled patient must be released within 72 hours unless the CTO is revoked (resulting in detention under s3) (ss17F, 17G).

46. By s17A(5), the following criteria must all be met for a CTO to be made:

> "(a) the patient is suffering from mental disorder of a nature or degree which makes it appropriate for him to receive medical treatment;
>
> (b) it is necessary for his health or safety or for the protection of other persons that he should receive such treatment;
>
> (c) subject to his being liable to be recalled as mentioned in paragraph (d) below, such treatment can be provided without his continuing to be detained in a hospital;
>
> (d) it is necessary that the responsible clinician should be able to exercise the power under section 17E(1) below to recall the patient to hospital; and
>
> (e) appropriate medical treatment is available for him."

47. A patient subject to s3 detention or to a CTO must be examined within the 2-month period before its expiry (ss20(3) and 20A(4)). If the mandatory conditions are still met, the s3 detention / CTO will be extended by a further 6 months. Otherwise, it expires.

48. Separately, there is a power for the responsible clinician, hospital managers, or nearest relative to discharge a patient from detention or from a CTO: s23. There are no conditions regarding the exercise of this power by the responsible clinician or hospital managers. A patient whose CTO is discharged ceases to be subject to s3 detention.

49. A patient may make an application to the Tribunal for review of decisions made under the Act, including of a decision to detain him under s3 or to make him subject to a CTO – see s66. Such an application must be made within 6 months.

50. If the patient does not apply for a review, the hospital managers must refer the patient's case to the Tribunal for review at the 6 month point: s68(2).

51. The Tribunal must discharge the patient if the relevant mandatory conditions are not met. Even if they are met, it may discharge the patient: s72(1).

52. A detained patient may (with some exceptions, and subject to certain requirements) be given medical treatment without their consent: s58(1)(b), s58(3)(b), s63.

53. A patient under a CTO may be given medical treatment for his mental disorder if:

    (1) He has capacity to consent to it and does consent to it: s64(2)(a).

    (2) A donee or deputy or the Court of Protection consents to it on his behalf: s64(2)(b).

    (3) He lacks capacity, but, either there is no need to use force, or there is no reason to believe that the patient objects: s64D.

    (4) He lacks capacity and the treatment is immediately necessary: s64G.

Insanity

54. The common law and legislative history of the defence of insanity is relevant to the Trust's reliance on the defence of illegality.

55. In the fourteenth century, proof of insanity was treated in the same way as self-defence: it resulted in a special verdict which gave rise to a right to a pardon (see A History of the Criminal Law of England, Sir James Fitzjames Stephen, 1883, vol 2 p151). By the sixteenth century, proof of insanity could result in an acquittal without the need for a pardon ((1506) YB Mich 21 Hen VII pl 16) and see Hale's Pleas of the Crown, 1800 vol I p28 and "The origin of insanity as a special verdict: the trial for treason of James Hadfield (1800)", Richard Moran, Law & Society Review, Vol 19 No 3 (1985).

56. By the eighteenth century, a jury could in such a case either find the defendant not guilty, or return a special verdict that the accused committed the act but at the time was not "compos mentis". In each case the verdict was treated as an acquittal and the defendant was released - see Sir Michael Foster's Crown Law, third edition (1792), s1 p279 and *Felstead v The King* [1914] AC 534 *per* Lord Reading at 540.

57. The Criminal Lunatics Act 1800 provided that in relation to certain offences (including murder) if the jury found the defendant to be insane at the time of committing the offence, then the court "shall order such person to be kept in strict custody… until His Majesty's pleasure shall be known." The rationale was public safety rather than punishment because "it may be dangerous, to permit persons so acquitted to go at large."

58. The Trial of Lunatics Act 1883 provides, by s2, for a special verdict where the jury finds that the defendant did the act charged but that the defendant was insane at the

time. The sidenote to the section states "Special verdict where accused found guilty, but insane at date of act or omission charged…" As originally drafted, s2 provided for a verdict of "guilty of the act or omission charged, but insane so as not to be responsible, according to law, for his actions."

59. In *R v Ireland* [1910] 1 KB 654 the Court of Criminal Appeal (relying on the word "guilty" in the special verdict) held that the special verdict amounts to a conviction on indictment so as to give rise to a right of appeal under s3 Criminal Appeals Act 1907.

60. In *Felstead* the House of Lords overruled *Ireland* and held that a special verdict under s2 of the 1883 Act results in an acquittal rather than a conviction. Lord Reading said (at 543):

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

61. The wording of the special verdict was changed by an amendment to s2 of the 1883 Act introduced by the Criminal Procedure (Insanity) Act 1964. This substituted "a special verdict that the accused is not guilty by reason of insanity." Where such a verdict is returned, then, by s5 of the 1964 Act, the court must either impose a hospital order under s37 of the 1983 Act (with or without restrictions under s41), or impose a supervision order within the meaning of schedule 1A to the 1964 Act, or make an order for the absolute discharge of the defendant. Such orders do not involve any element of punishment (see, in respect of orders under ss37/41 of the 1983 Act, *R v Fisher* [2019] EWCA Crim 1066 [2020] MHLR 103 *per* Hickinbottom LJ at [34]). There is no power to impose an order under s45A of the 1983 Act (which does include a penal element).

The evidence

Marc Traylor, Nicole Traylor, Peter Traylor and Kitanna Traylor

62. Marc Traylor: Marc Traylor explains that he does not believe in taking medication. His aim throughout his engagement with the Trust was to stop taking medication. He only remembers one meeting with Dr Pisaca. He told Dr Pisaca that he did not want the depot injections anymore, that he would like to stop them and have tablets instead. He was happy with Dr Pisaca's decision to take him off the CTO and prescribe tablets rather than depot injections. He never took the tablets. He threw them away when walking the dogs. Nicole Traylor did not realise that he was not taking the medication. He lied to people (including Nicole Traylor and those who came to see him after he was discharged to review his progress) and said that he was taking the medication, when he was not. He does not recall the events of 8-9 February 2015. He says that if Dr Pisaca had advised him to remain on the depot injections, then he would have accepted that advice.

63. Nicole Traylor: Nicole Traylor gives detail of the background history, which is not controversial. She said that as soon as Marc Traylor was admitted to hospital, he expressed a determination to appeal against his detention. She supported him in that.

She says that with hindsight she realises that she failed to recognise how ill he was at the time, or subsequently – she just wanted to get back to normal. She attended the appointment with Dr Pisaca on 4 June 2014. She says:

> "On 4 June 2014 Marc saw a new doctor, Dr Pisaca, at Laurel House, accompanied by me and his father as far as I recall. He requested again to be taken off the depot injection and both his father and I disagreed and expressed our concerns about this. I remember turning round to Marc and saying something to the effect of 'I'm sorry Marc, I don't believe now is the right time and I don't believe you are going to take your medication'. Dr Pisaca asked if we did not agree that Marc should be given a chance to try oral medication? I said I agreed but I didn't think this was the right time. I thought back to the appointment only six weeks ago where Dr Szpak was clear that he should be on these long term, which to me meant at least a year to 18 months, not 6 weeks after she had said that. Dr Pisaca stated that Marc's views should be respected and agreed to transfer Marc to oral medication, despite Marc's past history of not taking his oral antipsychotic medication. He also agreed to review the CTO, with a view to discharging this soon. This is what I remember of this appointment (and I recall both me and his father were there, although I understand that this is not reflected in the records)."

64. Nicole Traylor says that she expressed concerns about her ability to tell if Marc Traylor was deteriorating, that she does not think that she was best placed to support him and that whilst she appreciated the need for medication, she did not understand the potential risks. She agrees that a "relapse plan" had been put in place. This identified the signs that might indicate that Marc Traylor was becoming unwell and what should be done in that event (including, in certain instances, contacting the care co-ordinator or the GP or the Crisis Team).

65. Peter Traylor: Peter Traylor says that when Marc Traylor was admitted to hospital, Nicole Traylor was always keen to get him discharged (whereas the rest of the family thought that he needed close supervision). Peter Traylor only recalls one appointment that he attended with Dr Pisaca and Marc Traylor:

> "I said in front of Dr Pisaca that in my view he should not come off the medication, and I recall what Dr Pisaca said: he said Marc should be allowed if he thinks he is strong enough, and he should be allowed to come off it because it is his right. I got the impression that Nicole agreed with him. I said it is not right, it is alright now because he is on the medication, and I don't think he should come off the CTO. Dr Pisaca said Marc should be able to think for himself. Nicole said she can look after him, which seemed absolutely crazy to me. Marc said 'I will be ok, I am fine'. I believe that was the final meeting, to take him off the CTO."

66. Kitanna Traylor: The evidence of Kitanna Traylor was not challenged, so she did not give oral evidence and instead relied on her written statement. In the absence of any

challenge to the content of that statement, I accept her evidence in its entirety. In February 2015 she was 16 years old. She is now 23. She describes the erratic and sometimes violent behaviour of Marc Traylor when she was growing up. She says that he was a "Prepper" which is, she says, someone who prepared for doomsday. He used to hoard weapons, including a hunting knife, a double-sided sword, bows-and-arrows and axes. When he was admitted to hospital under the 1983 Act, he refused to accept that he might be mentally ill. He told Nicole Traylor "that she had to get him out of there." When he was released from hospital there were arguments between her parents about him having his injections, and it was clear that he did not want to have them. Later, when he moved to oral medication, Kitanna Traylor recalls her mother telling her father to take the tablets, and him saying that he had taken them. She is not now surprised that he did not take them – he had always been averse to any form of medication or hospital treatment. In the months leading up to February 2015 there were subtle changes in Marc Traylor's behaviour which Kitanna Traylor now realises were a sign that his mental health was deteriorating. Kitanna Traylor sets out the detail of the events of 8-9 February 2015.

Dr Marcos Pisaca

67. Dr Pisaca was appointed as a consultant psychiatrist in 2003. He is approved under s12(2) of the 1983 Act. He has worked for the Trust since 2007. At the time of these events, he was the lead consultant psychiatrist for the Canterbury & Swale Community Mental Health Team. In June 2014 he moved from Sittingbourne to Canterbury to support the local community mental health team as their permanent consultant, taking over from Dr Szpak who had been filling the position on a locum basis.

68. Dr Pisaca explains that he had a detailed discussion with Dr Szpak about Marc Traylor's history during a handover meeting in late May 2014. They agreed that Marc Traylor would be booked in to see Dr Pisaca during his first week in post. He read the notes and reports which set out the history in considerable detail. He was therefore fully aware of the background history. At the consultation on 4 June 2014 Marc Traylor asked to switch to oral medication and made it clear that, in the long term, he wished to come off medication entirely. Dr Pisaca says that he recommended that Marc Traylor continue with his depot injections, and he explained the risks of relapse. Marc Traylor listened to the advice but declined to continue on a depot injection and requested a change to oral medication. Nicole Traylor supported this decision. Dr Pisaca says that he recalls Nicole Traylor saying that she would watch Marc Traylor take his medication every day (saying she had a vested interest to do so), and that Marc Traylor agreed to this. Marc Traylor was adamant that he wished to switch to oral medication, and this was a decision he was entitled to make. After a detailed discussion, a plan was agreed. Marc Traylor would have one more depot injection (which would take place the following day) and would then switch to oral medication. If that was successful then it might later be possible to reduce, and in the longer term to cease, oral medication under close supervision. Dr Pisaca believed that Marc Traylor was being "open and honest" with him. He believed that he would take his medication.

69. Dr Pisaca says that he was alive to the risks of coming off depot medication, but the risk was balanced. He set out a detailed explanation of how he considered that the risks were adequately addressed. This included that Marc Traylor was well aware of the risks of non-compliance with medication, that support was in place both from the mental health team (who would continue to visit him regularly) and from an "aware and

vigilant family", and this would assist to detect any early signs of deterioration. Moreover, the medication changes could be reviewed at any time, or new medication decisions made depending on progress.

The expert evidence

70. The claimants rely on the expert evidence of Dr Stephen Ginn. The Trust relies on the expert evidence of Dr Boris Iankov.

71. Dr Ginn is a consultant in adult psychiatry. He became a consultant in 2014, initially taking up a locum position before appointment to a substantive post in 2017. He works as an inpatient consultant psychiatrist and is responsible for, amongst other matters, the assessment, diagnosis, management and treatment of patients under his care, including patients suffering from schizophrenia. He is approved for work under s12(2) of the 1983 Act.

72. The reports he made in these two cases were among the first reports he had written (and the report in Marc Traylor's case was the first report he had written). That does not in any way undermine his evidence. What is far more important is an expert's experience and expertise in the matters on which expert evidence is given, rather than the expert's experience in giving evidence. The fact that the expert does not have previous experience of writing reports or giving evidence in court is not a reason for impugning their evidence, so long as the witness understands the role of an expert, what is required by Part 35 of the Civil Procedure Rules and (in a clinical negligence case) the concept of a reasonable body of medical opinion (*Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582). Dr Ginn's reports do, on their face, comply with Part 35 of the Civil Procedure Rules. He makes the declarations that are required by CPR PD 35 paragraph 3.2(9). Although it is not clear from the text of his reports that he understood the nature of the *Bolam* test, it is clear from his oral evidence that he does so. I do not therefore see any reason to give less weight to his evidence on the grounds of his inexperience as an expert witness.

73. The experts were asked, when preparing a joint statement, to summarise their professional experience of considering to renew a CTO, preparing reports about CTOs, and sitting on Tribunals considering CTOs. In answer to each of these questions, Dr Ginn wrote "regarding my experience please refer to my report dated 3 May 2021 paragraph 1.1.1 onwards." In fact, as he agreed when giving oral evidence, his report does not provide any information of his experience in relation to CTOs. He accepted, in cross-examination, that he has no such experience.

74. This raises two problems with his evidence more generally. First, this case concerns the management of a patient who had been on a CTO and, in particular, his management at the point a CTO is discharged. Dr Ginn has no relevant experience of working in this context. Second, the correct answer to the questions that were asked was "none." It would have been easy to say so. Dr Ginn's explanation is "I work full time and… there were two reports to do in a very short period of time and at the time it seemed reasonable to concentrate on those questions and to direct you to my report that I had done before." I do not consider that this adequately explains what has here happened. For these reasons I treat Dr Ginn's evidence with some caution.

75. Dr Iankov is a consultant psychiatrist who is approved under s12(2) of the 1983 Act. He is currently working at HMP Five Wells, but prior to that he worked as a general adult psychiatrist working in community and inpatient settings. He is a medical member of the Tribunal. He has substantial experience of managing patients who are on a CTO. On one issue (when Ms Gerry questioned him about whether the conditions for making a CTO continued to be satisfied in June 2014) I was left with the impression that his responses may not have sufficiently acknowledged the possibility for a range of opinion, but that was an isolated feature. On the whole his evidence was careful, well-reasoned and convincing.

76. In their written reports, and joint statements, the experts agree that, as from 4 June 2014 when Marc Traylor took medication by mouth rather than by administered injection, there was a risk that he would not take the medication. This resulted in an increased risk of a further psychotic episode. This gave rise to a risk to Marc Traylor himself and to his family. Conversely, if Marc Traylor had continued to have depot injections it is unlikely that he would have relapsed. The experts also agree that the contemporaneous note of 4 June 2014 does not "represent a robust record of the risk assessment." Both experts agree that there should have been at least monthly visits to Marc Traylor with monitoring or oversight of medication compliance. Those monitoring arrangements might have included actively asking Marc Traylor about his concordance with medication, documenting any responses, and seeking collateral history from family members regarding medication monitoring.

77. Dr Ginn considers that there should have been a separate assessment of Marc Traylor's capacity at the time he stopped receiving depot injections. Both experts agree that Marc Traylor did have capacity, so the question of whether a capacity assessment should have been carried out is moot.

78. In his written evidence, Dr Ginn considered that the decision to stop depot injections and replace them with oral medication was a breach of duty. He suggested that, at the very least, the decision to stop depot medication should have been deferred to allow an appropriate risk assessment plan to be formulated.

79. Dr Iankov considered that it was not really a question of a balance of risk. That presupposes that Dr Pisaca had a free hand in the method of administering medication. He did not. Marc Traylor had capacity to consent or withhold his consent to the administration of medication. It was not therefore open to Dr Pisaca to defer a decision to move to oral medication if (as was the case) Marc Traylor was not willing to stay on depot injections. In that context what was required was the agreement between clinician and patient of a mutually agreeable plan. That is what Dr Pisaca did.

80. Dr Ginn also considered that it was a breach of duty to discharge Marc Traylor from the CTO. Dr Iankov considered that a reasonable body of psychiatrists would have discharged Marc Traylor from the CTO.

81. Dr Iankov's oral evidence broadly reflected his written reports. For his part, Dr Ginn accepted, in a number of respects, that breaches of duty that he had set out in his report could not be sustained. In particular, Dr Ginn acknowledged that Marc Traylor had capacity within the meaning of the 2005 Act, and it was not open to Dr Pisaca to administer injections without his consent.

Issue 1: Marc Traylor's claim - breach of duty of care

82. The Trust admits that there was a breach of duty in respect of the decision in December 2014 to discharge Marc Traylor from secondary healthcare, but it is common ground that this decision did not make a difference to the outcome. Marc Traylor would have continued not to take his medication even if he had not been discharged.

83. Mr Naughton helpfully withdrew many allegations of breach of duty in the light of the concessions that were made by Dr Ginn. By the end of the evidence, Marc Traylor's claim that Dr Pisaca breached the duty of care that was owed to him narrowed right down to two allegations:

(1) Dr Pisaca did not undertake a sufficient assessment of the risk that Marc Traylor would not take his medication.

(2) Hence, or otherwise, Dr Pisaca did not advise Marc Traylor that he should remain on his depot injections.

Risk assessment

84. The question of whether an adequate risk assessment was carried out is not a free-standing issue. It is linked to the second question: whether Dr Pisaca advised Marc Traylor that he should remain on his depot injections. Mr Naughton's point is that if Dr Pisaca had properly assessed the risks, then he would have appreciated that there was a real risk that Marc Traylor would not take his oral medication. In that event he would have given advice to Marc Traylor to remain on depot injections. The risk assessment therefore feeds into the duty to advise. Given that it is common ground that the duty to advise arose in any event, the question of whether Dr Pisaca adequately addressed the risks may not, in itself, take Marc Traylor's case very far. The real relevance of the risk assessment is that if Dr Pisaca had not appreciated the risks, then it might be more likely that he did not give the necessary advice. Conversely, if he had appreciated the risks then it is less likely that he omitted to give advice that helped avoid or mitigate those risks.

85. The contemporaneous notes do not make any record of any type of risk assessment. For the reasons given below (see paragraphs 90 - 91), and without in any way doubting Dr Pisaca's honesty, I do not accept that the account that he now gives can (without external support) be regarded as a reliable record of his thought process in June 2014. Nevertheless, I am satisfied on the balance of probabilities that Dr Pisaca did consider the risks, that he appreciated that Marc Traylor might not take oral medication and the consequential risks that flowed from that, and that he regarded depot injections as the preferable option. That is because:

(1) Risk assessment is integral to the practice of psychiatry. Statutory decisions under the 1983 Act require consultant psychiatrists to assess risks. One of the decisions that Dr Pisaca made, in principle, was to discharge the CTO. That in itself required consideration of questions of risk (see s17A(5)(b) of the 1983 Act).

(2) Dr Pisaca was well versed in the background both from the handover meeting from Dr Szpak and from reading the notes. That showed a long history of violence, a period of non-compliance with medication, an aversion to medical treatment and a

desire to stop medication. The risks were obvious. It is difficult to conceive that Dr Pisaca was not aware of them.

(3) The internal evidence of the contemporaneous note expressly refers to the possibility that Marc Traylor might not follow medical advice and might stop taking medication, and states that the risks have been substantially mitigated. That is primarily concerned with the advice to take oral medication and the risks of not doing so, rather than the risk of coming off depot injections. However, the risk that he would not take his oral medication only arose at the point depot injections stopped. This is the point that was reached on 4 June 2014. Dr Pisaca must have had that well in mind.

(4) There are several indications in the short note that Dr Pisaca was seeking to assess, manage and mitigate the risks. Thus, he referred to the fact that Marc Traylor was in remission, that his treatment had been reduced, that he was insightful, that he was enjoying increased support from his family, that they were more aware of his problems, that he agreed to have his next depot injection, and that mental health services could intervene early if concerns were raised. Much of the note is concerned with the question of risk, even though it is not set out in the form of a robust written risk assessment.

(5) The relapse plan, the regular visits, and the agreement of Nicole Traylor to support her husband, were all measures that were in place to control and mitigate the risks. They indicate that the risks were well appreciated.

Advice to remain on depot injections

86. It is common ground that antipsychotic medication administered by depot injection is more efficacious than orally administered medication. It also avoids the risk that a patient will stop taking his medication without the clinical team's knowledge. It requires less resource (because the level of monitoring that is needed is less if the patient is on depot injections). For all those reasons, from the clinical point of view, depot injections are preferable to oral medication. The only rational reason for substituting oral medication in place of depot injections is the patient's wish and informed decision.

87. It is therefore common ground that Dr Pisaca should have advised Marc Traylor to continue with the depot medication so that he could make an informed decision. It is common ground that if he did not give that advice then that was a breach of the duty of care owed by Dr Pisaca to Marc Traylor.

88. The contemporaneous notes do not record whether this advice was given (see paragraph 33 above). Nor does the letter to the GP (see paragraph 35 above).

89. It is likely that those who were at the consultation on 4 June 2014 were Dr Pisaca, Marc Traylor, Nicole Traylor and Carol Eccleshare. That is what is recorded in the contemporaneous note. Nicole Traylor recalls that Marc Traylor's father, Peter Traylor, was present. She is probably wrong about that, and she is probably conflating the consultation on 4 June 2014 with that on 18 June 2014. Peter Traylor only recalls going to one consultation, and he is recorded in the contemporaneous notes as being present at the consultation on 18 June 2014.

90. Dr Pisaca made a detailed witness statement and gave oral evidence. He explains, and I accept, that in late May 2014 he received a detailed handover from Dr Szpak in which they discussed Marc Traylor's case (amongst others). They agreed that as Dr Pisaca would be the permanent consultant, he was in a better position to plan the longer-term strategy for the patients he was taking over, such as Marc Traylor. The consultation for 4 June 2014 was the day before a planned depot injection. He says that he recommended that Marc Traylor should continue with his depot injection, that he explained the risks of relapse if he stopped taking his medication, that Marc Traylor listened to the advice that he was given but declined to continue on a depot injection and requested changing to oral medication.

91. Mr Naughton made it clear, in terms, that he did not challenge Dr Pisaca's honesty. He contended, however, that it is not safe to rely on his recollection of the detail of the consultation of 4 June 2014, at least not in isolation. I agree. The witness statement was made 6½ years after the consultation in question. There was nothing particularly remarkable about the consultation. Dr Pisaca will have seen very many other patients in the interim. He candidly explains that the process of producing his witness statement involved "a combined effort" with the Trust's legal team. There had been an earlier complaint investigation at which the issues were canvassed. I am satisfied that Dr Pisaca was doing his best to give an accurate and truthful account of what happened during the consultation on 4 June 2014. But I do not consider that his recollection now of what he said to Marc Traylor can, in isolation, be regarded as reliable (see, for analysis of the well-known problems with recollection in this sort of context, *Onassis v Vergottis* [1968] 2 Lloyds Rep 403 *per* Lord Pearce at 431, *Grace Shipping v Sharp & Co* [1987] 1 Lloyd's Law Rep 207 *per* Lord Goff at 215-6, *Wetton v Ahmed and others* [2011] EWCA Civ 610 *per* Arden LJ at [11]-[14], *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) [2020] 1 CLC 428 *per* Leggatt J at [16]-[22] and Lord Bingham, The Business of Judging (2000) at 15-18).

92. Marc Traylor and Nicole Traylor may have better reasons to remember some of the detail of the consultation on 4 June 2014 than Dr Pisaca. Nevertheless, for similar reasons, their recollections as to what was said should be treated with some caution. In Nicole Traylor's case there are inconsistencies between her evidence as to what was said on 4 June 2014, and the contemporaneous note. She recalls (I think wrongly) that Peter Traylor was present. She recalls Peter Traylor expressing concern about Marc Traylor coming off his depot injection. If, as I have found, Peter Traylor was not present then she must be wrong about that too. She suggests that she argued against Marc Traylor being moved from depot to oral medication. The contemporaneous notes say in terms that she was arguing in favour of this. It is unlikely that this was due to a misunderstanding or a failure in communication. I am satisfied (having heard her give evidence) that Nicole Traylor is well capable of making herself understood. It is likely that during the lengthy meeting she made her views well known to Dr Pisaca. The background history shows that she was strongly supportive of Marc Traylor's preferred wishes and that she was an advocate on his behalf (for example her actions in pursuing an application to the Tribunal to discharge the order for Marc Traylor's detention under s3 of the 1983 Act). Peter Traylor says (although probably in relation to the 18 June consultation rather than that on 4 June) that Nicole Traylor was advocating in favour of Marc Traylor being allowed to come off his medication altogether.

93. Nicole Traylor was, like Dr Pisaca, an entirely honest witness. But, again like Dr Pisaca, I do not consider that her recollection of the detail of the consultation is reliable.

94. Marc Traylor suggests that he was not advised to remain on the depot medication. As with the other witnesses, I do not consider that his evidence on this issue is reliable. Moreover, he consistently lied to others on the question of whether he was taking his medication.

95. The primary source for findings as to what was said on 4 June 2014 is therefore the contemporaneous note of that meeting, together with the content of the letter of 18 June 2014, read in the context of the history as a whole and the expert evidence, with the witness accounts providing more of a secondary cross-check.

96. Although the contemporaneous notes do not record in terms that Marc Taylor was advised to continue with his depot injections, I have concluded that it is likely that this advice was given. That is because:

(1) It was a reasonably lengthy consultation. Dr Pisaca's evidence (which appears to be corroborated by the computerised timings) is that it overran the 1-hour time slot that had been allocated. The notes are therefore only a short summary of the discussion that took place.

(2) The whole focus of the consultation was the continuation of medication.

(3) Dr Pisaca's strong view (which on the expert evidence that was produced is the only tenable view) was that subject to Marc Traylor's wishes, it was preferable to administer the medication by depot injection.

(4) There was every opportunity for Dr Pisaca to give that advice in what was a lengthy consultation dealing with, effectively, a single issue, and there was no reason for him not to give the advice.

(5) Neither expert witness suggested that there is any absolute necessity for advice of this nature to be separately noted.

(6) Although the notes do not expressly record that this advice was given, they are not inconsistent with such advice being given.

(7) There are indications in the notes that are consistent with Dr Pisaca's evidence that he did give the advice. They record that Marc Traylor "agrees" to have his next depot medication, there was a "discuss[ion]" about replacing the injection with tablets. There is reference to the possibility that he might decide to come off his medication "against advice." The "advice" there mentioned relates to the prospect of ceasing medication altogether (rather than specifically as to the choice between depot and oral medication), but it is nevertheless consistent with there being a detailed discussion, including advice, as to the different options.

(8) If Dr Pisaca had not strongly advised that Marc Traylor should continue with depot medication, there is no obvious reason why Marc Traylor agreed to take the depot medication the following day (rather than immediately swapping to oral medication). This is much more likely to have been a compromise between Dr

Pisaca's preferred option, that Marc Traylor remain on depot medication, and Marc Traylor's wish to stop.

(9) Nothing in the letter of 18 June 2014 is inconsistent with Marc Traylor having been given advice to remain on depot medication. Dr Iankov opined, and I accept, that there was no reason for that letter to record the advice that had been given.

97. It follows that Marc Traylor has not succeeded in establishing either of the remaining allegations of breach of duty.

Issues 2 and 3: Marc Traylor's claim – causation and voluntary assumption of risk

98. These issues do not arise because Marc Traylor has not established a breach of duty.

99. Even if Dr Pisaca had failed to advise Marc Traylor to remain on depot medication, it was not shown that this made a difference to the outcome. Despite what he says in his evidence, it is unlikely that Marc Traylor would have accepted such advice. The events show that he was determined to come off his medication. As soon as he had the opportunity to do that, he did. And he lied about it. It is common ground that Dr Pisaca had no power to compel Marc Traylor to remain on depot medication. Marc Traylor had fixed views about the (in)efficacy of medication. No amount of advice could change those views. It is likely that he was compliant with the depot medication before June 2014 only because he was under the (mis)apprehension that the Trust had the power to compel him to take the medication, and because he thought that compliance with the Trust in the shorter term would enable him to come off the CTO quicker. The history shows that he was capable of cynical manipulation of the system in this way (see paragraph 15 above).

100. Accordingly, on the facts, Marc Traylor has not proved that any breach of duty caused the damage for which he claims.

101. If Marc Traylor had established causation in a factual sense, then I would not have acceded to the Trust's separate argument that the breach of duty was not a legal cause of Marc Traylor's relapse. The Trust is right that a more immediate cause was the free and voluntary decision of Marc Traylor not to take his medication. In other contexts that would be sufficient to break the chain of causation – see Hart and Honoré, Causation in the Law (second edition, 1985) at p136: "the free, deliberate and informed act or omission of a human being, intended to exploit the situation created by a defendant, negatives causal connection." Here, the primary purpose of what is agreed to be a duty of care (to advise Marc Traylor to remain on depot medication) was to guard against the risk that Marc Traylor would not take oral medication. The general principle identified by Hart and Honoré does not apply where the law imposes that type of duty – see *Reeves v Commissioner of Police of the Metropolis* [2000] 1 AC 360 *per* Lord Hoffmann at 367H:

> "It would make nonsense of the existence of such a duty if the law were to hold that the occurrence of the very act which ought to have been prevented negatived causal connection between the breach of duty and the loss."

102. In *Gray v Thames Trains Ltd* [2009] UKHL 33 [2009] 1 AC 1339 Lord Hoffmann said (at [28]):

> "It is not sufficient to exclude liability that the immediate cause of the damage was the deliberate act of the claimant himself. Although in general a defendant will not be liable for damage of which the immediate cause was the deliberate act of the claimant or a third party, that principle does not ordinarily apply when the claimant or third party's act was itself a consequence of the defendant's breach of duty."

103. For the same reason I do not accept the Trust's separate argument that an otherwise viable claim would be defeated because Marc Traylor had voluntarily accepted the risk created by Dr Pisaca's failure to give proper advice (and see *Reeves* at 367E-F (Lord Hoffmann) 375H (Lord Jauncey) and 381D (Lord Hope)). If the defence were available then that would effectively empty the duty of any meaningful content (see *Reeves* at 386F, quoting the judgment of Lord Bingham CJ in the Court of Appeal).

104. Mr Bishop argues that the duty identified in *Reeves* (to take reasonable care to avoid a detainee from committing suicide) arose in a different context (a duty owed by a police custody sergeant to a prisoner in a police cell). That is correct, but it misses the point. What is important is that the duty of care that exists in both contexts is a duty to prevent harm that would arise from the claimant's own deliberate act. It is because of this special and unusual feature of the duty (rather than the circumstances that give rise to it) that defences based on causation or voluntary acceptance of risk cannot succeed.

Issue 4: Marc Traylor's claim – illegality

105. As with issues 2 and 3, the defence of illegality does not arise because Marc Traylor has not established a breach of duty.

106. The jury in the criminal proceedings returned a special verdict that Marc Traylor was not guilty by reason of insanity. Mr Bishop QC helpfully indicated, at the outset of the trial, that the Trust accepts that at the time Marc Traylor took his daughter hostage, he was insane within the meaning of the *McNaughten* rules. That is (see *M'Naughten's Case* (1843) 10 Cl & F 200 8 ER 718) that he "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." It is not therefore necessary for Marc Traylor to rely directly on the jury verdict. It follows that no question arises as to whether reliance on the jury verdict is contrary to the rule in *Hollington v Hewthorn* [1943] 1 KB 587.

107. It is common ground that if Marc Traylor had not been insane within the meaning of the *McNaughten* rules, then his claim would be defeated by the defence of illegality. The question of whether that defence is available where the claimant was, at the relevant time, insane within the meaning of the *McNaughten* rules has not been finally determined in this jurisdiction. It was explicitly left open in *Gray* – see *per* Lord Hoffmann at [42].

108. Mr Bishop QC submits that although Marc Traylor was rightly found "not guilty by reason of insanity", he was nevertheless guilty of "a criminal act." He was only

acquitted because he did not have the requisite capacity to form the necessary intent. This is the premise on which he contends that the defence of illegality remains available. He relies on the sidenote to s2 Trial of Lunatics Act 1883 ("guilty of the act or omission charged, but insane so as not to be responsible, according to law, for his actions."). He also relies on the definition of "conviction" in s2 Bail Act 1976:

> "**2 Other definitions**
>
> (1) In this Act, unless the context otherwise requires, "conviction" includes—
>
> (a) a finding of guilt,
>
> (b) a finding that a person is not guilty by reason of insanity,
>
> (c) a finding under section 11(1) of the Powers of Criminal Courts (Sentencing) Act 2000 (remand for medical examination) that the person in question did the act or made the omission charged, and
>
> (d) a conviction of an offence for which an order is made discharging the offender absolutely or conditionally,
>
> and "convicted" shall be construed accordingly."

109. Mr Bishop QC also relies on paragraph 3 of Annex B to the Criminal Injuries Compensation Scheme 2012:

> "In exceptional cases, an act may be treated as a crime of violence where the assailant:
>
> (a) is not capable of forming the necessary mental element due to insanity; or
>
> (b) is a child below the age of criminal responsibility who in fact understood the consequences of their actions."

110. I do not accept the submission that Marc Traylor is to be treated as having committed a criminal act. The common law background and legislative history show that those who satisfy the test in the *McNaughten* rules are not regarded in law as having committed the act or having any responsibility for the act – see paragraphs 55 - 61 above. The sidenote to s2 Trial of Lunatics Act 1883 (in particular the use of the word "guilty") does not now reflect the content of the provision, which has since been amended. Even in its original form, s2 did not have the effect that the defendant was treated as being responsible for the criminal act (see paragraph 60 above). The Bail Act 1976 makes express provision (by s2(1)(b)) that a person found not guilty by reason of insanity is to be treated, for the purposes of that Act, as if he had been convicted. Rather than supporting the Trust's argument, that further shows that the special verdict is not treated, as a matter of the general law, as a conviction. Otherwise s2(1)(b) would not

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

111. There are many authorities which suggest that the illegality defence only applies where the claimant knew that he was acting unlawfully:

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

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

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

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

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

112. The application of the defence in a case where the *McNaughten* rules are satisfied would seemingly be contrary to this line of authority.

113. It would also be contrary to dicta in *Beresford v Royal Insurance Company Ltd* [1937] 2 KB 197 and *Clunis v Camden and Islington Health Authority* [1998] QB 978. In *Beresford* the deceased committed suicide (at a time when suicide was a criminal offence). His administratrix sought to recover under a life insurance policy. It was found that he had not been insane within the meaning of the *McNaughten* rules at the time of the suicide. At first instance, Swift J rejected the insurance company's illegality defence. The Court of Appeal allowed an appeal holding that the illegality defence applied but indicated that the position would have been different if the deceased had been insane – see *per* Lord Wright MR (giving the judgment of the Court) at 210: "If the assured had taken his life while insane, the fact would not have constituted a

defence." An appeal to the House of Lords was dismissed ([1938] AC 586), but no view was expressed on what the position would have been if the deceased had been insane at the time of committing suicide. In *Clunis* the Court of Appeal indicated that the illegality defence would not have succeeded if the plaintiff had been insane within the meaning of the *McNaughten* rules – see at 989E *per* Beldam LJ:

> "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."

114. Importantly, it would also run contrary to the reasoning of a recent decision of the Supreme Court, in a similar type of case, *Henderson v Dorset Healthcare University NHS Foundation Trust* [2020] UKSC 43 [2021] AC 563. The claimant stabbed and killed her mother during a psychotic episode. She pleaded guilty to manslaughter on the grounds of diminished responsibility. The Supreme Court upheld the decision of Jay J and the Court of Appeal that the claim was defeated by the defence of illegality. In doing so, the court emphasised the desirability of maintaining consistency between the criminal and civil law – see *per* Lord Hamblen JSC at [108]: "If… it is appropriate for the civil court to move away from the *McNaghten* approach to insanity, and to develop its own approach to such issues, then [inconsistencies between the criminal and the civil courts] will be heightened." In *Henderson* the claimant had diminished responsibility but did not come within the scope of the *McNaghten* rules, so the illegality defence was available – Lord Hamblen JSC at [139] (and [142]): "The appellant knew what she was doing and that it was legally and morally wrong." The maintenance of consistency between the civil and criminal law militates in favour of the opposite outcome in the present case. That is because the concession that Marc Traylor satisfied the test in the *McNaughten* rules means that he did not know what he was doing or, if he did, he did not know that it was wrong.

115. The Trust's argument also runs counter to decisions in the United States. In *Boruschewitz v Kirts* (1990) 554 NE 2d 1112 (a decision of the Illinois Court of Appeals) it was held that a claimant's action would not be barred by public policy if the claimant "was not responsible for the underlying criminal act by reason of legal insanity." The Supreme Court of Georgia reached the same view in *O'Brien v Burscato* (2011) 289 Ga 739. In *Rimert v Mortell* (1997) NE 2d 867 (Court of Appeals of Indiana) the court said at 874-875:

> "A prohibition against imposing liability for one's own criminal acts to another through a civil action is simply not justified when a plaintiff is not responsible for the act or acts in question. Thus, if in this case [the claimant] had been found not guilty by reason of insanity, he would bear no criminal responsibility for his acts and his subsequent civil action for recovery… could not be barred by the public policy expressed above."

116. I was shown one case where the opposite conclusion was reached – the decision of the New South Wales Court of Appeal in *Hunter Area Health Service v Presland* [2005] NSWCA 33. In that case, Spigelman CJ referred to a long line of authority from this jurisdiction and concluded that the illegality defence should not succeed in cases of

insanity. So far as concerned the outcome, he was in the minority. The other two members of the constitution held that the claim in that case should fail, but neither relied on an orthodox application of the common law illegality defence (see Sheller JA at [300] and Santow JA at [315]).

117. Mr Bishop QC advanced an alternative case based on Marc Traylor's decision not to take the medication that had been prescribed (and his lies about this). Marc Traylor's conduct in this respect was not unlawful. I was not shown any authority that conduct of this nature could trigger the illegality defence. Mr Bishop QC pointed to authorities that automatism is not a defence where it is self-induced (as in the case of a diabetic who does not take food after a dose of insulin – see *R v Bailey* [1983] 1 WLR 760). That is an altogether different point.

118. Mr Bishop QC also submitted that it would be inconsistent for the law, on the one hand, to regard the actions of the police who shot Marc Traylor as lawful, but on the other hand to award compensation for injuries he sustained as a result of being shot. I am satisfied there is no inconsistency whatsoever. An award of compensation would not impugn the officers' actions; it would simply recognise (if it were the case) that those actions were the lawful consequence of a third party's tort.

119. For all these reasons, although it is not necessary to reach a final conclusion, I am not inclined to find that the illegality defence is available on the facts of this case.

Issue 5: Marc Traylor's claim – contributory fault

120. By not taking his medication, and by lying to the mental health care team, Marc Traylor did not take reasonable care for his own wellbeing. That amounts to fault within the meaning of s5 Law Reform (Contributory Negligence) Act 1945. His failure to take his medication was a cause of his relapse, and hence his injuries. It follows that the damages (that would have been recoverable if the claim had otherwise succeeded) should be reduced to such extent as is just and equitable having regard to the claimant's share in the responsibility for the damage (see s1(1) of the 1945 Act).

121. In cases of suicide or self-harm in detention, the reduction for contributory fault is generally no greater than 50% - *Corr v IBC Vehicles Ltd* [2008] UKHL 13 [2008] 1 AC 884 *per* Lord Neuberger at [62]-[69]. In those cases, it is recognised that a prisoner is particularly vulnerable by reason of incarceration, that prisoners are at a particular risk of self-harm or suicide, and that freedom of choice may, to a greater or lesser extent, be "overborne" by the fault of the defendant – see *Reeves* at 366B and *Corr* at [65].

122. Even if Dr Pisaca had failed to give advice about the merits of remaining on depot injections, I consider that Marc Traylor bore (by a substantial margin) the primary responsibility for what then happened. There is no question of his autonomy or freedom of choice being overborne by Dr Pisaca's conduct, or by imprisonment, or anything else. Over a period of around 7 months, he deliberately did not take his medication, and lied about that to Nicole Traylor and to those who came to visit him to monitor his progress. He had been advised as to the risks of not taking his medication. I consider that if the claim had otherwise succeeded it would be just and equitable to reduce the damages recoverable by three quarters.

Issue 6: Kitanna Traylor's claim – Articles 2 and 3 ECHR

123. The Trust is a public authority. By s6 Human Rights Act 1998 it is required to act compatibly with the Convention rights identified under s1 of the 1998 Act, including the right to life (article 2 ECHR) and the prohibition of inhuman and degrading treatment (article 3 ECHR). Each of those articles imposes a positive duty on the state to take positive steps to safeguard against risks of serious injury (article 3) or death (article 2). It is common ground that there is no relevant distinction between the scope of the positive duties owed under articles 2 and 3. For convenience, I address only article 2.

124. Mr Bishop QC submits that this is, in effect, a medical negligence claim, and acts of medical negligence do not generally engage article 2 ECHR. Ms Gerry's case is that if the Trust was aware of a real and immediate risk to life, then it was required to take such measures within the scope of its powers which might reasonably have been expected to avoid that risk.

125. In principle, I accept both submissions. They derive from two separate aspects of the positive obligation on the state to protect life (see *Rabone v Pennine Care NHS Trust* [2012] UKSC 2 [2012] 2 AC 72 *per* Lord Dyson at [12] and *Fernandes de Oliveira v Portugal* (2019) 69 EHRR 209 at [103]). First, the state must ensure that hospitals adopt appropriate measures for the protection of lives. So long as that is done, acts of medical negligence do not, in themselves, ordinarily amount to a breach of articles 2 or 3 ECHR – see *Lopes de Sousa Fernandes v Portugal* (2018) 66 EHRR 1011 at [186] (and cf at [202]-[205]). Second, there are circumstances where the state is under an obligation to provide protection against a known risk to life. In *Osman v United Kingdom* (1998) 29 EHRR 245 the court explained what is required to show a breach of this obligation:

> "…where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their above-mentioned duty to prevent and suppress offences against the person, it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk."

126. This duty may also, in certain circumstances, arise so as to require an NHS Trust to protect against a risk of suicide – *Rabone* at [34]. In *Fernandes* the court found that such a duty may arise in respect of patients receiving treatment for mental health problems on a voluntary basis. In *Griffiths v Chief Constable of Suffolk Police and another* [2018] EWHC 2538 (QB) [2019] Med LR 1 Ouseley J was prepared to contemplate (at [484]) that the positive duty may extend not just to protect against suicide but also to protect against a real and immediate risk to the life of a third party posed by one of its patients. I respectfully agree. The *Osman* duty, in its original form, was designed to protect against the risk to life from the criminal acts of a third party. It has been applied (including in *Rabone*) so as to require hospitals to protect against a risk of suicide posed by patients receiving treatment for mental health problems. No reason of principle was identified why it should not, in an appropriate case, also require

hospitals to protect against a risk of violence to third parties posed by a patient. At common law, hospitals owe a duty to ensure that their staff, and visitors, are kept reasonably safe from violent patients. The 1983 Act provides compulsory powers to protect others from those suffering mental illness (see s2(2)(b), s3(2)(c), s17A(5)(b)). The treatment of the *Osman* duty in *Fernandes* did not distinguish between the duty to protect against suicide or the duty to protect against a risk of violence to a third party – it described one of the duties that was engaged (at [103]) as "a positive obligation to take preventive operational measures to protect an individual from another individual or, in particular circumstances, from himself."

127. Mr Bishop QC suggested that there was effectively a choice between what are two alternative positive operational duties under article 2 EHCR – the "systems" duty to provide hospitals that adopt appropriate measures for the protection of lives, and the *Osman* duty to protect against suicide or criminal violence. In a primarily clinical setting the former duty arises. In a primarily protective setting, the latter duty may arise.

128. I do not accept that there is this sharp distinction between the different components of article 2 ECHR, or that only one type of duty may arise in a given context, or that a choice has to be made between two competing alternative options. The language of *Fernandes* shows that two duties may coexist – see at [103]: "two distinct albeit related positive obligations under art 2… may be engaged."

129. I therefore accept Ms Gerry's submission that the *Osman* duty may, in principle, arise in the present type of context.

Issue 7: Whether the Trust knew that there was a real and immediate risk to life or physical safety

130. The test for triggering the *Osman* duty is that the Trust knew or ought to have known that there was a real and immediate risk to (Kitanna Taylor's) life (or physical safety). On the facts of this case there is no argument about the difference between "knew" and "ought to have known": it is accepted that Dr Pisaca was aware of all relevant factors, including the detailed medical history. The issues concern whether (1) the risk was real, (2) the risk was immediate, (3) the risk extended to the life (or physical safety) of Kitanna Traylor.

131. Ms Gerry does not suggest that, as of June 2014, Marc Traylor was likely, within a short space of time, to suffer a relapse. His condition had been well controlled over many months. A depot injection was administered on 5 June 2014, and the next dose of medication was not due for another month. As Mr Bishop QC pointed out, the risk that eventually materialised depended on a number of interim steps: (1) Marc Traylor not taking his medication, (2) Marc Traylor lying about not taking his medication, (3) Marc Traylor's failure to take his medication, and his lies, not being detected despite the presence of Nicole Traylor and the visits from the mental health care team, (4) Marc Traylor suffering a relapse, (5) the relapse leading to a psychotic episode of a type that gave rise to violence against Kitanna Traylor. All the pieces of this jigsaw needed to fall into place before the risk materialised. I agree with this analysis. It is against that background that the questions arise as to whether the components of the *Osman* test are satisfied.

132. Ms Gerry submits that a real risk is simply a risk that is not fanciful. I agree. I consider that the first four links in the chain that Mr Bishop QC identified were each real and foreseeable concerns (the fifth link is more appropriately considered in the context of the question of whether the risk extended to the life or safety of Kitanna Traylor):

(1) Dr Ginn conceded that Marc Traylor's previous history of not taking medication was not significant because, at that time, he had been in the throes of a psychotic episode. Without going behind that concession, I do consider that there was a clear risk that Marc Traylor would not take his medication. He had expressed a firm desire over many months to stop taking the medication. I accept the evidence of Dr Iankov and Dr Pisaca that (counter-intuitively as it might seem) the fact that he had done so provided some cause for confidence, because it showed that he was engaging with the medical professionals and was honest about his feelings. It does, however, also show that he wanted to stop taking his medication, and there was no reason to be confident that he would not, at some point, do what he had long desired. It is accepted that a duty arose to advise Marc Traylor that he should remain on depot injections. That duty arose, in part, because it was foreseeable that he might not take oral medication. The Trust's staff had repeatedly recognised the risk that Marc Traylor might not take his medication.

(2) Marc Traylor had shown his capacity to lie about taking medication (see paragraph 16 above).

(3) Marc Traylor's previous lies had not been detected until he volunteered them. Dr Iankov indicated that it was not possible to be confident that the early signs of a relapse would be detected: "If Mr Traylor was a patient with 17 admissions, a long history, the relapse signature would be very clear. Here, we are trying to develop a relapse signature based on one event. It is not possible."

(4) The agreed evidence is that without medication the risk of relapse was in the region of 80%.

133. I accept the evidence that was adduced that many patients with a profile similar to Marc Traylor recover, and that the type of catastrophe that here occurred is not inevitable. I also accept Dr Iankov's evidence that it would have been unlikely that any reasonable psychiatrist would have predicted the catastrophe that ultimately unfolded. That does not, however, mean that there was no risk. There was a risk, it was a real risk, and it was a known risk (see paragraph 23 above). It is just that the precise way in which it ultimately materialised could not be predicted.

134. Ms Gerry further submits that an immediate risk may be one that is present and continuing. Again, I accept Ms Gerry's submission which is supported by authority – see *In re Officer L* [2007] UKHL 36 [2007] 1 WLR 2135 *per* Lord Carswell at [20]. Mr Bishop QC says that where, as here, the risk is not likely to materialise for some time the *Osman* test is not satisfied. He relies on the observation of Lord Dyson JSC in *Rabone* at [39] that "[t]he idea is to focus on a risk which is present at the time of the alleged breach of duty and not a risk that will arise at some time in the future." I do not agree that this supports Mr Bishop's submission. Lord Dyson was not saying that the duty is only engaged where the risk is likely immediately to materialise. A risk may be present and continuing even though it will not materialise for some time. Take an example, explored in argument. A police officer receives clear and reliable intelligence

that a terrorist will detonate an explosive device in a crowded area in 3 months' time. The officer decides not to do anything with that intelligence. The risk is present and continuing at the time of the officer's default, even though it will not materialise until a date in the future.

135. In the circumstances of the present case, the risk was not likely to materialise for at least a period of weeks or months. But as soon as the decision was made to move Marc Traylor to oral medication rather than depot injections the risk was created, and it remained present, and it was at least possible (as the events that occurred demonstrate) that there would not be a further opportunity to avert catastrophe.

136. I acknowledge that the *Osman* test sets a high threshold which was not met on the striking facts of *Osman* itself (although the Convention is a living instrument, and it has been suggested that the result of *Osman* might be different today – see the concurring opinion of Judge Garlicki in *Van Colle v United Kingdom* (2013) 56 EHRR 839 at [OI1]-[OI6]). In *Osman* it was held that there was no "decisive" stage in the escalating campaign of harassment when it could be said that the police ought to have known of a real risk to life. By contrast, in this case, the Trust had itself identified a real risk to the life of Nicole Traylor, well before June 2014 (see paragraphs 21 and 23 above).

137. It follows that I accept that, as of June 2014, there was a real and immediate risk that Marc Traylor would suffer a relapse, and that this would then pose a risk to Nicole Traylor's life. The detailed risk assessment that was carried out did not discretely identify a risk to the life or physical safety of the children (but it did identify a risk to their psychological wellbeing). The *Osman* duty does not require that the precise victim is identified in advance (see *Sarjantson v Chief Constable of Humberside Police* [2013] EWCA Civ 1252 [2014] QB 411 *per* Lord Dyson MR at [22] - [25]). Here, Kitanna Traylor lived with Marc Traylor. There was a real risk that he would suffer a psychotic episode. The history showed that he could then resort to violence. He had weapons available to him. There was a clear risk that Kitanna Traylor might become caught up in such violence. There was, moreover, a record that he had previously threatened to kill his children (see paragraph 12 above).

138. For all these reasons I accept Ms Gerry's submission that the *Osman* duty is engaged.

Issue 8: Whether the Trust took reasonable steps to avert the risk

139. Having found that the *Osman* duty is engaged, it is necessary to assess whether the Trust "failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid [the] risk."

140. The steps that Ms Gerry says should have been taken are: (1) an adequate risk assessment, (2) (strong) advice to stay on depot injections, and (3) continuation of the CTO.

141. I have already dismissed Marc Traylor's allegations of breach of duty in respect of risk assessment and advice. For the same reasons, I reject these aspects of the case advanced on behalf of Kitanna Traylor. I am satisfied that Dr Pisaca did adequately assess the risks, even though he did not document his assessment. Ms Gerry submits that Dr Pisaca "gave too much weight to the wishes of Marc Traylor and his capacity to make decisions concerning his treatment". I do not agree. It is common ground that Marc

Traylor had capacity. It is not suggested that he should have been detained under s3 of the 1983 Act. It follows that his wishes had an overriding effect on Dr Pisaca's options. It would have been unlawful to impose treatment on him that was contrary to his wishes.

142. I am also satisfied that Dr Pisaca advised Marc Traylor (in appropriate terms) to remain on depot injections. Ms Gerry says that Dr Pisaca should have disbelieved Marc Traylor when he said that he would take his oral medication. He could not, however, force him to take the medication and measures were in place to mitigate against that risk (the role of Nicole Traylor, the relapse plan and the visits).

143. As to the suggestion that the CTO should have been continued, I do not consider that this might reasonably have been expected to avoid the risk. It would not have ensured that Marc Traylor take the medication. It would merely have facilitated a route of recall to detention under s3 of the 2013 Act if matters deteriorated. That, however, would have depended on the clinicians being able to identify a deterioration. The maintenance of the CTO would not have increased the prospect that a deterioration would have been identified. Regular visits were, in any event, taking place. Moreover, I consider it was reasonable in all the circumstances to discharge the CTO. I accept Dr Iankov's evidence on this point (even though I had some reservations as to the way it was expressed), and I do not consider that I can rely on Dr Ginn's evidence on this point (he has no experience of discharging CTOs). In particular, Dr Iankov considered that where, as here, the patient appears to be compliant and willing to take medication, it is not necessary to exercise the power of recall. An essential condition to the continuation of the CTO is not therefore present. If Dr Pisaca had known that Marc Traylor would not take the medication, then the position may have been different, but that is not this case. Ms Gerry advanced a forceful case that Dr Pisaca should have been more sceptical about Marc Traylor's protestations that he would take the medication. This, however, involves sensitive clinical judgments. There is something in the evidence of Dr Pisaca and Dr Iankov that it reasonably seemed at the time that Marc Traylor had moved on from his earlier stance, and as a result of education, the gaining of insight, and the building up of trust and confidence he was more willing to engage with the clinicians. That turned out not to be the case, but Dr Pisaca was not to know that. He was, though, alive to the possibilities and contingency measures were in place. In all the circumstances, I do not consider that the decision to stop the CTO was a breach of Kitanna Traylor's Convention rights.

144. Further, I am satisfied that the Trust did take reasonable steps to avert the risk. The risks had been explained to both Marc Traylor and to Nicole Traylor. A careful "relapse plan" had been formulated. Appropriate medication had been provided. Marc Traylor had agreed to take the medication, and Nicole Traylor had agreed to monitor his compliance. Visits were arranged to check up on Marc Traylor, and these took place at regular intervals. The one step that would have avoided the risk with any certainty would have been to maintain depot injections. That would not have been lawful without exercising compulsory powers under s3 of the 1983 Act, and it is not suggested that detention under s3 of the 1983 Act would have been lawful.

145. Complaint is made that there was no care plan in place to explain how Marc Traylor's compliance would be monitored. Although there is no separate "care plan" document, it is clear from the papers how compliance was to be monitored. There were regular visits to check up on Marc Traylor, and, in addition, Nicole Traylor was living with him. She, I find, had agreed to play a monitoring role. Complaint is made that it was

not reasonable to rely on Nicole Traylor, but I accept the evidence of Dr Iankov on this point that the primary measure was the visits, and Nicole Traylor's role was subsidiary to those visits. It was an extra measure of protection. It did not stand alone. In all the circumstances, a reasonable package of measures was in place to guard against the risks.

Issue 9: Kitanna Traylor's claim – heads of loss

146. I have found that the Trust did not act incompatibly with Kitanna Traylor's Convention rights. The question as to which heads of loss would otherwise be available does not therefore arise.

147. If there had been a breach of Kitanna Traylor's Convention rights then she would have been entitled to an award of damages for non-pecuniary losses, to reflect the distress and injury to feelings occasioned by the breach of her Convention rights. She would also, in principle, have been entitled to any consequential pecuniary losses (but that would involve establishing that they had been caused by the breach of her Convention rights).

148. A separate question arose as to whether causation must be proved to recover damages for pain, suffering and loss of amenity. Insofar as such a claim is advanced for the physical injuries sustained on 9 February 2015 and subsequent psychiatric sequelae (as opposed to the psychological damage occasioned by any breach of Convention rights itself) then I consider that it would be necessary to prove causation. This was the approach taken in *D v Commissioner of Police of the Metropolis* [2014] *per* Green J at [24]-[27]. In that case both claimants succeeded in showing a breach of their Convention rights. In both cases, the Claimants were assaulted, but in only one of the cases was the assault caused by the breach of a Convention right. It was only in that case that the court considered that compensation fell to be awarded for the assault and consequential harm.

Outcome

149. The Trust took reasonable steps to avoid the risk that Marc Traylor would suffer a relapse of his psychotic illness. Dr Pisaca sought to persuade Marc Traylor to remain on depot injections and, failing that, to remain on his oral medication. Marc Traylor/ Nicole Traylor were told about the early signs and symptoms of relapse so that they could seek medical help. Regular monitoring was carried out to ensure that Marc Traylor was not relapsing and that he was taking his medication. This did not pick up that Marc Traylor had stopped taking his medication, in part because he lied to Nicole Traylor and to the mental health care team staff.

150. The Trust is not therefore liable in negligence to Marc Traylor. It is not liable to Kitanna Traylor under the Human Rights Act 1998.

Overview | **[1970] AC 1004**, | [1970] 2 All ER 294, | [1970] 2 WLR 1140, | [1970] 1 Lloyd's Rep 453, | 114 Sol Jo 375

HOME OFFICE APPELLANTS AND DORSET YACHT CO. LTD. RESPONDENTS [ON APPEAL FROM DOREST YACHT CO. LTD. v. HOME OFFICE] [1970] A.C. 1004

[HOUSE OF LORDS]

Lord Reid, Lord Morris of Borth-y-Gest, Viscount Dilhorne, Lord Pearson and Lord Diplock

1970 Feb. 23, 24, 25, 26; March 2; May 6

APPEAL from the Court of Appeal (Lord Denning M.R., Edmund Davies and Phillimore L.JJ.).

This was an appeal by leave of the Court of Appeal from a judgment of the Court of Appeal dated March 10, 1969, whereby the Court of Appeal dismissed with costs the appeal of the Home Office from a judgment of Thesiger J., dated December 19, 1968, whereby he determined a preliminary issue on a point of law adversely to the Home Office (the defendant in the action but plaintiff on the preliminary issue) and gave judgment in the preliminary issue with costs for the plaintiffs, the Dorset Yacht Co. Ltd.

The plaintiffs issued a writ on February 6, 1965, claiming damages against the Prison Commissioners, later amended to the Home Office. The endorsement to the writ claimed damages as a result of their motor yacht *Silver Mist* being cast adrift and boarded by Borstal boys on the night of September 21/22, 1962, in Poole Harbour, such damage being as a result of the alleged negligence of the Home Office, their servants or agents in permitting Borstal boys in their charge to cause damage to the yacht and/or for failing to take adequate steps to prevent the boys from escaping and for failing to exercise adequate control and/or supervision.

By their statement of claim dated February 23, 1963, the plaintiffs claimed that they were the owners of a motor yacht, the *Silver Mist*, which, in September, 1962, was lying at moorings off Brownsea Island in Poole Harbour and that on the night of September 21/22, owing to the negligence of the defendants, their servants or agents, seven Borstal boys escaped from Brownsea Island where they had been working under the control and supervision of the defendants and, after causing another yacht to collide with her, boarded the *Silver Mist*, cast her adrift and caused considerable damage to her and her contents.

The particulars of negligence pleaded were: (a) that, knowing that each of the boys had criminal records, including convictions for breaking and entering premises, larceny, and taking away vehicles without the owners' consent, and that five of the seven had a record of previous escapes from Borstal institutions, they failed to exercise any effective control or supervision over them but permitted them to escape from the island without let or hindrance; (b) that the three officers, the servants of the Home Office, who had charge of the boys, failed to keep any watch or exercise any control over them at the material time but retired to bed leaving the boys to their own devices; (c) that none of the three officers was on duty at the material time; (d) that they failed to make any or any effective arrangements for keeping the boys under control at night; (e) that the Home Office failed to give any or any adequate instructions to the officers for maintaining effective watch and control over the boys at night; and (f) that, knowing that there were craft such as the *Silver Mist* offshore and that there was no or no effective barrier in the way of the boys gaining access to such craft, they

failed to take any or any adequate steps to check the movements of the boys.

The plaintiffs claimed that they had thereby suffered damage, particularised as "Cost of repairing the damage to the 'Silver Mist' £1,303 1*s.* 8*d.* Survey fees £12 12*s.*"

The defendants entered an appearance to the writ on February 12, 1963, and a defence was filed on March 18, 1965, which, while admitting the escape of the boys, denied that they, their servants or agents owed the plaintiffs any duty of care with respect to the detention of those persons or to the manner in which they were treated, employed, disciplined, controlled or supervised while undergoing their sentences or any other duty of care of which breaches were alleged in the statement of claim. They also denied that they, their servants or agents were guilty of the alleged or any negligence, and they denied the damage claimed and also that the damage, if any, was caused by their negligence.

In further and better particulars of their statement of claim, the plaintiffs stated that the duty imposed upon the defendants, their servants or agents was that imposed by the common law and that the facts relied upon appeared from the particulars set out in the statement of claim, and that they would rely on the fact that it was the duty of the defendants, their servants or agents firmly to maintain discipline and order in accordance with the provisions of the Borstal (No. 2) Rules, 1949 (as amended), and would say that the facts alleged in me statement of claim showed a breach of such duty which amounted in law to negligence.

On a summons for directions, Master Ritchie on November 10, 1967, ordered that the following question of law be tried as a preliminary issue before the trial of the action, viz.:

> "whether on the facts pleaded in the statement of claim the defendants their servants or agents owed any duty of care to the plaintiffs capable of giving rise to a liability in damages with respect to the detention of persons undergoing sentences of Borstal training or with respect to the manner in which such persons were treated, employed, disciplined, controlled or supervised while undergoing such sentences, …"

The defendants being the plaintiffs on that issue. The master also ordered that, pending determination of the preliminary issue, all further proceedings in the proposed action be stayed.

Thesiger J., on December 19, 1968, decided the preliminary issue of law in favour of the plaintiffs.1 The Court of Appeal dismissed the defendants' appeal.

The defendants appealed, for the reasons (1) that there was no common law duty on them to take care in the performance of the statutory duties laid down in the Prison Act, 1952, and the Borstal Rules made thereunder; (2) that there was no general duty at common law whereby a person was under a duty to restrain, control or supervise another person so as to prevent him from doing harm to a stranger; (3) that the only exception to the general rule was the parent-child relationship, whereby

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1 Part of his judgment is set out at [1969] 2 Q.B. 412, 415-416.

a person in loco parentis might be liable to a third person injured as a result of damage caused by a child of tender years who by virtue of his lack of legal responsibility was under the control or supervision of his parents; (4) that the defendants' statutory duties in respect of the adminstration of the Borstal system were owed to the Crown and did not give rise to any action at law for their breach; (5) that public policy required that the law should not construct a duty upon the Borstal authorities to take care in the administration of the Borstal system; (6) that, even if there was at common law a duty to take care (which was not conceded), public policy required that the administrators of the Borstal system should be immune from legal suit.

Finally I must deal with public policy. It is argued that it would be contrary to public policy to hold the

Home Office or its officers liable to a member of the public for this carelessness - or, indeed, any failure of duty on their part. The basic question is: who shall bear the loss caused by that carelessness - the innocent respondents or the Home Office, who are vicariously liable for the conduct of their careless officers? I do not think that the argument for the Home Office can be put better than it was put by the Court of Appeals of New York in *Williams v. State of New York* (1955) 127 N.E. 2d 545, 550:

> "… public policy also requires that the State be not held liable. To hold otherwise would impose a heavy responsibility upon the State, or dissuade the wardens and principal keepers of our prison system from continued experimentation with 'minimum security' work details - which provide a means for encouraging better-risk prisoners to exercise their senses of responsibility and honor and so prepare themselves for their eventual return to society. Since 1917, the legislature has expressly provided for out-of-prison work, Correction Law, _ 182, and its intention should be respected without fostering the

---------- ***[1970] A.C. 1004 at 1033***

> reluctance of prison officials to assign eligible men to minimum security work, lest they thereby give rise to costly claims against the State, or indeed inducing the State itself to terminate this 'salutary procedure' looking toward rehabilitation."

It may be that public servants of the State of New York are so apprehensive, easily dissuaded from doing their duty and intent on preserving public funds from costly claims that they could be influenced in this way. But my experience leads me to believe that Her Majesty's servants are made of sterner stuff. So I have no hesitation in rejecting this argument. I can see no good ground in public policy for giving this immunity to a government department. I would dismiss this appeal.

LORD MORRIS OF BORTH-Y-GEST. My Lords, the claim which the company advanced in launching this litigation was that their property had been damaged by persons who were in charge of servants or agents of the Home Office and that the damage was the result of the negligence of those servants or agents in permitting or in not preventing the occurrence of the damage. Apart from other defences it was pleaded that in any event no duty of care was owed to the company. The facts have not yet been ascertained. It was thought fit, however, to direct that there should be a preliminary trial of a question of law. That was presumably on the basis that it would be of no advantage to investigate the facts which were alleged if, on the assumption that they could all be established, and on the further assumption that, if established, they suggested careless conduct, there could even so in no circumstances be success in the litigation for the reason that no duty of care was owed to the company.

It is important to observe the precise point of law which has been presented for determination. Assuming that all the facts in the statement of claim were proved, would there be owed to the company "any duty of care … capable of giving rise to a liability in damages"? The words "any" and "capable of" are to be noted. If it is held as a matter of law that in the circumstances there was a duty of care owed to the company it would not follow that proof of the facts alleged in the statement of claim would necessarily result in victory for the company. Assuming that some duty of care was owed to the company, being a duty of care with respect to the detention of those in charge and to "the manner in which such persons were treated, employed, disciplined, controlled or supervised," it would not be until all the relevant facts and circumstances had been examined that it could be determined (a) what was the exact nature and quality and extent of the duty that was owed and (b) whether there was or was not a breach of the duty as it was found to be. Questions as to resulting or recoverable damage would of course further arise.

It is therefore, in my view, important to remember that we are only asked to decide whether, on proof of the facts pleaded, there was some duty of care. We are not asked to say, and could not say, that, if the facts pleaded were proved, then breach of duty owed would automatically be proved. We are not asked to say that the conduct alleged must be held to have been careless conduct. We are only asked to say whether, assuming the facts to have been as pleaded, there was a duty of care owed to the

---------- ***[1970] A.C. 1004 at 1034***

company which could or might result in their being able to recover some damages.

The significant facts (i.e., the alleged facts) can shortly be summarised. Seven boys who had been sentenced to Borstal training were (with probably a few others) on an island in Poole Harbour. They had been working there under control and supervision. They were boys whose records included

convictions for breaking and entering premises, for larceny and for taking away vehicles without consent. Five of them had a record of previous escapes from Borstal institutions. Lying at moorings off the island was a yacht. There was another yacht near by. There was no barrier which was effective to prevent the boys from gaining access to the yachts. The boys were in the charge of three officers.

On these facts a normal or even modest measure of prescience and prevision must have led any ordinary person, but rather specially an officer in charge, to realise that the boys might wish to escape and might use a yacht if one was near at hand to help them to do so. That is exactly what it is said that seven boys did. In my view, the officers must have appreciated that either in an escape attempt or by reason of some other prompting the boys might interfere with one of the yachts with consequent likelihood of doing some injury to it. The risk of such a happening was glaringly obvious. The possibilities of damage being done to one of the nearby yachts (assuming that they were near-by) were many and apparent. In that situation and in those circumstances I consider that a duty of care was owed by the officers to the owners of the nearby yachts. The principle expressed in Lord Atkin's classic words in his speech in *Donoghue v. Stevenson* [1932] A.C. 562, 580, would seem to be directly applicable. If the principle applied, then it was incumbent on the officers to avoid acts or omissions which they could reasonably foresee would be likely to injure the owners of yachts. They were persons so closely and directly affected by what the officers did or failed to do that they ought reasonably to have been in the contemplation of the officers.

It has been generally recognised that Lord Atkin's statement of principle cannot be applied as though his words were contained in a positive and precise legislative enactment. It cannot be, therefore, that in all circumstances where certain consequences can reasonably be foreseen a duty of care arises. A failure to take some preventive action or rescue operation does not of and by itself necessarily betoken any breach of a legal duty of care. It has in consequence been suggested that, in situations where reasonable foresight can be in operation, the decision of a court as to whether a duty of care exists is in reality a policy decision. So it was strongly urged that, in the circumstances of a case such as the present, there are reasons of public policy which should induce a court to hold that no duty of care arises which is separate from the duty owed by the officers to those by whom they were employed.

It is also always to be remembered that Lord Atkin's speech was made in affirmation of the proposition that a manufacturer of products which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they leave him with no reasonable possibility of intermediate examination and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will lead

to an injury to the consumer's life or property owes a duty to the consumer to take that reasonable care.

It is to be remembered that it is a notable and laudable feature of the system of Borstal training that it aims to achieve all-round development of character and capacities. "It is based on progressive trust demanding increasing personal decision, responsibility, and self-control"1; it "is not compatible with the maintenance of 'safe custody' as an overriding consideration."2 In keeping with the policy which has been most carefully and constructively evolved it is inevitable that close and constant supervision of each person under training is neither planned nor desirable. The aim is to train, to educate and to direct. The hope is to bring about the result that those under training will return as honest and useful members of society. All this is relevant when considering the measure of any duty of care which the officers might owe to the company and whether they failed to do what in the circumstances they ought to have done; but it in no way determines the question whether the officers did owe some duty of care.

The conclusion that I have reached is that the officers owed a duty to the company to take such care as in all the circumstances was reasonable with a view of preventing the boys in their charge and under their control from causing damage to the nearby property of the company if that was a happening of which there was a manifest and obvious risk. If in the daytime the officers saw that the boys in their charge and under their control were deliberately setting out to damage a nearby yacht or were in the act of damaging it and if they could readily have caused them to desist the facts would warrant a conclusion that there was a failure to take reasonable care. In other circumstances, and having regard in particular to the fact that the officers were operating a system which was legitimately designed to

give a measure of freedom to those undergoing training, it might well be that the happening of events such as escapes or the causing of damage would not suffice to prove that there had been a failure to exercise due and reasonable care. If the point of law now raised is decided in favour of the company it does not involve that proof of an escape would necessarily be proof of want of care amounting to a breach of duty towards a neighbour. Nor does the point of law involve that any duty of care owed to the company need be defined or limited (when the facts ultimately are ascertained) by reference to preventing the escape of boys in training. The concern of the company is for their property. There might be escapes which would be of no concern whatsoever to the company. There might be damage to their property which was unrelated to any escape. In the present case the alleged damage to property is said to have been in connection with or following upon escapes. But the duty which the company in this case claim was owed to them was a duty to take reasonable care in the exercise of powers of control over the boys so as to prevent loss and damage being sustained by the company.

It has not been contended that the company had any right of action on the basis of any breach of statutory duty imposed either on the Home Office or on the Borstal officers. The duty of care which was owed to the company

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1 Prisons and Borstals, England and Wales, H.M.S.O. (1960), p. 57, para. 20.

2 Ibid. para. 21.

was a duty which arose from the facts and which was quite independent of any statutory obligations. There are statutory powers which authorise detention in Borstal institutions. But the fact that something is done in pursuance of statutory authority does not warrant its being done unreasonably so that avoidable damage is negligently caused: see *Geddis v. Proprietors of Bann Reservoir*, 3 App.Cas. 430, 455.

The duty of care now being considered will to a large extent be conditioned by the duty owed by the officers to their employers and by the instructions given by the employers. Provided instructions are lawful ones they must be obeyed by the officers to whom they are issued. It could not be held that a duty of care owed by the officers to the company required an exercise of control over the boys which was more stringent than or which ran counter to the instructions issued to the officers as to the way in which their duties were to be discharged. But the duty of care which is owed to the company is a separate duty from that owed by the officers to their employers. The company sue in their own right and for a wrong done to them and not (to use a phrase of Cardozo J. in the *Palsgraf case* (1928) 248 N.Y. 339) "as the vicarious beneficiary of a breach of duty to another."

The allegations of fact which are made in the statement of claim are such that, if there is any liability in the Home Office, it is on the basis of vicarious liability for the acts or omissions of the officers as their servants or agents. For the reasons which I have given I consider that the officers could not be held to have been under any duty to the company to control the boys in some way which conflicted with the directives of the Home Office. In so far as the statement of claim may allege liability other than on the basis of vicarious liability different considerations arise. Thus there is an allegation that there was a failure to give any or any adequate instructions to the officers for maintaining effective watch and control over the boys at night. This may mean that it is proposed at the trial to express criticism of the system which was in operation. That, however was a matter which was in the discretion of those who had to decide how best to regulate the conditions under which Borstal training should take place. We are not in the present case concerned with a decision to release a boy from training. It might well happen that unfortunate consequences followed a release. A boy might commit crimes shortly afterwards. But the decision would be one made in the exercise of a discretion by someone acting within his powers. Nor is the present case to be compared with *Greenwell v. Prison Commissioners*, 101 L.J. 486, which was decided in 1951. It is not said in the present case that the boys never ought to have been where they were. In *Greenwell's case* two boys went away from an "open" Borstal institution to which they had been sent. It was held that with regard to one of the boys there was liability for damage locally done. The basis appears to have been that having regard to the record of that particular

boy it was not reasonable to have him and keep him in an "open" institution where he would be under no restraint. While I would agree with the general statement of the learned judge in that case to the effect that a duty was owed to a near-by resident to take reasonable care to prevent injury being done to his property by the boys at the institution, the judgment is not precise as to where the breach of duty lay. The particular institution was a completely open one. There were no physical barriers of any kind to prevent

---------- *[1970] A.C. 1004 at 1037*

escape. It was accepted that it would have been very difficult to take steps to prevent "escapes." It does not appear from the judgment that there was any finding of carelessness or neglect on the part of the officers in their care of the boys at the institution. But the boy who did damage in respect of which it was held that there was liability had a bad record. He had three times previously gone away from this institution. I prefer so to describe his movements because where effective steps to limit movements can be ruled out as being impracticable the word "escape" does not seem to be the appropriate word. After the last time when the boy had gone away or "escaped" from the institution (which was in October, 1949, some three months before the "escape" in January, 1950, which gave rise to the claim) it is recorded in the judgment that "the question of his removal had arisen." The basis of the judgment seems to have been expressed in the following words:

> "Having regard to the great number of escapes taking place, to the crimes being committed, and particularly to Lawrence's record of previous escapes, I cannot think it was reasonable to have this boy in this institution under no restraint whatever so that he could as easily escape for the fourth time on January 31, 1950, as he had done on previous occasions. Moreover, the question of his removal had been outstanding for a long time, indeed ever since his previous escape in October, 1949, and yet he was still there. … The plain fact is, I think, that the defendants and their governors found Lawrence such a challenge to their sincere desire to reform him that they forgot or overlooked, perhaps temporarily, their duty to their neighbours such as the plaintiff."

Who, then, was negligent? It is rather vague. The view that there was a failure to give consideration to the case was a surmise. It may be that someone made a decision that Lawrence was for the time being to remain at the institution but that the matter was later to be reconsidered.

Whatever was the right result in that particular case, I think that it is important to point out that liability should not be held to result from what might be an error of judgment on the part of someone making a decision which it is within his powers and his discretion to make. The evidence in the *Greenwell case* was that from a reformatory point of view the results have been considerably better where training had been in open rather than in closed institutions. As the whole system of Borstal training aims at reform and rehabilitation it is clear that decisions of policy will have to be made on a weighing up of the balance of competing considerations as to the appropriate course to be followed in a particular case. There should not be liability merely because unfortunate consequences have followed upon a decision which someone has in his discretion made while acting within his powers.

If A can reasonably foresee that some act or omission of his may have the result that loss or damage may be suffered by B who is someone who would be closely and directly affected by the act or omission, there will be some circumstances in which a legal duty will be owed by A to B and some in which it will not. The question arises as to what is the dividing line and on which side the present case falls. The fact that the immediate damage

---------- *[1970] A.C. 1004 at 1038*

suffered by B may have been caused by C does not affect the question whether A owed a duty to B; such fact would only relate to a question whether the act or omission of A did result in damage to B. Some act on the part of C might be the very kind of thing which would be likely to happen if there was a breach of duty by A.

In answering the question which I have posed, help will sometimes be derived by considering the way in which claims arising in particular cases have been dealt with by the courts. Particular decisions in relation to claims arising from sets of facts comparable to those being investigated may, if approved, give guidance. But precedents do not fix the limits of what may be called duty situations; they illustrate them. If there are no clear-cut precedents the court may have to reach a decision whether, once the facts and circumstances of a situation are ascertained, it can be said that it was a "duty situation." What

should be the basis for a decision? Lord Atkin in his speech in *Donoghue v. Stevenson* [1932] A.C. 562, said, at p. 580:

> "At present I content myself with pointing out that in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances. The liability for negligence, whether you style it such or treat it as in other systems as a species of 'culpa,' is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy."

At the conclusion of his speech Lord Atkin said that it was advantageous if the law "is in accordance with sound common sense."

I consider that the feature in the present case that there was a right to exercise control over the boys makes it sufficiently analogous with eases in which it has been held that there was a duty situation to make it reasonable so to hold here. In his judgment in *Smith v. Leurs(1945)* 70 C.L.R. 256 Dixon J. said, at pp. 261-262:

> "But, apart from vicarious responsibility, one man may be responsible to another for the harm done to the latter by a third person; he may be responsible on the ground that the act of the third person could not have taken place but for his own fault or breach of duty. There is more than one description of duty the breach of which may produce this consequence. For instance, it may be a duty of care in reference to things involving special danger. It may even be a duty of care with reference to the control of actions or conduct of the third person. It is, however, exceptional to find in the law a duty to control another's actions to prevent harm to strangers. The general rule is that one man is under no duty of controlling another man to prevent his doing damage to a third. There are, however, special relations which are the source of a duty of this nature."

In the present case there was, I think, a special relation of this nature.

---------- ***[1970] A.C. 1004 at 1039***

There was a special relation in that the officers were entitled to exercise control over boys who to the knowledge of the officers might wish to take their departure and who might well do some damage to property near at hand. The events which are said to have happened could reasonably have been foreseen. The possibility that the property of the company might be damaged was not a remote one. A duty arose. It was a duty owed to the company. It was not a duty to prevent the boys from escaping or from doing damage but a duty to take such care as in all the circumstances was reasonable in the hope of preventing the occurrence of events likely to cause damage to the company.

Apart from this I would conclude that, in the situation stipulated in the present case, it would not only be fair and reasonable that a duty of care should exist but that it would be contrary to the fitness of things were it not so. I doubt whether it is necessary to say, in cases where the court is asked whether in a particular situation a duty existed, that the court is called upon to make a decision as to policy. Policy need not be invoked where reason and good sense will at once point the way. If the test as to whether in some particular situation a duty of care arises may in some cases have to be whether it is fair and reasonable that it should so arise, the court must not shrink from being the arbiter. As Lord Radcliffe said in his speech in *Davis Contractors Ltd. v. Fareham Urban District Council* [1956] A.C. 696, 728, the court is "the spokesman of the fair and reasonable man."

If someone chooses to keep a wild animal it would, by common assent be assumed that he was under a duty to prevent its escape. If a person who is in lawful custody has made a threat, accepted as seriously intended, that, if he can escape, he will injure X, is it unreasonable to assert that in those circumstances a duty is owed to X to take reasonable care to prevent escape? other situations will present lesser perils. It will be universally known that the movements and activities of young children may lead to perils not only for them but for others. Consequently there may be a duty of care which may be owed to any one of a class of persons; it could be owed to all persons who could reasonably be foreseen as being liable to be injured by a failure to exercise reasonable care. That was the position in *Carmarthenshire County Council v. Lewis* [1955] A.C. 549. The duty owed by the nursery school who had a four-year-old boy in their care was held to include a duty to users of a nearby highway. The lorry driver who, swerving to avoid the boy, was killed when his lorry struck a telegraph post was, prior to that time, an unidentified member of a class of persons to whom a duty of care was owed. In that case

it was argued that, though the education authority owed a duty to the child, they owed no duty to other users of the highway. In rejecting that contention Lord Reid said in his speech, at p. 565:

> "If the appellants are right it means that no matter how careless the person in charge of a young child may be, and no matter how obvious it may be that the child may stray into a busy street and cause an accident, yet that person is under no liability for damage to others caused solely by the action of the child because his only duty is towards the child under his care."

A similar consideration would arise in the present case. If the appellants

are right in the present case it would mean that however careless the officers in charge might be and however obvious it might be that the boys in their charge might do damage to some nearby property which by reasonable care the officers could prevent, there could in no circumstances be liability to the owners of that property because the only duty owed by the officers would be to their employers and to the boys.

In his speech in *Bourhill v. Young* [1943] A.C. 92, 107, Lord Wright considered whether the general concept of reasonable foresight as the criterion of negligence or breach of duty might be thought to be too vague. He said, however, that negligence was a fluid principle which had to be applied to the most diverse conditions and problems of human life. "It is a concrete, not an abstract, idea. It has to be fitted to the facts of the particular case." In that case it was held that the motor cyclist (who had driven negligently) had owed no duty to a lady who suffered fright and nervous shock because she was not within the area which he ought reasonably to have contemplated as the area of potential danger. Lord Thankerton at p. 98 quoted words used by Lord Johnston in *Kemp & Dougall v. Darngavil Coal Co. Ltd*., 1909 S.C. 1314, 1327 in reference to the proposition that a man cannot be charged with negligence if he has no obligation to exercise diligence, viz.:

> '"the obligee in such duty must be a person or of a class definitely ascertained, and so related by the circumstances to the obligor that the obligor is bound, in the exercise of ordinary sense, to regard his interest and his safety. Only the relation must not be too remote, for remoteness must be held as a general limitation of the doctrine."'

Those who use the highway must clearly take reasonable care for the safety of all other users of the highway. Someone who by negligence created a dangerous situation by leaving horses unattended in a busy street where mischievous children might cause the horses to run away was held to have owed a duty to a police officer who suffered injury in stopping the horses when they did run away: it ought to have been contemplated that in such a situation there would be an attempt to stop the horses: *Haynes v. Harwood* [1935] 1 K.B. 146. These and other cases are but illustrations of the range and extent of what ought reasonably to have been contemplated; other cases illustrate the variety of situations in which a duty of care may be owed. If someone is serving a sentence of imprisonment and consequently is not free to order his own movements I would think it eminently reasonable to hold that those in charge of the prison owe him a duty to take reasonable care to protect him from being assaulted by a fellow-prisoner who may have shown himself to be one who might cause harm *(Ellis v. Home Office* [1953] 2 All E.R. 149; *D'Arcy v. Prison Commissioners*, "The Times," November 17, 1955). In each of those two cases the defendants had the power to control the persons who caused injury to the respective plaintiffs. The defendants were not under a duty to ensure that no prisoner would be hurt by a fellow-prisoner and the here occurrence of such an event did not by itself prove that there had been a failure of duty. The circumstances under which the injuries were caused were, however, such as to make it eminently appropriate to hold that a duty of care arose. Without expressing any view as to the facts in

Holgate v. Lancashire Mental Hospitals Board [1937] 4 All E.R. 19, I consider that in a comparable situation a duty of reasonable care would be owed to those whose safety, as reasonable foresight would show, might be in jeopardy.

In so far as any submission involved that if on principle a duty of care was owed to the company there should be immunity from liability because of the problems and difficulties which face the Home Office (and all those for whom they are liable) in connection with the administration of the system of Borstal training I can see no possible reason for creating or recognising any such immunity.

For the reasons which I have given I would dismiss the appeal.

VISCOUNT DILHORNE. My Lords, in this appeal we have to decide as a preliminary issue whether on the facts alleged in the statement of claim any duty capable of giving rise to a liability in damages was owed by the appellants, the Home Office, to the respondents, the Dorset Yacht Co. Ltd.

It appears that ten youths who had been sentenced to Borstal training and who had been detained in the Portland Borstal institution, a "closed" Borstal, were in September, 1962, on Brownsea Island in the custody of three officers. They all slept in an empty house on the island and it is alleged that on the night of September 21 or 22, 1962, seven of them escaped while the three officers were asleep. All seven had criminal records including convictions for breaking and entering premises, larceny and taking away vehicles without the owner's consent. Five of the seven had a record of previous escapes from a Borstal institution. There were yachts moored off the island. The seven got on board one and then there was a collision with another, the property of the respondents. The youths boarded that yacht and cast her adrift. The respondents' claim is for the cost of repairing the damage done to their yacht, most, if not all, of which was caused by the collision.

It cannot, in my view, be disputed that if the three officers and their superiors had directed their minds to the likely consequences of an escape from the island by any of the youths who were there in custody, they would have foreseen the probability that those escaping would endeavour to seize a vessel to get to the mainland and the likelihood that damage would be done to the vessel seized.

In these circumstances the respondents allege that there was a duty of care owed to them by the three officers, that there was a breach of it and consequently that the Home Office, the successors of the Prison Commissioners, are vicariously liable to them for the damage done by the youths to their yacht.

The respondents also allege that there was negligence on the part of the Prison Commissioners in failing to exercise any effective control or supervision over the youths and in permitting them to escape, in failing to make any or any effective arrangements for keeping the boys under control at night, in failing to give any or any adequate instructions to the three officers for maintaining effective watch or control over the boys at night and in failing to take any or any adequate steps to check the movements of the boys when they knew that there were vessels moored offshore and that

there was no effective barrier in the way of the boys to prevent them from gaining access to them.

If there was a duty of care owed to the respondents by the Prison Commissioners or by the three officers breach of which would give rise to liability to pay damages in the circumstances of this case then I can see no reason for concluding that a similar duty of care is not owed in respect of those detained in prisons, detention centres and approved schools who escape therefrom and do damage which is reasonably foreseeable.

Apart from one decision in the Ipswich County Court in 1951 to which I shall refer later, among the thousands of reported cases not a single case can be found where a claim similar to that in this case has been put forward. No case in this country has been found to support the contention that such a duty of care exists under the common law.

Reliance was placed by the respondents on the classic passage in Lord Atkin's speech in *Donoghue v. Stevenson* [1932] A,C. 562, 580. It should be remembered that the question for decision in that case was not so much as to the existence of a duty of care but as to whom it was owed. The question was whether a duty was owed by the manufacturer of ginger beer to the ultimate consumer. Lord Atkin, after pointing out at p. 579 how difficult it was to find in the English authorities statements of general application, said, at p. 580:

> "And yet the duty which is common to all cases where liability is established must logically be based upon some element common to the cases where it is found to exist. To seek a complete logical definition of the general principle is probably to go beyond the function of the judge, for the more general the definition the more likely it is to omit essentials or to introduce non-essentials … At present I content myself with pointing out that in English law there must be, and is, some

> general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances … The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

Lord Atkin in defining the elements common to all cases where a breach of a duty of care gives rise to liability cannot have intended his words to mean that in every case failure to take reasonable care to avoid acts or omissions which could reasonably be foreseen as likely to injure one's neighbour as defined by him was actionable. He cannot, for instance, have meant that a person is liable in negligence if he fails to warn a person near by whom he sees about to step off the pavement into the path of an oncoming vehicle or if he fails to attempt to rescue a child in difficulties in a pond. In both these instances - and they could be multiplied - it can be said that he could reasonably have foreseen that they would be likely to suffer injury by his

---------- ***[1970] A.C. 1004 at 1043***

omission to take action and that they were so closely and directly affected by his omission to do so that he ought to have had them in contemplation.

If, applying Lord Atkin's test, it be held that a duty of care existed in this case, I do not think that such a duty can be limited to being owed only to those in the immediate proximity of the place from which the escape is made. In *Donoghue v. Stevenson* the duty was held to be owed to consumers wherever they might be. If there be such a duty, it must, in my view, be owed to all those who it can reasonably be foreseen are likely to suffer damage as a result of the escape. Surely it is reasonably foreseeable that those who escape may take a succession of vehicles, perhaps many miles from the place from which they escaped, to make their getaway. Surely it is reasonably foreseeable that those who escape from prisons, Borstals and other places of confinement will, while they are on the run, seek to steal food for their sustenance and money and are likely to break into premises for that purpose.

If the foresee ability test is applied to determine to whom the duty is owed, I am at a loss to perceive any logical ground for excluding liability to persons who suffer injury or loss, no matter how far they or their property may be from the place of escape, if the loss or injury was of a character reasonably foreseeable as the consequence of failure to take proper care to prevent the escape.

Lord Atkin's answer to the question "Who, then, in law is my neighbour?" while very relevant to determine to whom a duty of care is owed, cannot determine, in my opinion, the question whether a duty of care exists.

I find support for this view in the observations of du Parcq L.J. in *Deyong v. Shenburn* [1946] K,B. 227. There the plaintiff had been employed in a theater by the defendant. Some of his clothing had been stolen from his dressing room due, it was alleged, to the negligence of the defendant.

du Parcq L.J. said, at p. 233:

> "It is said that this is a case of tort, and we were reminded of observations which are very familiar to lawyers in *Heaven v. Pender* (1883) 11 Q.B.D. 503 and *Donoghue v. Stevenson*. I do not think that I need cite them in terms. There are well known words of Lord Atkin in *Donoghue v. Stevenson* as to the duty towards one's neighbour and the method of ascertaining who is one's neighbour. It has been pointed out (and this only shows the difficulty of stating a general proposition which is not too wide) that unless one somewhat narrows the term of the proposition as it has been stated, one would be including in it something which the law does not support. It is not true to say that wherever a man finds himself in such a position that unless he does a certain act another person may suffer, or that if he does something another person will suffer, then it is his duty in the one case to be careful to do the act and in the other case to be careful not to do the act. Any such proposition is much too wide. There has to be a breach of a duty which the law recognises, and to ascertain what the law recognises regard must be had to the decisions of the courts. There has never been a decision that a master must,

---------- ***[1970] A.C. 1004 at 1044***

> merely because of the relationship which exists between master and servant, take reasonable care for the safety of his servant's belongings in the sense that he must take steps to ensure, so far as he can, that no wicked person shall have an opportunity of stealing the servant's goods. That is the duty contended for here, and there is not a shred of authority to suggest that any such duty exists or ever has existed."

This was cited and followed by my learned and noble friends Lord Hodson and Lord Morris of Borth-y-Gest in *Edwards v. West Herts Group Hospital Management Committee* [1957] 1 W.L.R. 415, 420, 422.

In *Commissioners of Railways v. Quinlan* [1964] A.C. 1054 the question was considered whether on the facts of that case and on the principle of *Donoghue v. Stevenson* [1932] A.C. 562 a general duty of care and liability in negligence for its breach existed in relation to a trespasser. Viscount Radcliffe, delivering the judgment of the board, said, at p. 1070:

> "…such a duty, it was suggested, might be founded on a general principle derived from the House of Lords decision in *Donoghue v. Stevenson*. Their Lordships think this view mistaken. They cannot see that there is any general principle to be deduced from that decision which throws any particular light upon the legal rights and duties that arise when a trespasser is injured on a railway level crossing where he has no right to be …"

Later he said, at p. 1084:

> "… passages occur in one or two of the other judgments that suggest that a trespasser can somehow become the occupier's ' neighbour,' within the meaning of the somewhat overworked shorthand of *Donoghue v. Stevenson* …"

In the light of those passages I think that it is clear that the *Donoghue v. Stevenson* principle cannot be regarded as an infallible test of the existence of a duty of care, nor do I think that, if that test is satisfied, there arises any presumption of the existence of such a duty.

The county court case to which I have referred is *Greenwell v. Prison Commissioners*, 101 L.J. 486. Two boys escaped from the "open" Hollesley Bay Borstal institution and damaged the plaintiff's truck. It was the fourth escape of one of the two boys. Despite his record he had not been kept under any restraint and was as free to abscond as he had been on the three previous occasions. The judge based his decision in favour of the plaintiff on Lord Atkin's words cited above. He held that a duty of care was owed by the Prison Commissioners to the plaintiff - a duty to take reasonable precautions to prevent him from being injured by the depredations of boys escaping. He found that they had been negligent with regard to the escape of the boy who had previously escaped but not with regard to that of the other boy.

If there was a duty to take reasonable precautions to prevent the plaintiff being injured by the depredations of boys escaping, it is not easy to see why the judge held that the Prison Commissioners were not negligent in relation to the escape of the other boy. Both had criminal records. One, it is true, had escaped before. It was an "open" Borstal from which many escapes had been made. Nor is it clear from the report

of the case in what respects the judge found that the Prison Commissioners had failed in their duty, but it would seem to have been in keeping the boy who had previously escaped in this institutions and without taking any steps to prevent him escaping again. It was for the Prison Commissioners to decide to which Borstal institution a boy sentenced to Borstal training should be sent and to decide whether he should be moved from one institution to another. The judge appears to have held that it was negligence on their part to have allowed him to remain at Hollesley Bay.

Apart from that case in which *Donoghue v. Stevenson* was applied, no shred of authority can be found to support the view that a duty of care, breach of which gives rise to liability in damages, is under the common law owed by the custodians of persons lawfully in custody to anyone who suffers damage or loss at the hands of persons who have escaped from custody.

Lord Denning M.R. in the course of his judgment in this case [1969] 2 Q.B. 412, 424, said that he thought that the absence of authority was "because, until recently, no lawyer ever thought such an action would lie" on one of two grounds, first, that the damage was far too remote, the chain of causation being broken by the act of the person who had escaped; and, secondly, that the only duty owed was to the Crown.

Whatever be the reasons for the absence of authority, the significant fact is its absence and this leads me to the conclusion, despite the disclaimer of Mr. Fox-Andrews for the respondents of any such intention, that we are being asked to create in reliance on Lord Atkin's words an entirely new and novel duty and one which does not arise out of any novel situation.

I, of course, recognise that the common law develops by the application of well-established principles to new circumstances but I cannot accept that the application of Lord Atkin's words, which, though they applied in *Deyong v. Shenburn* [1946] K.B. 227, and might have applied in *Commissioner for Railways v. Quinlan* [1964] A.C. 1054, were not held to impose a new duty on a master to his servant or on an occupier to a trespasser, suffices to impose a new duty on the Home Office and on others in charge of persons in lawful custody of the kind suggested.

No doubt very powerful arguments can be advanced that there should be such a duty. It can be argued that it is wrong that those who suffer loss or damage at the hands of those who have escaped from custody as a result of negligence on the part of the custodians should have no redress save against the persons who inflicted the loss or damage who are unlikely to be able to pay; that they should not have to bear the loss themselves, whereas, if there is such a duty, liability might fall on the Home Office and the burden on the general body of taxpayers.

However this may be, we are concerned not with what the law should be but with what it is. The absence of authority shows that no such duty now exists. If there should be one, that is, in my view, a matter for the legislature and not for the courts.

A considerable number of cases were referred to in the course of the argument, and to some of them I must refer.

In *Smith v. Leurs*, 70 C.L.R. 256 the parents of a boy of 13 were sued for negligence, it being alleged that they had failed to exercise

reasonable care over the use of a catapult by the boy. Dixon J. said, at pp. 261-262:

> "… apart from vicarious responsibility, one man may be responsible to another for the harm done to the latter by a third person; he may be responsible on the ground that the act of the third person could not have taken place but for his own fault or breach of duty. There is more than one description of duty the breach of which may produce this consequence. For instance, it may be a duty of care in reference to things involving special danger. It may even be a duty of care with reference to the control of actions or conduct of the third person. It is, however, exceptional to find in the law a duty to control another's actions to prevent harm to strangers. The general rule is that one man is under no duty of controlling another man to prevent his doing damage to a third. There are, however, special relations which are the source of a duty of this nature. It appears now to be recognised that it is incumbent on a parent who maintains control over a young child to take reasonable care so to exercise that control as to avoid conduct on his part exposing the person or property of others to unreasonable danger."

It is to be observed that Dixon J. did not suggest that there was any special relationship between a person in custody and his custodian which constituted an exception to the general rule enunciated by him.

In *Carmarthenshire County Council v. Lewis* [1955] A.C. 549 the county council was held liable in negligence for damages arising out of an accident caused by a young child who had escaped from a school adjoining the highway. He was, when at the school, under the care and control of the county council. The duty owed by the county council appears to me analogous to that owed by a parent to which Dixon J. referred.

An instance where the act of a third person could not have taken place but for another's fault or breach of duty is to be found in *Stansbie v. Truman* [1948] 2 K.B. 48, where the duty arose out of contract.

The facts in *Thorne and Rowe v. State of Western Australia* [1964] W.A.R. 147 more nearly resemble those of this case. Mrs. Thorny claimed damages in respect of injuries which she had sustained as a result of an assault by her husband after his escape from prison. He had been convicted of a number of

offences arising out of an incident in which his wife had been involved. On his way to prison he had said that he would "get out and fix her." She and another alleged negligence in allowing him to escape.

In the course of his judgment Negus J. said, at p. 151:

> "I emphasise that a mere breach of their duty to the Crown to keep prisoners in safe custody could not give the plaintiffs a right of action. The plaintiffs must establish they had a special duty to Mrs. Thorny and failed in that duty. The existence of such a special duty, assuming that the facts of this case provide an exception to the general rule, that one man is under no duty of controlling another to prevent his doing damage to a third (*per* Dixon J. in *Smith v. Leurs*, 70 C.L.R.

256, 262), depends on their knowledge that Thorne had a propensity and intention or was likely to attack his wife."

He held that, though the warders knew of the threat, it could not be inferred from the fact of the threat that Thorne had that propensity and intention.

Negus J. did not suggest that there was any common law duty of care to prevent the escape of prisoners when it was reasonably foreseeable that damage might ensue. He decided the case on the assumption that there was a special duty of care owed to Mrs. Thorny if Thorne's propensity and intention were known to the warders, and, holding that they were not known, it was not necessary for him to decide that such a special duty of care existed.

This case is no authority for the proposition that there is a common law duty of care owed by custodians where it is reasonably foreseeable that damage is likely to follow if through negligence persons are allowed to escape, nor, indeed, is it any authority for saying that such a duty arises if the custodians have knowledge of a prisoner's particular propensities.

There are two English cases in which the Home Office and the Prison Commissioners respectively have been held liable in damages for injuries suffered by a prisoner at the hands of fellow prisoners. In *Ellis v. Home Office* [1953] 2 All E.R. 149 the plaintiff, when a prisoner in Winchester Prison, suffered injuries as a result of an assault by another prisoner. He sued the Home Office for damages for negligence. In the course of his judgment Singleton L.J. said, at p. 154:

> "The duty on those responsible for one of Her Majesty's prisons is to take reasonable care for the safety of those who are within, and that includes those who are within against their wish or will, of whom the plaintiff was one."

In *D'Arcy v. Prison commissioners,* "The Times," November 17, 1955, the plaintiff, while in prison in Parkhurst, suffered injuries at the hands of fellow prisoners. He alleged negligence and the Prison Commissioners did not deny that they were under a duty to take reasonable care. The jury found for the plaintiff.

The Attorney-General did not seek to challenge that a duty of care for their safety and welfare was owed by the Home Office to prisoners in a prison. He was not prepared to concede that such a duty was owed to visitors to the prison, though it is not easy to see why it is not. But "matters happening within one's own bounds are one thing and matters happening outside those bounds are an entirely different thing," as Lord Uthwatt said in *Read v. J. Lyons & Co. Ltd*. [1947] A.C. 156, 186. The duties owed by the occupiers of premises to those lawfully upon them are well established. The fact that a duty of care is owed by prison authorities to prisoners within a prison to protect them from injury at the hands of fellow prisoners who are under their control does not lead to the inference that there is a similar duty of care owed by prison and Borstal authorities to prevent injury or loss being suffered by persons outside the prison or Borstal institution at the hands of those who have ceased to be under the

control of the authorities. If in the latter case there is no such duty, I do not think that it follows that Ellis and D'Arcy were wrongly decided.

The Attorney-General contended that public policy demanded that the Borstal authorities should be

immune from actions of the kind brought by the respondents in this case. He drew attention to the following paragraphs in the booklet *Prisons and Borstals* issued by the Home Office in 1960:

> "20. The system of training in each Borstal seeks the all-round development of character and capacities. … It is based on progressive trust demanding increasing personal decision, responsibility and self control. … The conditions of a Borstal must then be as unlike those of a prison as is compatible with compulsory detention, but they must be various and elastic to suit different stages of development. … 21. Borstal training in the sense above described is not compatible with the maintenance of 'safe-custody' as an over-riding consideration, and it is inevitable that a proportion of those under training of this sort find that it makes too great demands of them, and seek to solve their problems by escaping. Nevertheless, the proportion, given the nature of these restless adolescents, is not high, amounting on average to less than one in five of the whole. This absconding is, too often, a serious nuisance to the police in the neighbourhood of the Borstals and, where offences are committed by the absconders, to the public also; its reduction is therefore a matter of constant care and effort by the administration …"

and contended that, if such actions lay, it would have an inhibiting effect on those responsible for the training and reformation of those sentenced to Borstal training.

While I would not wish to question that the methods now used are in accordance with public policy, it does not follow that pubic policy requires that losses suffered by individuals at the hands of absconders should be borne by those individuals. If there is such a duty under the common law, the creation of such an immunity is a matter for Parliament.

It has been suggested that a duty of care, if owed by those responsible for the administration of the Borstal system, may be reduced in extent or indeed extinguished if it conflicts with the exercise of powers or of discretion vested by Parliament in those responsible for the administration. If, for instance, the three officers in this case had been told not to take any steps to prevent the youths escaping in order to test their responsibility, it is, I gather, suggested that that would negative the existence of a duty of care in this case. If, for instance, the Home Office decided that a boy who had previously escaped from a Borstal institution should remain in an "open" Borstal where no steps were taken to prevent his escape, there would be no liability for foreseeable damage done by him after his escape. If this is right, and if the decision to leave the boy who had escaped in the Hollesley Bay institution was a deliberate decision of the Prison Commissioners, it would seem to follow that *Greenwell v. Prison Commissioners*, 101 L.J. 486 was wrongly decided.

The respondents do not claim to be entitled to damages for breach of a statutory duty. If Parliament has authorised a particular course of action, no action at common law can succeed if the damage suffered follows from

the pursuit of that course. Similarly, if Parliament has vested a discretion in the authorities no action will lie in respect of the consequences of the exercise of the discretion. If such a duty of care can be owed, it would be open to the courts to conclude that a particular exercise of discretion was so unreasonable and so careless as not to constitute any real exercise of discretion. If such a duty of care can be owed, and if its existence and extent depends on what has been done in the administration of the Borstal system, the way in which the authorities have exercised their powers and discretion would be called into question in the courts and I agree with the Attorney-General in thinking that this might well have an inhibiting effect.

The statute which now governs Borstal institutions and Borstal training is the Prison Act, 1952, amended in certain respects by the Criminal Justice Act, 1961. Section 43 (1) of the Act gives the Secretary of State power to provide

> "… (*c*) Borstal institutions, that is to say places in which offenders … may be detained and given such training and instruction as will conduce to their reformation and the prevention of crime."

Section 45 enacts:

> "(1) A person sentenced to Borstal training shall be detained in a Borstal institution, … (2) A person sentenced to Borstal training shall be detained in a Borstal institution for such period, … as the Prison Commissioners may determine, and shall then be released …"

Section 46 expressly provides for temporary detention until arrangements can be made to take a person so sentenced to an institution, and section 22 (applied to those sentenced to Borstal training by section 43 (3) (*b*)) inter alia gives the Secretary of State power to order such a person to be taken in

certain circumstances to a place, e.g., for medical treatment, and provides that, unless the Secretary of State otherwise directs, he is to be kept in custody while he is being taken there, while he is there and "while being taken back to the prison" (Borstal institution) "in which he is required in accordance with law to be detained."

Section 47 (5) gives power to make rules for the temporary release of persons sentenced to Borstal training.

From these provisions it would appear to be the case that the Prison Act requires that persons sentenced to Borstal training be detained, while they are serving their sentences. in Borstal institutions until they are released or taken temporarily away therefrom under section 22.

If this be so, one wonders what statutory authority there was for the 10 youths residing on Brownsea Island.

A Borstal institution is a place in which a person sentenced to Borstal training "may be detained and given such training and instruction as will conduce to" his "reformation." This appears to imply that the training and instruction will take place within the institution.

Section 13 (2) (which applies to those sentenced to Borstal training by virtue of section 14 (3) (*c*)) reads as follows:

> "A prisoner" (Borstal detainee) "shall be deemed to be in legal custody while he is confined in, or is being taken to or from, any

> prison" (Borstal institution) "and while he is working, or is for any other reason, outside the prison" (Borstal institution) "in the custody or under the control of an officer of the prison" (Borstal institution).

This implies that a Borstal detainee may be required to do work outside an institution, but it is one thing to do work outside it and another to be allowed to reside outside it.

Under section 47 the Secretary of State may make rules for the regulation and management of Borstal institutions "and for the classification, treatment, employment, discipline and control" of persons required to be detained in Borstal and rules providing for the training of particular classes of persons and their allocation to Borstal institutions. Rules so made cannot amend the provisions of the Act or reduce or limit the mandatory provisions requiring detention in a Borstal institution.

Whether or not there was statutory power sanctioning the detention of the 10 youths on Brownsea Island, they were by virtue of section 13 (2) deemed to be in custody while there.

If it be the case that a duty of care such as that alleged in this case can exist, then it would seem very desirable that the powers and discretion to be exercised by those responsible for the Borstal system should be defined more specifically and with more precision than at present.

In *Geddis v. Proprietors of Bann Reservoir*, 3 App.Cas. 430 Lord Blackburn said, at pp. 455-456:

> "For I take it, without citing cases, that it is now thoroughly well established that no action will lie for doing that which the legislature has authorised, if it be done without negligence, although it does occasion damage to anyone; but an action does lie for doing that which the legislature has authorised, if it be done negligently. And I think that if by a reasonable exercise of the powers, either given by statute to the promoters, or which they have at common law, the damage could be prevented it is, within this rule, 'negligence' not to make such reasonable exercise of their powers."

In that case it could not, in my view, be disputed that the defendants owed a duty to the plaintiff to take care to prevent the flooding of his land. They had statutory powers the exercise of which would have prevented that. Their failure to exercise them was held to be negligence.

If those responsible for the administration of the Borstal system do what the legislature has authorised negligently, then an action will lie, but negligence in this context must involve a breach of a duty owed to the person who has suffered damage.

This is illustrated by the decision in *East Suffolk Rivers Catchment Board v. Kent* [1941] A.C. 74. A high

tide had made a breach in a sea wall and in consequence the respondent's land was flooded. The appellants had statutory powers to repair the wall. They carried out the work so inefficiently that the flooding continued for 178 days. The breach of the wall could have been repaired in 14 days.

It must have been reasonably foreseeable that delay on their part in the exercise of their statutory powers would cause damage to their neighbour, the respondent. Nevertheless it was held that, as they were

under no obligation to repair the wall or to complete the work after having begun it, they were under no liability to the respondent.

Lord Simon in the course of his speech said, at pp. 86-87, in reference to Lord Blackburn's words in *Geddis*, 3 App.Cas. 430, 455-456:

> "Lord Blackburn would certainly not wish to be understood as saying that such an action would lie in the absence of proof that the defendant's negligence caused damage; indeed, negligence in such a connection involves the twofold conception of want of care on the part of the defendant and the consequential infliction of loss upon the plaintiff. As Lord Reading C.J. observed in *Munday v. London County Council* [1916] 2 K.B. 331, 334: 'Negligence alone does not give a cause of action; damage alone does not give a cause of action; the two must co-exist.' A third essential factor is the existence of the particular duty. As Lord Wright expressed it in *Lochgelly Iron and Coal Co. v. M'Mullan* [1934] A.C. 1, 25, 'In strict legal analysis, negligence means more than heedless or careless conduct, whether in omission or commission: it properly connotes the complex concept of duty, breach, and damage thereby suffered by the person to whom the duty was owing.'"

It is this third essential factor which, in my opinion, is absent in this case. There is no authority for the existence of such a duty under the common law. Lord Denning M.R. in his judgment in the Court of Appeal I think recognised this, for he said [1969] 2 Q.B. 412, 426: "It is, I think, at bottom a matter of public policy which we, as judges, must resolve" and "What is the right policy for the judges to adopt?" He went on to say, at p. 426:

Many, many a time has a prisoner escaped - or been let out on purloined done damage. But there is never a case in our law books when the prison authorities have been liable for it. No householder who has been burgled, no person who has been wounded by a criminal, has ever recovered damages from the prison authorities such as to find a place in the reports. The householder has claimed on his insurance company. The injured man can now claim on the compensation fund. None has claimed against the prison authorities. Should we alter all this? I should be reluctant to do so if, by so doing, we should hamper all the good work being done by our prison authorities."

Where I differ is in thinking that it is not part of the judicial function "to alter all this." The facts of a particular case may be a wholly inadequate basis for a far-reaching change of the law. We have not to decide what the law should be and then alter the existing law. That is the function of Parliament.

As in my opinion no such duty under the common Law now exists my answer to the question raised in this preliminary issue is in the negative and I would allow the appeal.

LORD PEARSON. My Lords, an order was made that

> "the following question of law be tried as a preliminary issue before

> the trial of the action, viz., whether on the facts pleaded in the statement of claim the defendants their servants or agents owed any duty of care to the plaintiffs capable of giving rise to a liability in damages with respect to the detention of persons undergoing sentences of Borstal training or with respect to the manner in which such persons were treated, employed, disciplined, controlled or supervised whilst undergoing such sentences."

The form of the order assumes the familiar analysis of the tort of negligence into its three component elements, viz., the duty of care, the breach of that duty and the resulting damage. The analysis is logically correct and often convenient for purposes of exposition, but it is only an analysis and should not eliminate consideration of the tort of negligence as a whole. It may be artificial and unhelpful to consider the question as to the existence of a duty of care in isolation from the elements of breach of

duty and damage. The actual damage alleged to have been suffered by the plaintiffs may be an example of a kind or range of potential damage which was foreseeable, and if the act or omission by which the damage was caused is identifiable it may put one on the trail of a possible duty of care of which the act or omission would be a breach. In short, it may be illuminating to start with the damage and work back through the cause of it to the possible duty which may have been broken.

I will not set out the whole of the statement of claim but only those facts, alleged or to be inferred from allegations in the statement of claim, which are of special importance on my view of the case. There are of course no findings of fact.

13. (1) The Borstal boys had been working at Brownsea Island under the control and supervision of the defendants' officers.

15. (2) Presumably the boys had been brought to the island from a Borstal institution, and were being kept on the island, by officers of the defendants for the purposes of Borstal training.

18. (3) The plaintiffs' motor yacht, the *Silver Mist*, was lying at moorings off Brownsea Island.

19. (4) The other yacht, the *Diligence of Marston*, was presumably also lying at moorings off Brownsea Island or at any rate was somewhere in the vicinity.

20. (5) The Borstal boys made their way to and presumably boarded the *Diligence of Marston* and caused her to collide with the *Silver Mist*, and they then boarded the *Silver Mist* and cast her off and caused her considerable damage.

21. (6) The three officers of the defendants who had charge of the boys failed to keep any watch or exercise any control over them at the material time but retired to bed leaving them to their own devices.

23. (7) None of those three officers was on duty at the material time.

25. (8) They failed to make any or any effective arrangements for keeping the boys under control at night.

26. (9) Knowing that there were craft such as the *Silver Mist* off shore and that there was no or no effective barrier in the way of the boys gaining access to such craft they failed to take any adequate steps to check the movement of the boys.

The plaintiffs are thus complaining of the injurious interference by the Borstal boys with boats moored off Brownsea Island. As these were Borstal boys under detention for compulsory training and the boats were easily accessible and constituted a natural temptation, it can at any rate be argued that interference by the boys with the boats was eminently foreseeable as likely to happen unless the defendants' officers took precautions to prevent it. According to the allegations in the statement of claim no precautions were taken, no care was exercised and no arrangements were made for safeguarding the boats against such interference. It would seem therefore that according to the allegations the injurious interference with the boats was caused by the acts and omissions of the defendants' officers in bringing the Borstal boys to Brownsea Island and keeping them there under detention for compulsory training and yet taking no care for the safety of the plaintiffs' boat and the other boat or boats in the immediate vicinity of the place where the boys were being kept. If the defendants had any duty to take care for the safety of the boats, then on the facts alleged in the statement of claim it would seem that there was a breach of the duty causing the damage of which the plaintiffs complain.

What would be the nature of the duty of care owed by the defendants to the plaintiffs, if it existed?

In my opinion, the defendants did not owe to the plaintiffs any general duty to keep the Borstal boys in detention. If the defendants had, in the exercise of their discretion, released some of these boys, taking them on shore and putting them on trains or buses with tickets to their homes, there would have been no prospect of damage to the plaintiffs as boatowners and the plaintiffs would not have been concerned and would have had nothing to complain of. Again, the boys might have escaped in such a way that no damage could be caused to the plaintiffs as boatowners; for instance, they might have escaped by swimming ashore or by going ashore in a boat belonging to or hired by the Borstal authorities or by having their friends bring a rescue boat from outside and carry them off to a refuge in the Isle of Wight or Portsmouth or elsewhere. On the other hand the boys might interfere with the boats from motives of curiosity and desire for amusement without having any intention to escape from Borstal detention. The essential feature of this case is not the "escape" (whatever that may have amounted to) but the interference with the boats. The duty of care would be simply a duty to take reasonable care to prevent such interference. The duty would not be broken merely by the defendants' failure to prevent an escape from Borstal detention or from Borstal training. Performance of the duty might incidentally involve an element of physical detention, if interference with the boats by some particular boy could not be prevented by any other means. But if some other means - such as supervision, keeping watch, dissuasion or deterrence - would suffice, physical detention would not be required for performance of the duty.

Can such a duty be held to exist on the facts alleged here? On this question there is no judicial authority except the one decision in the Ipswich County Court in *Greenwell v. Prison Commissioners*, 101 L.J. 486. In this situation it seems permissible, indeed almost inevitable, that one should revert to the statement of basic principle by Lord Atkin in *Donoghue v. Stevenson* [1932] A.C. 562, 580:

> "At present I content myself with pointing out that in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances. The liability for negligence, whether you style it such or treat it as in other systems as a species of 'culpa,' is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay, But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

Reference can also be made to Hay or *Bourhill v. Young* [1943] A.C. 92. Lord Thankerton, at p. 98, cited words of Lord Johnston in *Kemp and Dougall v. Darngavil Coal Co. Ltd*., 1909 S.C. 1314, 1327:

> '"the obligee in such duty must be a person or of a class definitely ascertained, and so related by the circumstances to the obligor that the obligor is bound, in the exercise of ordinary sense, to regard his interest and his safety. Only the relation must not be too remote, for remoteness must be held as a general limitation of the doctrine."'

Lord Thankerton then said:

> "… I doubt whether, in view of the infinite variation of circumstances which may exist, it is possible or profitable to lay down any hard and fast principle, beyond the test of remoteness as applied to the particular case."

It seems to me that prima facie, in the situation which arose in this case according to the allegations, the plaintiffs as boatowners were in law "neighbours" of the defendants and so there was a duty of care owing by the defendants to the plaintiffs. It is true that the *Donoghue v. Stevenson* principle as stated in the passage which has been cited is a basic and general but not universal principle and does not in law apply to all the situations which are covered by the wide words of the passage. To some extent the decision in this case must be a matter of impression and instinctive judgment as to what is fair and just. It seems to me that this case ought to, and does, come within the *Donoghue v. Stevenson* principle unless there is some sufficient reason for not applying the principle to it. Therefore, one has to consider the suggested reasons for not applying the principle here.

Proximity or remoteness: As there is no evidence, one can only judge from the allegations in the

statement of claim. It seems clear that there was sufficient proximity: there was geographical proximity and it was

---[1970] A.C. 1004 at 1055

foreseeable that the damage was likely to occur unless some care was taken to prevent it. In other cases a difficult problem may arise as to how widely the "neighborhood" extends, but no such problem faces the plaintiffs in this case.

Act of third party: In *Weld-Blundell v. Stephens* [1920] A.C. 956, 986, Lord Sumner said:

> "In general (apart from special contracts and relations and the maxim respond eat superior), even though A is in fault, he is not responsible for injury to C which B, a stranger to him, deliberately chooses to do."

In *Smith v. Leurs*, 70 C.L.R. 256, 261-262, Dixon J. said:

> "… apart from vicarious responsibility, one man may be responsible to another for the harm done to the latter by a third person; he may be responsible on the ground that the act of the third person could not have taken place but for his own fault or breach of duty. There is more than one description of duty the breach of which may produce this consequence. For instance, it may be a duty of care in reference to things involving special danger. It may even be a duty of care with reference to the control of actions or conduct of the third person. It is, however, exceptional to find in the law a duty to control another's actions to prevent harm to strangers. The general rule is that one man is under no duty of controlling another man to prevent his doing damage to a third. There are, however, special relations which are the source of a duty of this nature. It appears now to be recognised that it is incumbent upon a parent who maintains control over a young child to take reasonable care so to exercise that control as to avoid conduct on his part exposing the person or property of others to unreasonable danger. Parental control, where it exists, must be exercised with due care to prevent the child infecting intentional damage on others or causing damage by conduct involving unreasonable risk of injury to others."

In my opinion, this case falls under the exception and not the rule, because there was a special relation. The Borstal boys were under the control of the defendants' officers, and control imports responsibility. The boys' interference with the boats appears to have been a direct result of the defendants' officers' failure to exercise proper control and supervision. Problems may arise in other cases as to the responsibility of the defendants' officers for acts done by Borstal boys when they have completed their escape from control and are fully at large and acting independently. No such problem faces the plaintiffs in this case.

Statutory duty: Not only with respect to the detention of Borstal boys but also with respect to the discipline, supervision and control of them the defendants' officers were acting in pursuance of statutory duties. These statutory duties were owed to the Crown and not to private individuals such as the plaintiffs The plaintiffs, however, do not base their claim on breach of statutory duty. The existence of the statutory duties does not exclude liability at common law for negligence in the performance of the statutory duties. In *Geddis v. Proprietors of Bonn Reservoir*, 3 App.Cas 430, 455-456, Lord Blackburn said:

---[1970] A.C. 1004 at 1056

> "For I take it, without citing cases, that it is now thoroughly well established that no action will lie for doing that which the legislature has authorised, if it be done without negligence, although it does occasion damage to anyone; but an action does lie for doing that which the legislature has authorised, if it be done negligently. And I think that if by a reasonable exercise of the powers, either given by statute to the promoters, or which they have at common law, the damage could be prevented it is, within this rule, 'negligence' not to make such reasonable exercise of their powers."

Similar reasoning will be found in the speech of Lord Hatherley at pp. 438 and 448-449. He said, at p. 449:

> "We are not bound, nor entitled, to suppose that they will wilfully do injury by the exercise of the legislative powers which have been given to them; but it appears to me clearly and plainly that they should use every precaution, by the exercise either of their powers created by the Act of Parliament itself, or of their common law powers, to prevent damage and injury being done to others through whose property the works or operations are carried on. …"

In my opinion, the reasoning applies to the present case. Be it assumed that the defendants' officers were acting in pursuance of statutory powers (or statutory duties which must include powers) in bringing the Borstal boys to Brownsea Island to work there under the supervision and control of the

defendants' officers. No complaint could be made of the defendants' officers doing that. But in doing that they had a duty to the plaintiffs as "neighbours" to make proper exercise of the powers of supervision and control for the purpose of preventing damage to the plaintiffs as "neighbours."

Public policy: It is said, and in the absence of evidence I assume (and perhaps it is common knowledge and can be judicially noticed), that one method of Borstal training, which is employed in relation to boys who may be able to respond to it, is to give them a considerable measure of freedom, initiative and independence in order that they may develop their self reliance and sense of responsibility. This method, at any rate when it is intensively applied, must diminish the amount of supervision and control which can be exercised over the Borstal boys by the defendants' officers, and there is then a risk, which is not wholly avoidable, that some of the boys will escape and may in the course of escaping or after escaping do injury to persons or damage to property. There is no evidence to show whether or not this method was being employed, intensively or at all, in the present case. But, supposing that it was, I am of opinion that it would affect only the content or standard and not the existence of the duty of care. It may be that when the method is being intensively employed there is not very much that the defendants' officers can do for the protection of the neighbours and their property. But it does not follow that they have no duty to do anything at all for this purpose. They should exercise such care for the protection of the neighbours and their property as is consistent with the due carrying out of the Borstal system of training. The needs of the Borstal system, important as they no doubt are, should not be treated as so paramount and all-important as to require or justify complete absence

---------- ***[1970] A.C. 1004 at 1057***

of care for the safety of the neighbours and their property and complete immunity from any liability for anything that the neighbours may suffer.

In answer to the question of law which I have set out at the beginning of this opinion, I would say that the defendants owed no duty to the plaintiffs with regard to the detention of the Borstal boys (except perhaps incidentally as an abominate in supervision and control) nor with regard to the treatment or employment of them, but that the defendants did owe to the plaintiffs a duty of care, capable of giving rise to a liability in damages, with respect to the manner in which the Borstal boys were disciplined, controlled and supervised.

I would dismiss the appeal.

LORD DIPLOCK. My Lords, this appeal is about the law of negligence. Regrettably, as I think, it comes before your Lordships' House upon a preliminary question of law which is said to arise upon the facts pleaded in the statement of claim. This makes it necessary to identify the precise question of law raised by those facts which are very summarily pleaded. Some of them relate to the acts of seven youths undergoing sentences of Borstal training; others relate to the acts and omissions of persons concerned in the management of Borstals and, in particular, to the acts and omissions of three officers of the Portland Borstal.

It is alleged and conceded that the defendant, the Home Office, is vicariously responsible for the tortuous acts of the three Borstal officers and any other persons concerned in the management of Borstals. It is not contended that the Home Office is vicariously liable for any tortuous acts of the youths undergoing sentences of Borstal training.

At the relevant time, the seven youths were taking part in a working party on Brownsea Island in the custody and control of the three officers. One night the youths escaped from the island and caused damage to the plaintiffs' yacht which was moored off-shore of the island. In causing the damage the youths were themselves guilty of trespass to the plaintiffs' goods.

The three officers did not take any or any effective steps to prevent the youths from escaping from the island. Although it is not stated in express terms, it is implicit in the language of the pleading that by the time the youths committed the damage they had successfully eluded the custody and control of the officers and had reached a place where it was not physically possible for the officers or anyone concerned with the management of Borstals to exercise any control over the youths' actions. The only cause of action relied upon is the "negligence" of the officers in failing to prevent the youths from escaping from their custody and control.

It is implicit in this averment of "negligence" and must be treated as admitted not only that the officers by taking reasonable care could have prevented the youths from escaping but also that it was reasonably foreseeable by them that if the youths did escape they would be likely to commit damage of the kind which they did commit to some craft moored in the vicinity of Brownsea Island.

The specific question of law raised in this appeal may therefore be

---------- ***[1970] A.C. 1004 at 1058***

stated as: Is any duty of care to prevent the escape of a Borstal trainee from custody owed by the Home Office to persons whose property would be likely to be damaged by the tortuous acts of the Borstal trainee if he escaped?

This is the first time that this specific question has been posed at a higher judicial level than that of a county court. Your Lordships in answering it will be performing a judicial function similar to that performed in *Donoghue v. Stevenson* [1932] A.C. 562 and more recently in *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd*. [1964] A.C. 465 of deciding whether the English law of civil wrongs should be extended to impose legal liability to make reparation for the loss caused to another by conduct of a kind which has not hitherto been recognised by the courts as entailing any such liability.

This function, which judges hesitate to acknowledge as law-making, plays at most a minor role in the decision of the great majority of cases, and little conscious thought has been given to analysing its methodology. Outstanding exceptions are to be found in the speeches of Lord Atkin in *Donoghue v. Stevenson* and of Lord Devlin in *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd*. It was because the former was the first authoritative attempt at such an analysis that it has had so seminal an effect upon the modern development of the law of negligence.

It will be apparent that I agree with the Master of the Rolls that what we are concerned with in this appeal "is … at bottom a matter of public policy which we, as judges, must resolve." He cited in support Lord Pearce's dictum in *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd*. [1964] A.C. 465, 536:

> "How wide the sphere of the duty of care in negligence is to be laid depends ultimately upon the courts' assessment of the demands of society for protection from the carelessness of others."

The reference in this passage to "the courts" in the plural is significant, for

> "As always in English law, the first step in such an inquiry is to see how far the authorities have gone, for new categories in the law do not spring into existence overnight" (*per* Lord Devlin, at p. 525).

The justification of the courts' role in giving the effect of law to the judges' conception of the public interest in the field of negligence is based upon the cumulative experience of the judiciary of the actual consequences of lack of care in particular instances. And the judicial development of the law of negligence rightly proceeds by seeking first to identify the relevant characteristics that are common to the kinds of conduct and relationship between the parties which are involved in the case for decision and the kinds of conduct and relationships which have been held in previous decisions of the courts to give rise to a duty of care.

The method adopted at this stage of the process is analytical and inductive. It starts with an analysis of the characteristics of the conduct and relationship involved in each of the decided cases. But the analyst must know what he is looking for, and this involves his approaching his analysis with some general conception of conduct and relationships which

---------- ***[1970] A.C. 1004 at 1059***

ought to give rise to a duty of care. This analysis leads to a proposition which can be stated in the form:

> "In all the decisions that have been analysed a duty of care has been held to exist wherever the conduct and the relationship possessed each of the characteristics A, B, C, D, etc., and has not so far been found to exist when any of these characteristics were absent."

For the second stage, which is deductive and analytical, that proposition is converted to: "In all cases where the conduct and relationship possess each of the characteristics A, B, C, D, etc., a duty of care arises." The conduct and relationship involved in the case for decision is then analysed to ascertain

whether they possess each of these characteristics. If they do the conclusion follows that a duty of care does arise in the case for decision.

But since ex hypothesi the kind of case which we are now considering offers a choice whether or not to extend the kinds of conduct or relationships which give rise to a duty of care, the conduct or relationship which is involved in it will lack at least one of the characteristics A, B, C or D, etc. And the choice is exercised by making a policy decision as to whether or not a duty of care ought to exist if the characteristic which is lacking were absent or redefined in terms broad enough to include the case under consideration. The policy decision will be influenced by the same general conception of what ought to give rise to a duty of care as. was used in approaching the analysis. The choice to extend is given effect to by redefining the characteristics in more general terms so as to exclude the necessity to conform to limitations imposed by the former definition which are considered to be inessential. The cases which are landmarks in the common law, such as *Lickbarrow v. Mason* (1787) 2 Term Rep. 63, *Rylands v. Fletcher* (1868) L.R. 3 H.L. 330, *Indermaur v. Dames* (1866) L.R. 1 C.P. 274, *Donoghue v. Stevenson* [1932] A.C. 562, to mention but a few, are instances of cases where the cumulative experience of judges has led to a restatement in wide general terms of characteristics of conduct and relationships which give rise to legal liability.

Inherent in this methodology, however, is a practical limitation which is imposed by the sheer volume of reported cases. The initial selection of previous cases to be analysed will itself eliminate from the analysis those in which the conduct or relationship involved possessed characteristics which are obviously absent in the case for decision. The proposition used in the deductive stage is not a true universal. It needs to be qualified so as to read:

> "In all cases where the conduct and relationship possess each of the characteristics A, B, C and D, etc. *but do not possess any of the characteristics Z, Y or X etc. which were present in the cases eliminated from the analysis*, a duty of care arises."

But this qualification, being irrelevant to the decision of the particular case, is generally left unexpressed.

This was the reason for the warning by Lord Atkin in *Donoghue v. Stevenson* [1932] A.C. 562, itself when he said, at pp. 583-584:

> "… in the branch of the law which deals with civil wrongs,

---***[1970] A.C. 1004 at 1060***

> dependent in England at any rate entirely upon the application by judges of general principles also formulated by judges, it is of particular importance to guard against the danger of stating propositions of law in wider terms than is necessary, lest essential factors be omitted in the wider survey and the inherent adaptability of English law be unduly restricted. For this reason it is very necessary in considering reported cases in the law of torts that the actual decision alone should carry authority, proper weight, of course, being given to the dicta of the judges."

The plaintiff's argument in the present appeal disregards this warning. It seeks to treat as a universal not the specific proposition of law in *Donoghue v. Stevenson* which was about a manufacturer's liability for damage caused by his dangerous products but the well-known aphorism used by Lord Atkin to describe a "general conception of relations giving rise to a duty of care" [1932] A.C. 562, 580:

> "You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

Used as a guide to characteristics which will be found to exist in conduct and relationships which give rise to a legal duty of care this aphorism marks a milestone in the modern development of the law of negligence. But misused as a universal it is manifestly false.

The branch of English law which deals with civil wrongs abounds with instances of acts and, more particularly, of omissions which give rise to no legal liability in the doer or omitter for loss or damage sustained by others as a consequence of the act or omission, however reasonably or probably that loss or damage might have been anticipated. The very parable of the good *Samaritan (Luke 10, v. 30*) which was evoked by Lord Atkin in *Donoghue v. Stevenson* illustrates, in the conduct of the priest and of the Levite who passed by on the other side, an omission which was likely to have as its reasonable and probable consequence damage to the health of the victim of the thieves, but for which the priest

and Levite would have incurred no civil liability in English law. Examples could be multiplied. You may cause loss to a tradesman by withdrawing your custom though the goods which he supplies are entirely satisfactory; you may damage your neighbour's land by intercepting the flow of percolating water to it even though the interception is of no advantage to yourself; you need not warn him of a risk of physical danger to which he is about to expose himself unless there is some special relationship between the two of you such as that of occupier of land and visitor; you may watch your neighbour's goods being ruined by a thunderstorm though the slightest effort on your part could protect them from the rain and you may do so with impunity unless there is some special relationship between you such as that of bailor and bailee.

---------- ***[1970] A.C. 1004 at 1061***

In *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd*. [1964] A.C. 465, which marked a fresh development in the law of negligence, the conduct in question was careless words, not careless deeds. Lord Atkin's aphorism, if it were of universal application, would have sufficed to dispose of that case, apart from the express disclaimer of liability. But your Lordships were unanimous in holding that the difference in the characteristics of the conduct in the two cases prevented the propositions of law in *Donoghue v. Stevenson* from being directly applicable. Your Lordships accordingly proceeded to analyse the previous decisions in which the conduct complained of had been careless words, from which you induced a proposition of law about liability for damage caused by careless words which differs from the proposition of law in *Donoghue v. Stevenson* about liability for damage caused by careless deeds.

In the present appeal, too, the conduct of the defendant which is called in question differs from the kind of conduct discussed in *Donoghue v. Stevenson* in at least two special characteristics. First, the actual damage sustained by the plaintiff was the direct consequence of a tortuous act done with conscious volition by a third party responsible in law for his own acts and this act was interposed between the act of the defendant complained of and the sustention of damage by the plaintiff. Secondly, there are two separate "neighbour relationships" of the defendant involved, a relationship with the plaintiff and a relationship with the third party. These are capable of giving rise to conflicting duties of care.

This appeal, therefore, also raises the lawyer's question: "Am I my brother's keeper?" A question which may also receive a restricted reply.

I start, therefore, with an examination of the previous cases in which both or one of these special characteristics are present. In the county court case of *Grunion v. Prison Commissioners*, 101 L.J. 486, both were present as was the characteristic of physical proximity of the plaintiff's property in the relationship between the plaintiff and the defendant. If this decision is right the plaintiff is entitled to succeed. But the county court judge simply treated the case as governed by Lord Atkin's aphorism in *Donoghue v. Stevenson* [1932] A.C 562, and for reasons already stated I do not think that this approach to the problem is adequate.

In two cases, *Ellis v. Home Office* [1953] 2 All E.R. 149, and *D'Arcy v. Prison Commissioners*, "The Times," November 17, 1955, it was assumed, in the absence of argument to the contrary, that the legal custodian of a prisoner detained in a prison owed to the plaintiff, another prisoner confined in the same prison, a duty of care to prevent the first prisoner from assaulting the plaintiff and causing him physical injuries. Unlike the present case, at the time of the tortuous act of the prisoner for the consequences of which it was assumed that the custodian was liable the prisoner was in the actual custody of the defendant and the relationship between them gave to the defendant a continuing power of physical control over the acts of the prisoner. The relationship between the defendants and the plaintiffs in these two cases, too, bore no obvious analogy to that between the plaintiff and the defendant in the present case. In each of the cases the defendant in the exercise of a legal right and physical power of custody and control of the plaintiff had required him to be in a position in which

---------- ***[1970] A.C. 1004 at 1062***

the defendant ought reasonably and probably to have foreseen that he was likely to be injured by his fellow prisoner.

In my view, it is the combination of these two characteristics, one of the relationship between the

defendant custodian and the person actually committing the wrong to the plaintiff and the other of the relationship between the defendant and the plaintiff, which supply the reason for the existence of the duty of care in these two cases - which I conceded as counsel in *Ellis v. Home Office*. The latter characteristic would be present also in the relationship between the defendant and any other person admitted to the prison who sustained similar damage from the tortuous act of a prisoner, since the Home Office as occupiers and managers of the prison have the legal right to control the admission and the movements of a visitor while he is on the prison premises. A similar duty of care would thus be owed to him. But I do not think that, save as a deliberate policy decision, any proposition of law based on the decisions in these two cases would be wide enough to extend to a duty to take reasonable care to prevent the escape of a prisoner from actual physical custody and control owed to a person whose property is situated outside the prison premises and is damaged by the tortuous act of the prisoner *after his escape*.

We have also been referred to a number of cases decided in the State courts of New York and California dealing with the liability of the various authorities for physical injuries caused by prisoners who have been negligently released on parole or on bail or who have been permitted to escape. I do not find them helpful, as this is a field of law in which the modern development in the various jurisdictions of the United States of America has been on different lines from its development in England.

There is also a decision of Negus J. in the Supreme Court of Western Australia, *Thorne and Rowe v. State of Western Australia* [1964] W.A.R. 147, dismissing an action for negligently allowing a prisoner to escape and cause physical injury to the plaintiffs. It is not a decision that any duty of care to prevent escape was owed to the injured persons. The judgment was mainly concerned with the topic of vicarious liability; the most that can be said is that the judge was prepared to assume, without deciding, that such a duty might exist, since he found on the facts, perhaps surprisingly, that due care had been taken.

I will refer briefly to a few other previous decisions in which the conduct and relationships involved possessed one or other of the characteristics of the conduct and relationships with which the present appeal is concerned but also possessed other characteristics which, in my view, deprive these decisions of relevance to the issue of law in the present appeal.

There are two cases in which a plentiful' has recovered against a custodian damages for injuries sustained as a consequence of the subsequent act of a human being whom the custodian has carelessly failed to keep in his custody and control. In neither case was the custody penal custody or the human being who did the act causing the damage one who was regarded in law as responsible for his actions. In *Holgate v. Lancashire Mental Hospitals Board* [1937] 4 All E.R. 19, tried with a jury on assize, the human being causing the damage was of unsound mind. It was held that the doctors had been negligent in allowing him to be released on a visit. Only the summing-up of Lewis J. is reported. I reserve my opinion as to

whether this decision was right. The second case, which was in your Lordships' House, *Carmarthenshire County Council v. Lewis* [1955] A.C. 549, concerned a child of four who ran out into the road from a school maintained by the defendant and caused an accident on the highway to a driver trying to avoid him. The defendant was held liable for not taking reasonable care to keep the gate shut. The headnote reports the ratio decidendi as based on the duty of an occupier of premises adjacent to a highway, and Lord Goddard did found his judgment on this. There seems to me to be a clear and relevant distinction between the responsibility of a custodian for acts which are done after escaping from custody by a human being who is not a reasonable man and so not responsible in law for his own acts on the one hand and for acts of conscious volition which are done by a responsible human being on the other hand. Furthermore, in the *Carmarthenshire* case there was no possible conflict between the duty of the defendant council to the child and its duty to users of the adjacent highway.

There are other cases in which parents have been held liable for the acts of older children, but these can, in my view, be classified as depending on the duty of the defendant to exercise due care in the control of things involving special danger. As is so often the case in the law of tort the basis of this

liability is helpfully expounded in a judgment of Dixon J. in the High Court of Australia, *Smith v. Leurs*, 70 C.L.R. 256.

I do not find it useful to refer to the many other cases cited in which the damage to the plaintiff was not caused by an act of conscious volition of a responsible third person whose conduct the defendant had a legal right to control. The result of the survey of previous authorities can be summarised in the words of Dixon J. in *Smith v. Leurs*, 70 C.L.R. 256, 262:

> "The general rule is that one man is under no duty of controlling another man to prevent his doing damage to a third. There are, however, special relations which are the source of a duty of this nature."

From the previous decisions of the English courts, in particular those in *Ellis v. Home Office* [1953] 2 All E.R. 149 and *D'Arcy v. Prison Commissioners*, "The Times," November 17, 1955, which I accept as correct, it is possible to arrive by induction at an established proposition of law as respects one of those special relations, viz.:

> "A is responsible for damage caused to the person or property of by the tortious act of C (a person responsible in law for his own acts) where the relationship between A and C has the characteristics (1) that A has the legal right to detain C in penal custody and to control his acts while in custody; (2) that A is actually exercising his legal right of custody of C at the time of C's tortuous act and (3) that A if he had taken reasonable care in the exercise of his right of custody could have prevented C from doing the tortuous act which caused damage to the person or property of B; and where also the relationship between A and B has the characteristics (4) that at the time of C's tortuous act A has the legal right to control the situation of B or his property as respects physical proximity to C and (5) that A can

> reasonably foresee that B is likely to sustain damage to his person or property if A does not take reasonable care to prevent C from doing tortuous acts of the kind which he did."

Upon the facts which your Lordships are required to assume for the purposes of the present appeal the relationship between the defendant, A, and the Borstal trainee, C, did possess characteristics (1) and (3) but did not possess characteristic (2), while the relationship between the defendant, A, and the plaintiff, B, did possess characteristic (5) but did not possess characteristic (4).

What your Lordships have to decide as respects each of the relationships is whether the missing characteristic is essential to the existence of the duty or whether the facts assumed for the purposes of this appeal disclose some other characteristic which if substituted for that which is missing would produce a new proposition of law which *ought* to be true.

As any proposition which relates to the duty of controlling another man to prevent his doing damage to a third deals with a category of civil wrongs of which the English courts have hitherto had little experience it would not be consistent with the methodology of the development of the law by judicial decision that any new proposition should be stated in wider terms than are necessary for the determination of the present appeal. Public policy may call for the immediate recognition of a new sub-category of relations which are the source of a duty of this nature additional to the sub-category described in the established proposition, but further experience of actual cases would be needed before the time became ripe for the coalescence of sub-categories into a broader category of relations giving rise to the duty, such as was effected with respect to the duty of care of a manufacturer of products in *Donoghue v. Stevenson* [1932] A.C. 562. Nevertheless, any new sub-category will form part of the English law of civil wrongs and must be consistent with its general principles.

Since the tortuous act of the Borstal trainees took place after they had ceased to be in the actual custody of the Borstal officers, what your Lordships are concerned with in the relationship between the Home Office and Borstal trainees is the responsibility of the Home Office to detain them in custody. To detain them at all would be to commit a civil wrong to them unless the legal right to detain them were conferred upon the custodians by statute or at common law. In the case of Borstal trainees that right is conferred by statute, viz., section 13 of the Prison Act, 1952. This makes lawful their detention within the cartilage of the Borstal institution and outside its cartilage in the custody or under the control of a Borstal officer. This section does not impose upon the Borstal officers or upon the Home Office (to which, by an order in council made under section 24 of the Criminal Justice Act, 1961, the responsibility for the administration of Borstal training was transferred) any responsibility to continue to keep trainees

in custody. Whatever responsibility it has to do so is imposed by section 45 of the Act (as amended by sections 1 to 11 of the Criminal Justice Act, 1961), of which the relevant provision is:

> "(2) A person sentenced to Borstal training shall be detained in a Borstal institution for such period, not extending beyond two years after
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> [1970] A.C. 1004Page 1065
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> the date of his sentence, as the" (Home Office) "may determine, and shall then be released. …"

There are also extended powers of release conferred upon the Home Secretary.

The only statutory reference to the purpose of Borstal training is to be found in the definition of Borstal institutions in section 43 (1) (*c*) viz.:

> "… places in which persons not less than 15 but under 21 years of age may be detained and given such training and instruction as will conduce to their reformation and the prevention of crime."

But section 47 gives to the Home Secretary very wide power to make rules

> "for the regulation and management of … Borstal institutions … and for the classification, treatment, employment, discipline and control of persons required to be detained therein,"

including rules for the temporary release of persons "serving a sentence of … Borstal training."

The statute from which the right to detain is derived thus only gives the broadest indication of the purpose of the detention and confers upon the Home Secretary very wide powers to determine by subordinate legislation the way in which the powers of custody and control of Borstal trainees should be exercised by the officers of the prison service. In exercising his rule-making power, at any rate, it would be inconsistent with what are now recognised principles of English law to suggest that he owed a duty of care capable of giving rise to any liability in civil law to avoid making a rule the observance of which was likely to result in damage to a private citizen. For a careless exercise of his rule-making power he is responsible to Parliament alone. The only limitation on this power which courts of law have jurisdiction to enforce depends not on the civil law concept of negligence, but on the public law concept of ultra vires.

The statutory rules in force at the relevant time which deal with discipline and control limit themselves to laying down the general principles to be observed, viz.:

> "The purpose of Borstal training requires that every inmate, while conforming to the rules necessary for well-ordered community life, shall be able to develop his individuality on right lines with a proper sense of personal responsibility. Officers shall therefore, while firmly maintaining discipline and order, seek to do so by influencing the inmates through their own example and leadership and by enlisting their willing co-operation."3

If these instructions with their emphasis on co-operation rather than coercion are to be followed in a working party outside the confines of a "closed" Borstal or in an "open" Borstal they must inevitably involve some risk of an individual trainee's escaping from custody and indulging again in the same kind of criminal activities that led to his sentence of Borstal training and which are likely to cause damage to the property of another person. To adopt a method of supervision of trainees still subject

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3 Borstal (No. 2) Rules, 1949, r. 25.

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to detention which affords them any opportunity of escape is, as Lord Dilhorne has pointed out, an act or omission which it can be reasonably foreseen may have as its consequence some injury to another person. But the same is true of every decision made by the Home Office, through the appropriate officers of the Borstal service, in the exercise of the statutory power to release a Borstal trainee from detention in less than two years from the time of his being sentenced or to release him temporarily on parole.

If one accepted the principle laid down in relation to private Acts of Parliament in the passages already cited by your Lordships from *Geddis v. Proprietors of Bann Reservoir*, 3 App.Cas. 430 as a proposition of law of general application to modern statutes which confer upon government departments or public

authorities a discretion as to the way in which a particular public purpose is to be achieved, the courts would be required, at the suit of any plaintiff who had in fact sustained damage at the hands of a Borstal trainee who had been released, to review the Home Office decision to release him and to determine whether sufficient consideration had been given to the risk of his causing damage to the plaintiff.

A private Act of Parliament in the nineteenth century, of which that under consideration in *Geddis v. Proprietors of Bann Reservoir* was typical, conferred upon statutory undertakers powers to construct and maintain works which interfered with the common law proprietary rights of other persons. The only conflict of interests to which the exercise of these powers could give rise was between the interests of the undertakers in achieving the physical result contemplated by the private bill which they had promoted and the interests of those other persons whose common law proprietary rights would be affected by the exercise of the powers. In construing a statute of this kind it can be presumed that Parliament did not intend to authorise the undertakers to exercise the powers in such a way as to cause damage to the proprietary rights of private citizens which could be avoided by reasonable care without prejudicing the achievement of the contemplated result. In the context of proprietary rights, the concept of a duty of reasonable care was one with which the courts were familiar in the nineteenth century as constituting a cause of action in "negligence." The analogy between the careless exercise of statutory powers conferred by a private Act of this kind and the careless exercise of powers existing at common law in respect of property was close and the issues involved suitable for decision by a jury, upon evidence admissible and adduced in accordance with the ordinary procedure of courts of law. There was no compelling reason to suppose that Parliament intended to deprive of any remedy at common law private citizens whose common law proprietary rights were injured by the careless, and therefore unauthorised, acts or omissions of the undertakers.

But the analogy between "negligence" at common law and the careless exercise of statutory powers breaks down where the act or omission complained of is not of a kind which would itself give rise to a cause of action at common law if it were not authorised by the statute. To relinquish intentionally or inadvertently the custody and control of a person responsible in law for his own acts is not an act or omission which, independently of any statute, would give rise to a cause of action at common law against

the custodian on the part of another person who subsequently sustained tortuous damage at the hands of the person released. The instant case thus lacks a relevant characteristic which was present in the series of decisions from which the principle formulated in *Geddis v. Proprietors of Bann Reservoir* was derived. Furthermore, there is present in the instant case a characteristic which was lacking in *Geddis v. Proprietors of Bann Reservoir*. There the only conflicting interests involved were those on the one hand of the statutory undertakers responsible for the act or omission complained of and on the other hand of the person who sustained damage as a consequence of it. In the instant case, it is the interest of the Borstal trainee himself which is most directly affected by any decision to release him and by any system of relaxed control while he is still in custody that is intended to develop his sense of personal responsibility and so afford him an opportunity to escape. Directly affected also are the interests of other members of the community of trainees subject to the common system of control, and indirectly affected by the system of control while under detention and of release under supervision is the general public interest in the reformation of young offenders and the prevention of crime.

These interests, unlike those of a person who sustains damage to his property or person by the tortuous act or omission of another, do not fall within any category of property or rights recognised in English law as entitled to protection by a civil action for damages. The conflicting interests of the various categories of persons likely to be affected by an act or omission of the custodian of a Borstal trainee which has as its consequence his release or his escape are thus of different kinds for which in law there is no common basis for comparison. If the reasonable man when directing his mind to the act or omission which has this consequence ought to have in contemplation persons in all the categories directly affected and also the general public interest in the reformation of young offenders, there is no criterion by which a court can assess where the balance lies between the weight to be given to one interest and that to be given to another. The material relevant to the assessment of the reformative effect upon trainees of release under supervision or of any relaxation of control while still under detention is not of a kind which can be satisfactorily elicited by the adversary procedure and rules of

evidence adopted in English courts of law or of which judges (and juries) are suited by their training and experience to assess the probative value.

It is, I apprehend, for practical reasons of this kind that over the past century the public law concept of ultra vires has replaced the civil law concept of negligence as the test of the legality, and consequently of the action ability, of acts or omissions of government departments or public authorities done in the exercise of a discretion conferred upon them by Parliament as to the means by which they are to achieve a particular public purpose. According to this concept Parliament has entrusted to the department or authority charged with the administration of the statute the exclusive right to determine the particular means within the limits laid down by the statute by which its purpose can best be fulfilled. It is not the function of the court. for which it would be ill-suited, to substitute its own view of the appropriate means for that of the department or authority by granting a remedy by way of a civil action at law to a private citizen

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adversely affected by the way in which the discretion has been exercised. Its function is confined in the first instance to deciding whether the act or omission complained of fell within the statutory limits imposed upon the department's or authority's discretion. Only if it did not would the court have jurisdiction to determine whether or not the act or omission, not being justified by the statute, constituted an actionable infringement of the plaintiff's rights in civil law.

These considerations lead me to the conclusion that neither the intentional release of a Borstal trainee under supervision, nor the unintended escape of a Borstal trainee still under detention which was the consequence of the application of a system of relaxed control intentionally adopted by the Home Office as conducive to the reformation of trainees, can have been intended by Parliament to give rise to any cause of action on the part of any private citizen unless the system adopted was so unrelated to any purpose of reformation that no reasonable person could have reached a bona fide conclusion that it was conducive to that purpose. Only then would the decision to adopt it be ultra vires in public law.

A parliamentary intention to leave to the discretion of the Home Office the decision as to what system of control should be adopted to prevent the escape of Borstal trainees must involve, from the very nature of the subject matter of the decision, an intention that in the application of the system a wide discretion in the application of the system may be delegated by the Home Office to subordinate officers engaged in the administration of the Borstal system. But although the system of control, including the sub delegation of discretion to subordinate officers, may itself be intra vires, an act or omission of a subordinate officer employed in the administration of the system may nevertheless be ultra vires if it falls outside the limits of the discretion delegated to him - i.e., if it is done contrary to instructions which he has received from the Home Office.

In a civil action which calls in question an act or omission of a subordinate officer of the Home Office on the ground that he has been "negligent" in his custody and control of a Borstal trainee who has caused damage to another person the initial inquiry should be whether or not the act or omission was ultra vires for one or other of these reasons. Where the act or omission is done in pursuance of the officer's instructions, the court may have to form its own view as to what is in the interests of Borstal trainees, but only to the limited extent of determining whether or not any reasonable person could bona fide come to the conclusion that the trainee causing the damage or other trainees in the same custody could be benefited in any way by the act or omission. This does not involve the court in attempting to substitute, for that of the Home Office, its own assessment of the comparative weight to be given to the benefit of the trainees and the detriment to persons likely to sustain damage. If on the other hand the officer's act or omission is done contrary to his instructions it is not protected by the public law doctrine of intra vires. Its action ability falls to be determined by the civil law principles of negligence, like the acts of the statutory undertakers in *Geddis v. Proprietors of Bann Reservoir*, 3 App. Cas. 430.

This, as it seems to me, is the way in which the courts should set about the task of reconciling the public interest in maintaining the freedom of

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the Home Office to decide upon the system of custody and control of Borstal trainees which is most

likely to conduce to their reformation and the prevention of crime and the public interest that Borstal officers should not be allowed to be completely disregardful of the interests both of the trainees in their charge and of persons likely to be injured by their carelessness without the law providing redress to those who in fact sustain injury.

Ellis v. Home Office [1953] 2 All E.R. 149 and *D'Arcy v. Prison Commissioners*, "The Times," November 17, 1955, are decisions which are consistent with this principle as respects the initial inquiry. In neither of them was it sought to justify the alleged acts or omissions of the prison officers concerned as having been done in compliance with instructions given to them by the appropriate authority (at that date the Prison Commissioners) or as being in the interests of the prisoner whose tortuous act caused the damage or any other inmates of the prison. If the test suggested were applied to acts and omissions alleged in those two cases they would in public law be ultra vires.

If this analogy with the principle of ultra vires in public law is applied as the relevant condition precedent to the liability of a custodian for damage caused by the tortuous act of a person (the detainee) over whom he has a statutory right of custody, the characteristic of the relationship between the custodian and the detainee which was present in those two cases, viz., that the custodian was actually exercising his right of custody at the time of the tortuous act of the detainee, would not be essential. A cause of action is capable of arising from failure by the custodian to take reasonable care to prevent the detainee from escaping, if his escape was the consequence of an act or omission of the custodian falling outside the limits of the discretion delegated to him under the statute.

The practical effect of this would be that no liability in the Home Office for "negligence" could arise out of the escape from an "open" Borstal of a trainee who had been classified for training at a Borstal of this type by the appropriate officer to whom the function of classification had been delegated upon the ground that the officer had been negligent in so classifying him or in failing to re-classify him for removal to a "closed" Borstal. The decision as to classification would be one which lay within the officer's discretion. The court could not inquire into its propriety as it did in *Greenwell v. Prison Commissioners*, 101 L.J. 486 in order to determine whether he had given what the court considered to be sufficient weight to the interests of persons whose property the trainee would be likely to damage if he should escape.

For this reason I think that *Greenwell v. Prison Commissioners* was wrongly decided by the county court judge. But to say this does not dispose of the present appeal, for the allegations of negligence against the Borstal officers are consistent with their having acted outside any discretion delegated to them and having disregarded their instructions as to the precautions which they should take to prevent members of the working party of trainees from escaping from Brownsea Island. Whether they had or not could only be determined at the trial of the action.

But this is only a condition precedent to the existence of any liability.

---------- ***[1970] A.C. 1004 at 1070***

Even if the acts and omissions of the Borstal officers alleged in the particulars of negligence were done in breach of their instructions and so were ultra vires in public law it does not follow that they were also done in breach of any duty of care owed by the officers to the plaintiff in civil law.

It is common knowledge, of which judicial notice may be taken, that Borstal training often fails to achieve its purpose of reformation, and that trainees when they have ceased to be detained in custody revert to crime and commit tortuous damage to the person and property of others. But so do criminals who have never been apprehended and criminals who have been released from custody upon completion of their sentences, or earlier pursuant to a statutory power to do so. The risk of sustaining damage from the tortuous acts of criminals is shared by the public at large. It has never been recognised at common law as giving rise to any cause of action against anyone but the criminal himself. It would seem arbitrary and therefore unjust to single out for the special privilege of being able to recover compensation from the authorities responsible for the prevention of crime a person whose property was damaged by the tortuous act of a criminal merely because the damage to him happened to be caused by a criminal who had escaped from custody before completion of his sentence instead of by one who had been lawfully released or who had been put on probation or given a suspended sentence or who had never been previously apprehended at all. To give rise to a duty on the part of the

custodian owed to a member of the public to take reasonable care to prevent a Borstal trainee from escaping from his custody before completion of the trainee's sentence there should be some relationship between the custodian and the person to whom the duty is owed which exposes that person to a particular risk of damage in consequence of that escape which is different in its incidence from the general risk of damage from criminal acts of others which he shares with all members of the public.

What distinguishes a Borstal trainee who has escaped from one who has been duly released from custody is his liability to recapture, and the distinctive added risk which is a reasonably foreseeable consequence of a failure to exercise due care in preventing him from escaping is the likelihood that in order to elude pursuit immediately upon the discovery of his absence the escaping trainee may steal or appropriate and damage property which is situated in the vicinity of the place of detention from which he has escaped.

So long as Parliament is content to leave the general risk of damage from criminal acts to lie where it falls without any remedy except against the criminal himself the courts would be exceeding their limited function in developing the common law to meet changing conditions if they were to recognise a duty of care to prevent criminals escaping from penal custody owed to a wider category of members of the public than those whose property was exposed to an exceptional added risk by the adoption of a custodial system for young offenders which increased the likelihood of their escape unless due care was taken by those responsible for their custody.

I should therefore hold that any duty of a Borstal officer to use reasonable care to prevent a Borstal trainee from escaping from his custody was owed only to persons whom he could reasonably foresee had property

---------- ***[1970] A.C. 1004 at 1071***

situate in the vicinity of the place of detention of the detainee which the detainee was likely to steal or to appropriate and damage in the course of eluding immediate pursuit and recapture. Whether or not any person fell within this category would depend upon the facts of the particular case including the previous criminal and escaping record of the individual trainee concerned and the nature of the place from which he escaped.

So to hold would be a rational extension of the relationship between the custodian and the person sustaining the damage which was accepted in *Ellis v. Home Office* [1953] 2 All E.R. 149 and *D'Arcy v. Prison Commissioners*, "The Times," November 17, 1955, as giving rise to a duty of care on the part of the custodian to exercise reasonable care in controlling his detainee. In those two cases the custodian had a legal right to control the physical proximity of the person or property sustaining the damage to the detainee who caused it. The extended relationship substitutes for the right to control the knowledge which the custodian possessed or ought to have possessed that physical proximity in fact existed.

In the present appeal the place from which the trainees escaped was an island from which the only means of escape would presumably be a boat accessible from the shore of the island. There is thus material fit for consideration at the trial for holding that the plaintiff, as the owner of a boat moored off the island, fell within the category of persons to whom a duty of care to prevent the escape of the trainees was owed by the officers responsible for their custody.

If, therefore, it can be established at the trial of this action (1) that the Borstal officers in failing to take precautions to prevent the trainees from escaping were acting in breach of their instructions and not in bona fide exercise of a discretion delegated to them by the Home Office as to the degree of control to be adopted and (2) that it was reasonably foreseeable by the officers that if these particular trainees did escape they would be likely to appropriate a boat moored in the vicinity of Brownsea Island for the purpose of eluding immediate pursuit and to cause damage to it, the Borstal officers would be in breach of a duty of care owed to the plaintiff and the plaintiff would, in my view, have a cause of action against the Home Office as vicariously liable for the "negligence" of the Borstal officers.

I would accordingly dismiss the appeal upon the preliminary issue of law and allow the case to go for trial on those issues of fact.

Appeal dismissed with costs.

Solicitors: Treasury Solicitor; Ingledew, Brown, Bennison & Garrett.

M. G

Hill v Chief Constable of West Yorkshire

Overview | **[1989] AC 53**, | [1988] 2 All ER 238, | [1988] 2 WLR 1049, | 132 Sol Jo 700, | [1988] NLJR 126, | (1988) Times, 29 April

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HILL APPELLANT AND CHIEF CONSTABLE OF WEST YORKSHIRE RESPONDENT [1989] A.C. 53

[HOUSE OF LORDS]

Lord Keith of Kinkel, Lord Brandon of Oakbrook, Lord Templeman, Lord Oliver of Aylmerton and Lord Goff of Chieveley

1988 Feb. 8, 9, 10; April 28

Police — Duties — Law enforcement — General duty to suppress crime — Failure to apprehend violent criminal resulting in murder committed by criminal — Whether liable for breach of duty of care

The plaintiff's 20-year-old daughter was attacked at night in a city street of the police area of which the defendant was chief constable and died from her injuries. Her attacker, S., who was convicted of her murder, was alleged to have committed a series of offences of murder and attempted murder against young women in the area in similar circumstances over a period of years before the deceased's murder. The plaintiff claimed on behalf of her deceased daughter's estate damages against the defendant for negligence, in that in the conduct of investigations into the crimes which had been committed the police failed to apprehend S. and prevent the murder of her daughter. On the defendant's application, the judge ordered the striking out of the writ and statement of claim as disclosing no cause of action.

----------*[1989] A.C. 53 at 54*

In the present case it cannot be disputed that it was at all material times foreseeable as probable that if not apprehended Sutcliffe would murder or attempt to murder other unaccompanied young women who might be by night in a built-up area in West Yorkshire. The police were aware of an exceptionally dangerous criminal operating almost entirely within their area whose victims were within a comparatively limited category. Even if it were proper to regard the case as one where a duty was owed to a class of persons, the deceased was one of a sufficiently limited class for such a duty to be readily construed. [Reference was made, on the question of proximity, to *Donoghue v. Stevenson* [1932] A.C. 562; *Anns v. Merton London Borough Council* [1976] A.C. 728; *Governors of the Peabody Donation Fund v. Sir Lindsay Parkinson & Co. Ltd*. [1985] A.C. 210 and *Jaensch v. Coffey* (1984) 58 A.L.J.R. 426, 441].

On the issue whether or not it can be a proper defence to a claim in negligence that the act complained of was the act of an independent third party, reliance is placed upon *Smith v. Littlewoods Organisation Ltd*. [1987] A.C. 241, and upon the line of authorities, including *Haynes v. Harwood* [1935] 1 K.B. 146; *Stansbie v. Troman* [1948] 2 K.B. 48; *Philco Radio and Television Corporation of Great Britain Ltd. v. J. Spurling Ltd*. [1949] 2 K.B. 33; *Newby v. General Lighterage Co. Ltd*. [1955] 1 Lloyd's Rep. 273 and *Dorset Yacht Co. Ltd. v. Home Office* [1970] A.C. 1004. [Reference was made to *Ward v. Cannock Chase District Council* [1986] Ch. 546, 564.]

Positing that the police are in any event liable for their negligence in the operational field and that the death of the deceased was in no way too remote a consequence of the breach of duty for the appellant

to recover, there is no reason in public policy why she should not recover. The argument based upon public policy was emphatically rejected by the House in the *Dorset Yacht case*, upholding the views of the Court of Appeal that it was public policy that Government servants should not be free from liability if they exercised their duties negligently: [1969] 2 Q.B. 412, 435 *per* Phillimore L.J. [Reference was made to *McLoughlin v. O'Brian* [1983] 1 A.C. 410 (as to the desirability of not taking too many hypothetical cases when there is a case before the court where justice requires that there be a cause of action); *Attia v. British Gas Plc*. [1988] Q.B. 304; *Yuen Kun Yeu v. Attorney-General of Hong Kong*

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[1988] A.C. 175 and *Rowling v. Takaro Properties Ltd*. [1988] A.C. 473.] It is only in a rare case like the present, where the police knew enough to hold and detain Sutcliffe and where there was practically no restrictions on the extent of their investigations, that the matter had gone beyond discretion and become a purely operational matter. Therefore the "floodgates" argument is not applicable. The ground of public policy in *Rondel v. Worsley* [1969] 1 A.C. 191 arose from the duty which an advocate owes to the court which may conflict with his duty to his client. There is no such ground of public policy to negative the liability of the police for their operational negligence.

Reliance is placed not only on the Anns case [1978] A.C. 728hence *Curran v. Northern Ireland Co-ownership Housing Association Ltd*. [1987] A.C. 718 does not cause difficulty) but also on *Donoghue v. Stevenson* [1932] A.C. 562: we pass the tests enunciated in that case as to "who is my neighbour?" and proximity.

Collins followed.

Alan Rawley Q.C. and ***Richard Rains*** for the respondent. No duty of care arises as there is no sufficient proximity between the police force and the deceased. Further, alternatively, no duty of care arises for reasons of public policy. The instant case falls also within the general rule that A is not liable for the acts of B causing damage to C. Such a duty could arise in exceptional cases where there is a relationship between A and B: here there was no special relationship between the police and Sutcliffe and accordingly no duty of care arose. On the authorities, e.g. *Reg. v. Commissioner of Police of the Metropolis, Ex parte Blackburn* [1968] 2 Q.B. 118, the duties owed by the police to prevent and detect crime are duties owed to the public at large and are not and never have been duties owed to individual members of the public. The distinction between policy and operational stages of the investigation made by the appellant is either a false distinction or a distinction in very many cases difficult or even impossible to make, because policy, e.g. the disposition of a limited force, may well dictate decisions on detail affecting the course and manner of a particular investigation, e.g. the sending of too few or too inexperienced officers to conduct an interview or to effect an arrest. The same policy may well dictate the extent of the briefing of officers sent to conduct an interview or to effect an arrest. In the result, if the appellant's contentions are correct, a decision not to brief or only partially to brief an officer sent to conduct an interview would not give rise to action for negligence whereas a careless failure to brief would give rise to such an action. In any event the real cause of the deceased's death was the criminal act of Sutcliffe. The carelessness of the police may have given Sutcliffe the freedom to act as he did. It did not cause him to act as he did. Accordingly the carelessness of the police was not causative of the deceased's death.

Clegg Q.C. replied.

Their Lordships took time for consideration.

28 April. LORD KEITH OF KINKEL. My Lords, in 1975 a man named Peter Sutcliffe embarked upon a terrifying career of violent crime, centred in the metropolitan police area of West Yorkshire. All his victims were

---------- ***[1989] A.C. 53 at 58***

young or fairly young women. Between July 1975 and November 1980 he committed 13 murders and eight attempted murders upon such women, the modus operandi in each case being similar. Sutcliffe's last victim was a 20-year-old student called Jacqueline Hill, whom he murdered in Leeds on 17 November 1980. By chance, Sutcliffe was arrested in suspicious circumstances in Sheffield on 2

January 1981, and confessed to the series of murders and attempted murders following interrogation. On 22 May 1981, at the Central Criminal Court, Sutcliffe was convicted of inter alia the murder of Miss Hill.

Miss Hill's mother and sole personal representative now sues the Chief Constable of West Yorkshire, claiming on behalf of Miss Hill's estate damages on the ground of negligence, for inter alia loss of expectation of life and pain and suffering. The defendant is sued under section 48(1) of the Police Act 1964, enacting that the chief officer of police for any police area shall be liable in respect of torts committed by constables under his direction and control in the performance or purported performance of their functions. The plaintiff in her statement of claim sets out the 20 offences committed by Sutcliffe before the death of Miss Hill and avers that the circumstances of each of these were such that it was reasonable to infer that all were committed by the same man and further that it was foreseeable that, if not apprehended, he would commit further offences of the same nature. The pleadings go on to allege that it was accordingly the duty of the defendant and all officers in his police force to use their best endeavours and exercise all reasonable care and skill to apprehend the perpetrator of the crimes and so protect members of the public who might otherwise be his future victims. A substantial number of matters are set out and relied upon as indicating that the West Yorkshire police force failed in that duty. It is unnecessary to set out these matters in detail. They amount broadly to allegations of failure to collate properly information in possession of the force pointing to Sutcliffe as a likely suspect, and of failing to give due weight to certain pieces of information while according excessive importance to others.

The defendant, without delivering defences, applied under R.S.C., Ord. 18, r. 19 to have the statement of claim struck out as disclosing no reasonable cause of action. That application was granted by Sir Neil Lawson, sitting as a judge of the High Court, on 19 December 1985. Upon appeal by the plaintiff the Court of Appeal (Fox and Glidewell L.JJ. and Sir Roualeyn Cumming-Bruce) [1988] Q.B. 60, on 19 February 1987, affirmed Sir Neil Lawson. The plaintiff now appeals, with leave given in the Court of Appeal, to your Lordships' House.

In considering whether the statement of claim was rightly struck out it must be assumed that the averments of fact therein contained are true. In particular, it must be assumed that in the course of their investigations into the series of crimes committed by Sutcliffe the West Yorkshire police force made a number of mistakes which they would not have made if they had exercised a reasonable degree of care and skill such as would have been expected to be displayed in the circumstances by an ordinarily competent police force. It must also be assumed, though this is not specifically averred in the statement of claim, that had

they exercised that degree of care and skill Sutcliffe would have been apprehended before the date upon which he murdered Miss Hill, with the result that that particular crime would not have been committed.

The question of law which is opened up by the case is whether the individual members of a police force, in the course of carrying out their functions of controlling and keeping down the incidence of crime, owe a duty of care to individual members of the public who may suffer injury to person or property through the activities of criminals, such as to result in liability in damages, on the ground of negligence, to anyone who suffers such injury by reason of breach of that duty.

There is no question that a police officer, like anyone else, may be liable in tort to a person who is injured as a direct result of his acts or omissions. So he may be liable in damages for assault, unlawful arrest, wrongful imprisonment and malicious prosecution, and also for negligence. Instances where liability for negligence has been established are *Knightley v. Johns* [1982] 1 W.L.R. 349 and *Rigby v. Chief Constable of Northamptonshire* [1985] 1 W.L.R. 1242. Further, a police officer may be guilty of a criminal offence if he wilfully fails to perform a duty which he is bound to perform by common law or by statute: see *Reg. v. Dytham* [1979] Q.B. 722, where a constable was convicted of wilful neglect of duty because, being present at the scene of a violent assault resulting in the death of the victim, he had taken no steps to intervene.

By common law police officers owe to the general public a duty to enforce the criminal law: see *Reg. v.*

Commissioner of Police of the Metropolis, Ex parte Blackburn [1968] 2 Q.B. 118. That duty may be enforced by mandamus, at the instance of one having title to sue. But as that case shows, a chief officer of police has a wide discretion as to the manner in which the duty is discharged. It is for him to decide how available resources should be deployed, whether particular lines of inquiry should or should not be followed and even whether or not certain crimes should be prosecuted. It is only if his decision upon such matters is such as no reasonable chief officer of police would arrive at that someone with an interest to do so may be in a position to have recourse to judicial review. So the common law, while laying upon chief officers of police an obligation to enforce the law, makes no specific requirements as to the manner in which the obligation is to be discharged. That is not a situation where there can readily be inferred an intention of the common law to create a duty towards individual members of the public.

Counsel for the appellant, however, sought to equiparate the situation to that which resulted in liability on the ground of negligence in *Anns v. Merton London Borough Council* [1978] A.C. 728. There the borough were under a duty, imposed by legislation, to supervise compliance with building bye-laws, in particular as regards the construction of foundations. It was held that though the borough had a discretion whether or not to carry out an inspection of foundations in any particular case, in order to check compliance, once a decision had been made to carry out an inspection the borough owed to future owners and occupiers of the building in question a common law duty to exercise reasonable care in the inspection. In the present case, so it was maintained, the respondent,

having decided to investigate the Sutcliffe murders, owed to his potential future victims a duty to do so with reasonable care.

The foundation of the duty of care was said to be reasonable foreseeability of harm to potential future victims if Sutcliffe were not promptly apprehended. Lord Atkin's classic propositions in *Donoghue v. Stevenson* [1932] A.C. 562, 580 were prayed in aid, as was Lord Wilberforce's well-known two stage test of liability in negligence in the *Anns case* [1978] A.C. 728, 751-752.

It has been said almost too frequently to require repetition that foreseeability of likely harm is not in itself a sufficient test of liability in negligence. Some further ingredient is invariably needed to establish the requisite proximity of relationship between plaintiff and defendant, and all the circumstances of the case must be carefully considered and analysed in order to ascertain whether such an ingredient is present. The nature of the ingredient will be found to vary in a number of different categories of decided cases. In the *Anns case* there was held to be sufficient proximity of relationship between the borough and future owners and occupiers of a particular building the foundations of which it was decided to inspect, and there was also a close relationship between the borough and the builder who had constructed the foundations.

In *Dorset Yacht Co. Ltd. v. Home Office* [1970] A.C. 1004, 1060 Lord Diplock said of Lord Atkin's proposition:

> "Used as a guide to characteristics which will be found to exist in conduct and relationships which give rise to a legal duty of care this aphorism marks a milestone in the modern development of the law of negligence. But misused as a universal it is manifestly false."

Earlier he had said, at p. 1058:

> "The judicial development of the law of negligence rightly proceeds by seeking first to identify the relevant characteristics that are common to the kinds of conduct and relationship between the parties which are involved in the case for decision and the kinds of conduct and relationships which have been held in previous decisions of the courts to give rise to a duty of care."

The *Dorset Yacht case* dealt with a situation where some Borstal boys, who, having records of previous escapes, were encamped on Brownsea Island under the supervision of prison officers and escaped in the night while their guardians slept, boarded a yacht moored nearby in order to make their way to the mainland and manoeuvred it so as to damage the plaintiffs' yacht. One of the features of the case was that the damage sustained by the plaintiffs was the direct consequence of a tortious act done with conscious volition by a third party responsible for his own acts, which was interposed between the allegedly negligent conduct of the prison officers and the damage suffered. The actual decision, which was on a preliminary point of law, was that a special relationship existed on the one hand between the prison officers and the Borstal boys who were in their custody, and on the other hand between the

prison officers and the owners of yachts moored near the encampment. That the boys might seek to make use of a yacht in order to get away to the mainland

---------- *[1989] A.C. 53 at 61*

and might damage it in the process was the very thing which the prison officers ought reasonably to have foreseen. The prison officers had brought the boys, of whose propensity to attempt escape they were aware, into the locality where the yachts were moored and so had created a potential situation of danger for the owners of those yachts. Accordingly liability was capable of being established on the facts.

However, the class of persons to whom a duty of care might be owed to prevent the escape of detainees was held to be limited. Lord Diplock said [1970] A.C. 1004, 1070-1071:

> "The risk of sustaining damage from the tortious acts of criminals is shared by the public at large. It has never been recognised at common law as giving rise to any cause of action against anyone but the criminal himself. It would seem arbitrary and therefore unjust to single out for the special privilege of being able to recover compensation from the authorities responsible for the prevention of crime a person whose property was damaged by the tortious act of a criminal merely because the damage to him happened to be caused by a criminal who had escaped from custody before completion of his sentence instead of by one who had been lawfully released or who had been put on probation or given a suspended sentence or who had never been previously apprehended at all. To give rise to a duty on the part of the custodian owed to a member of the public to take reasonable care to prevent a Borstal trainee from escaping from his custody before completion of the trainee's sentence there should be some relationship between the custodian and the person to whom the duty is owed which exposes that person to a particular risk of damage in consequence of that escape which is different in its incidence from the general risk of damage from criminal acts of others which he shares with all members of the public. What distinguishes a Borstal trainee who has escaped from one who has been duly released from custody is his liability to recapture, and the distinctive added risk which is a reasonably foreseeable consequence of a failure to exercise due care in preventing him from escaping is the likelihood that in order to elude pursuit immediately upon the discovery of his absence the escaping trainee may steal or appropriate and damage property which is situated in the vicinity of the place of detention from which he has escaped. So long as Parliament is content to leave the general risk of damage from criminal acts to lie where it falls without any remedy except against the criminal himself the courts would be exceeding their limited function in developing the common law to meet changing conditions if they were to recognise a duty of care to prevent criminals escaping from penal custody owed to a wider category of members of the public than those whose property was exposed to an exceptional added risk by the adoption of a custodial system for young offenders which increased the likelihood of their escape unless due care was taken by those responsible for their custody. I should therefore hold that any duty of a Borstal officer to use reasonable care to prevent a Borstal trainee from escaping from his custody was owed only to persons whom he could reasonably foresee had property situate in

---------- *[1989] A.C. 53 at 62*

> the vicinity of the place of detention of the detainee which the detainee was likely to steal or appropriate and damage in the course of eluding immediate pursuit and recapture. Whether or not any person fell within this category would depend upon the facts of the particular case including the previous criminal and escaping record of the individual trainee concerned and the nature of the place from which he escaped."

The *Dorset Yacht case* was concerned with the special characteristics or ingredients beyond reasonable foreseeability of likely harm which may result in civil liability for failure to control another man to prevent his doing harm to a third. The present case falls broadly into the same category. It is plain that vital characteristics which were present in the *Dorset Yacht case* and which led to the imposition of liability are here lacking. Sutcliffe was never in the custody of the police force. Miss Hill was one of a vast number of the female general public who might be at risk from his activities but was at no special distinctive risk in relation to them, unlike the owners of yachts moored off Brownsea Island in relation to the foreseeable conduct of the Borstal boys. It appears from the passage quoted from the speech of Lord Diplock in the *Dorset Yacht case* that in his view no liability would rest upon a prison authority, which carelessly allowed the escape of an habitual criminal, for damage which he subsequently caused, not in the course of attempting to make good his getaway to persons at special risk, but in further pursuance of his general criminal career to the person or property of members of the general public. The same rule must apply as regards failure to recapture the criminal before he had

time to resume his career. In the case of an escaped criminal his identity and description are known. In the instant case the identity of the wanted criminal was at the material time unknown and it is not averred that any full or clear description of him was ever available. The alleged negligence of the police consists in a failure to discover his identity. But if there is no general duty of care owed to individual members of the public by the responsible authorities to prevent the escape of a known criminal or to recapture him, there cannot reasonably be imposed upon any police force a duty of care similarly owed to identify and apprehend an unknown one. Miss Hill cannot for this purpose be regarded as a person at special risk simply because she was young and female. Where the class of potential victims of a particular habitual criminal is a large one the precise size of it cannot in principle affect the issue. All householders are potential victims of an habitual burglar, and all females those of an habitual rapist. The conclusion must be that although there existed reasonable foreseeability of likely harm to such as Miss Hill if Sutcliffe were not identified and apprehended, there is absent from the case any such ingredient or characteristic as led to the liability of the Home Office in the *Dorset Yacht case*. Nor is there present any additional characteristic such as might make up the deficiency. The circumstances of the case are therefore not capable of establishing a duty of care owed towards Miss Hill by the West Yorkshire Police.

[1989] A.C. 53 at 63

That is sufficient for the disposal of the appeal. But in my opinion there is another reason why an action for damages in negligence should not lie against the police in circumstances such as those of the present case, and that is public policy. In *Yuen Kun Yeu v. Attorney-General of Hong Kong* [1988] A.C. 175, 193, I expressed the view that the category of cases where the second stage of Lord Wilberforce's two stage test in *Anns v. Merton London Borough Council* [1978] A.C. 728, 751-752 might fall to be applied was a limited one, one example of that category being *Rondel v. Worsley* [1969] 1 A.C. 191. Application of that second stage is, however, capable of constituting a separate and independent ground for holding that the existence of liability in negligence should not be entertained. Potential existence of such liability may in many instances be in the general public interest, as tending towards the observance of a higher standard of care in the carrying on of various different types of activity. I do not, however, consider that this can be said of police activities. The general sense of public duty which motivates police forces is unlikely to be appreciably reinforced by the imposition of such liability so far as concerns their function in the investigation and suppression of crime. From time to time they make mistakes in the exercise of that function, but it is not to be doubted that they apply their best endeavours to the performance of it. In some instances the imposition of liability may lead to the exercise of a function being carried on in a detrimentally defensive frame of mind. The possibility of this happening in relation to the investigative operations of the police cannot be excluded. Further it would be reasonable to expect that if potential liability were to be imposed it would be not uncommon for actions to be raised against police forces on the ground that they had failed to catch some criminal as soon as they might have done, with the result that he went on to commit further crimes. While some such actions might involve allegations of a simple and straightforward type of failure - for example that a police officer negligently tripped and fell while pursuing a burglar - others would be likely to enter deeply into the general nature of a police investigation, as indeed the present action would seek to do. The manner of conduct of such an investigation must necessarily involve a variety of decisions to be made on matters of policy and discretion, for example as to which particular line of inquiry is most advantageously to be pursued and what is the most advantageous way to deploy the available resources. Many such decisions would not be regarded by the courts as appropriate to be called in question, yet elaborate investigation of the facts might be necessary to ascertain whether or not this was so. A great deal of police time, trouble and expense might be expected to have to be put into the preparation of the defence to the action and the attendance of witnesses at the trial. The result would be a significant diversion of police manpower and attention from their most important function, that of the suppression of crime. Closed investigations would require to be reopened and retraversed, not with the object of bringing any criminal to justice but to ascertain whether or not they had been competently conducted. I therefore consider that Glidewell L.J., in his judgment in the Court of Appeal [1988] Q.B. 60, 76 in the present case, was right to take the view that

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[1989] A.C. 53 at 64

the police were immune from an action of this kind on grounds similar to those which in *Rondel v. Worsley* [1969] 1 A.C. 191 were held to render a barrister immune from actions for negligence in his conduct of proceedings in court.

My Lords, for these reasons I would dismiss the appeal.

LORD BRANDON OF OAKBROOK. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Keith of Kinkel. I agree with it, and for the reasons which he gives I would dismiss the appeal.

LORD TEMPLEMAN. My Lords, the appellant, Mrs. Hill, is tormented with the unshakeable belief that her daughter would be alive today if the respondent, the West Yorkshire police force, had been more efficient. That belief is entitled to respect and understanding. Damages cannot compensate for the brutal extinction of a young life and Mrs. Hill proposes that any damages awarded shall be devoted to an appropriate charity. Damages awarded by the court would not be paid by any policeman found wanting in the performance of his duty but would be paid by the public. Mrs. Hill therefore brings these proceedings with the object of obtaining an investigation into the conduct of the West Yorkshire police force so that lives shall not be lost in the future by avoidable delay in the identification and arrest of a murderer.

The question for determination in this appeal is whether an action for damages is an appropriate vehicle for investigating the efficiency of a police force. The present action will be confined to narrow albeit perplexing questions, for example, whether, discounting hindsight, it should have been obvious to a senior police officer that Sutcliffe was a prime suspect, whether a senior police officer should not have been deceived by an evil hoaxer, whether an officer interviewing Sutcliffe should have been better briefed, and whether a report on Sutcliffe should have been given greater attention. The court would have to consider the conduct of each police officer, to decide whether the policeman failed to attain the standard of care of a hypothetical average policeman. The court would have to decide whether an inspector is to be condemned for failing to display the acumen of Sherlock Holmes and whether a constable is to be condemned for being as obtuse as Dr. Watson. The plaintiff will presumably seek evidence, for what it is worth, from retired police inspectors, who would be asked whether they would have been misled by the hoaxer, and whether they would have identified Sutcliffe at an earlier stage. At the end of the day the court might or might not find that there had been negligence by one or more members of the police force. But that finding would not help anybody or punish anybody.

It may be, and we all hope that the lessons of the Yorkshire Ripper case have been learned, that the methods of handling information and handling the press have been improved, and that co-operation between different police forces is now more highly organised. The present action would not serve any useful purpose in that regard. The present action could not consider whether the training of the West Yorkshire police force

is sufficiently thorough, whether the selection of candidates for appointment or promotion is defective, whether rates of pay are sufficient to attract recruits of the required calibre, whether financial restrictions prevent the provision of modern equipment and facilities, or whether the Yorkshire police force is clever enough and if not, what can and ought to be done about it. The present action could only investigate whether an individual member of the police force conscientiously carrying out his duty was negligent when he was bemused by contradictory information or overlooked significant information or failed to draw inferences which later appeared to be obvious. That kind of investigation would not achieve the object which Mrs. Hill desires. The efficiency of a police force can only be investigated by an inquiry instituted by the national or local authorities which are responsible to the electorate for that efficiency.

Moreover, if this action lies, every citizen will be able to require the court to investigate the performance of every policeman. If the policeman concentrates on one crime, he may be accused of neglecting others. If the policeman does not arrest on suspicion a suspect with previous convictions, the police force may be held liable for subsequent crimes. The threat of litigation against a police force would not make a policeman more efficient. The necessity for defending proceedings, successfully or unsuccessfully, would distract the policeman from his duties.

This action is in my opinion misconceived and will do more harm than good. A policeman is a servant of the public and is liable to be dismissed for incompetence. A police force serves the public and the

elected representatives of the public must ensure that the public get the police force they deserve. It may be that the West Yorkshire police force was in 1980 in some respects better and in some respects worse than the public deserve. An action for damages for alleged acts of negligence by individual police officers in 1980 could not determine whether and in what respects the West Yorkshire police force can be improved in 1988. I would dismiss the appeal.

LORD OLIVER OF AYLMERTON. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Keith of Kinkel. I agree that the appeal should be dismissed for the reasons which he has given.

LORD GOFF OF CHIEVELEY. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Keith of Kinkel. I agree with it and for the reasons he gives I would dismiss the appeal.

Appeal dismissed.

Respondent's costs to be paid out of legal aid fund pursuant to section 13 of Legal Aid Act 1974.

Yorkshire County Council.

C. T. B

End of Document

Michael and others v Chief Constable of SouthWales Police and another (Refuge and others intervening) [2015] AC 1732

[2015] UKSC 2

Supreme Court

Lord Neuberger of Abbotsbury PSC, Baroness Hale of Richmond DPSC, Lord Mance, Lord Kerr of Tonaghmore, Lord Reed, Lord Toulson, Lord Hodge JJSC

2014 July 28, 29; 2015 Jan 28

Human rights — Life — Breach — Victim calling police to report threats to kill her — Police failing to respond timeously — Victim stabbed to death before police arriving — Victim's estate and dependants bringing action against police forces for breach of Convention right to life — Whether action to be struck out — Whether police forces entitled to summary judgment — Whether claim to proceed to trial — Human Rights Act 1998 (c 42), Sch 1, Pt I, art 2

Negligence — Duty of care — Police — Victim calling police to report threats of violence and to kill her — Police failing to respond timeously — Victim stabbed to death before police arriving — Victim's estate and dependants bringing action against police forces in negligence — Whether police owing duty of care to victim — Whether claim to be struck out — Whether police forces entitled to summary judgment

The victim made an emergency call on her mobile phone to the police from her home. The signal was received at a mast across the county border and, accordingly, a call handler from a neighbouring police force took the call. The victim said that her former partner had come to her home, found her with someone else, bitten her ear really hard, taken the other person away in his car and said that he would return to hit her. At a later point in the call she reported that the former partner had said that he was going to return to kill her but the call handler apparently failed to hear her say that. The call handler said that the call would be passed on to the appropriate police force which would want to call the victim back and asked her to keep her phone available for that call. The victim's emergency call was automatically graded as requiring an immediate response envisaging attendance at her house within about five minutes. The call handler then reported to the emergency control room at the appropriate police force that the former partner had threatened to return to hit the victim but did not refer to the threat to kill her. The call was graded by the appropriate police force at a lower priority level requiring a response within 60 minutes. Before the appropriate police force had responded to the original emergency call, and some 15 minutes after it had been made, the victim called 999 again when she was heard to scream. The police responded immediately but found the victim had been stabbed to death. Her former partner was subsequently convicted of her murder. The claimants, the victim's estate and her dependants, commenced proceedings against the two police forces involved, alleging negligence and breach of article 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms[1]. The police forces' application to strike out the claims

and/or for summary judgment was rejected by the judge. The police forces appealed. The Court of Appeal allowed the appeal on the negligence claim and gave summary judgment in their favour but, by a majority, allowed the claim under article 2 of the Convention to proceed to trial. The claimants appealed against the ruling on the negligence claim and the police forces cross-appealed against the ruling on article 2.

APPEAL from the Court of Appeal

By a claim form dated 15 April 2011 and particulars of claim dated 14 September 2011 the claimants, Angela Margaret Michael (administratrix of the estate of the deceased, Joanna Louise Michael), Anthony Kenneth Michael, Alisha Michael (a minor) and Tay Cyron Williams (a minor) (both minors suing by their grandmother and litigation friend, Angela Margaret Michael), claimed damages against the defendants, the Chief Constable of South Wales Police and the Chief Constable of Gwent Police, in relation to

the death of the deceased, Joanna Louise Michael, on the grounds of negligence and breach of article 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

The defendants applied to strike out the claims and/or for summary judgment. The application was rejected by Judge Jarman QC, sitting in the Cardiff District Registry of the Queen's Bench Division on 25 November 2011.

By an appellant's notice the defendants appealed. On 20 July 2012 the Court of Appeal (Longmore, Richards and Davis LJJ) [2012] EWCA Civ 981; [2012] HRLR 789 allowed the appeal in part and gave summary judgment to the defendants on the claim in negligence but (Davis LJ dissenting) allowed the claim under article 2 to proceed to hearing.

Pursuant to permission given by the Supreme Court (Lord Hope of Craighead DPSC, Lord Kerr of Tonaghmore and Lord Hughes JJSC) on 26 June 2013 the claimants appealed and the defendants cross-appealed. On 21 January 2014 the Supreme Court (Baroness Hale of Richmond DPSC, Lord Kerr of Tonaghmore and Lord Hughes JJSC) gave permission for Refuge and Liberty to intervene by oral submissions. The third intervener, Cymorth i Ferched Cymru (Welsh Women' Aid), was subsequently granted permission to intervene by written submissions only.

The facts are stated in the judgment of Lord Toulson JSC.

Nicholas Bowen QC, ***Duncan Fairgrieve*** and ***Jude Bunting*** (instructed by *Martyn Prowel Solicitors, Cardiff*) for the claimants. In principle the police can assume responsibility when answering a 999 call so as to give rise to a duty of care in negligence to arrive within a reasonable time. On the facts of the present case, which is a rescue case and can be distinguished from *Hill v Chief Constable of West Yorkshire* [1989] AC 53, there should be liability because the police forces (separately and together) accepted the 999 call and, looked at objectively and in all the circumstances, assumed responsibility to respond competently and timeously to that call. It is clearly established that the core principle which excludes a duty of care does not apply where there is an assumption of responsibility by the police: see *Van Colle v Chief Constable of the Hertfordshire Police (Secretary of State for the Home Department intervening)* [2009] AC 225, paras 120—121 and *Customs and Excise Comrs v Barclays Bank plc* [2007] 1 AC 181, para 35. A relationship of proximity was created by the interchange with the Gwent Police call handler when looked at together with the omissions of her South Wales counterpart.

There is no general principle of law that the police service cannot assume responsibility sufficient to found a duty of care in accepting a 999 call whereby and in which they give assurances to the caller. There would be an inconsistency if the police were not under such a duty of care while the ambulance service are: see *Customs and Excise Comrs v Barclays Bank plc* [2007] 1 AC 181; *Kent v London Ambulance Service* [1999] PIQR P192; *Rush v Police Service of Northern Ireland* [2011] NIQB 28; *Couch v Attorney General* [2008] 3 NZLR 725; *Kent v Griffiths* [2001] QB 36and *An Informer v A Chief Constable* [2013] QB 579. Generally there has been a misunderstanding of the rule in the *Hill* case [1989] AC 53. It has been applied too widely and should be reined in: see *Selwood v Durham County*

Council [2012] PIQR P440 and *Kirkham v Chief Constable of the Greater Manchester Police* [1990] 2 QB 283.

If, however, liability is not established on the basis of assumption of responsibility, the facts of this case are outside the exclusionary rule in the *Hill* case [1989] AC 53or can be labelled as an exception to it.

Properly categorised, the case is not one where the duties contended for are inextricably linked with those police functions which are protected by the core principle in the *Hill* case. The core principle should be recalibrated to meet the evolving needs of the common law in light of developing case law and the domestic approach to rights under the Convention for the Protection of Human Rights and Fundamental Freedoms: see *D v East Berkshire Community NHS Trust* [2004] QB 558.

Experience shows that police defendants (and those who act for claimants) still tend routinely to assert reliance upon or to assume that the *Hill* principle applies when faced with allegations of negligence, without proper analysis of that contention. The case law shows that it is not sufficient for police in a general sense to have been engaged in a criminal investigation at the time when the relevant damage arose; a more specific consideration is required as to whether the particular policing act or omission that gave rise to the damage itself concerned the investigation (or suppression) of crime. In *Brooks v Comr of Police of the Metropolis* [2005] 1 WLR 1495 a majority of the House of Lords expressly acknowledged that there could be exceptional situations involving the investigation or suppression of crime, but falling outside the concept of assumption of responsibility, where the *Hill* principle should not be applied. However, although the potential existence of such exceptions was acknowledged, little guidance was given as to when they might arise. Lord Nicholls of Birkenhead, at para 6, indicated that there might be exceptional cases where the circumstances compelled the conclusion that the absence of a remedy in damages would be an affront to the principles that underlie the common law. Lord Bingham of Cornhill, at paras 3—4, observed that he would be reluctant to endorse the full breadth of what was thought to be the reasoning in the *Hill* case. Lord Steyn, at para 34, said that he did not rule out cases arising of "outrageous negligence" by police which could fall beyond the reach of the *Hill* principle, but that such cases would have to be determined as and when they occurred.

By the time that *Smith v Chief Constable of Sussex Police* was heard by the House of Lords three years later, reported with *Van Colle v Chief Constable of the Hertfordshire Police* [2009] AC 225, there were no apparent examples available of the appellate courts recognising such an exceptional case and that appears to remain the case today. The majority in the *Smith* case (who reaffirmed the core *Hill* principle) were also prepared to countenance exceptional cases arising, although again little guidance was given.

Contrary to the concern expressed in the *Hill* case there are no data suggesting that imposing a duty will cause the police to act defensively. Reflective of the general law there is no requirement for specific undertaking by the police to protect the claimant. The court can infer it. Further the court can adopt the liability principle in full by following the dissenting judgment of Lord Bingham in the *Smith* case.

---------- ***[2015] AC 1732 at 1738***

In any event the present case can be distinguished from *Hill v Chief Constable of West Yorkshire* [1989] AC 53, *Brooks v Comr of Police of the Metropolis* [2005] 1 WLR 1495 and *Van Colle v Chief Constable of the Hertfordshire Police* [2009] AC 225.

The cross-appeal ought to be dismissed because the police have to show that the claimants' case is fanciful, which they cannot. The issue is not just what the police forces involved knew but what they ought to have known.

Karon Monaghan QC and ***Rajeev Thacker*** (instructed by *Deighton Pierce Glynn*) for the first and second interveners.

Domestic violence remains endemic and the police's response to it is and in particular their failures to address violence against women, are, as *Everyone's business: Improving the police response to domestic abuse* published by HM Inspectorate of Constabulary (2014) concluded, wholly inadequate. The statistics on domestic violence are horrifying: see, for example, *Domestic Violence, Forced Marriage and "Honour"-based Violence*, Sixth Report of Session 2007—2008", House of Commons Home Affairs Committee (2008) (HC 263-I); *Violence against women: an EU-wide survey*, Main results, published by the European Union Agency for Fundamental Rights (2014) and *Walby and Allen, Domestic Violence, Sexual Assault and Stalking: Findings from the British Crime Survey*, Home Office Research Study 276 (2004).

The core immunity identified in *Hill v Chief Constable of West Yorkshire* [1989] AC 53 should be

abolished, having regard in particular to (i) regional and international human rights standards requiring that states take positive measures directed at securing full equality for women and provide a remedy where there has been a failure in the state's response to gendered forms of violence, including domestic violence; (ii) the arbitrariness of the doctrine of immunity in that context, and the lack of clarity as to where the boundaries are drawn between “core” functions falling within the scope of the immunity and those falling out with it; and (iii) public policy, which now lies firmly in favour of the removal of the immunity, most especially in the context of domestic violence, so as to make claims in respect of negligent failures by the police, including in respect of their “core” functions, actionable.

International human rights law should inform the development of the common law. Article 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms must be interpreted in light of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (1979) and the Council of Europe Convention on preventing and combating violence against women and domestic violence (2011) (“the Istanbul Convention”), such that in determining whether there is a sufficient risk (presently expressed as “real and immediate” or “present and continuing”) which the police ought to have appreciated, regard must be had to the specific ways in which it is known risk develops in the case of domestic violence. Gendered forms of violence, such as domestic violence will engage, in addition to article 2 (and very often articles 3 and 8), article 14, imposing positive equality obligations on the state: see *Opuz v Turkey* (2009) 50 EHRR 695. It is possible to aggregate the acts, omissions and knowledge of different state agencies so as to create a composite liability under section 6 of the Human Rights Act 1998 where their combined

knowledge and cumulative acts and omissions together create a violation of article 2 (or articles 3, 8 and 14 as the case may be).

The court should now depart from the decision in *Hill v Chief Constable of West Yorkshire* [1989] AC 53 because public policy now lies in favour of removal of the immunity and the rule in the *Hill* case is not apt for tweaking.

Lord Pannick QC and ***Jeremy Johnson QC*** (instructed by *Director, South Wales Police and Gwent Police Joint Legal Services, Bridgend*) for the defendants.

Every police officer owes the public a duty to prevent crime to the best of his or her ability However, the duty is a public duty, owed to the public rather than to private individuals. The general rule is that no private law duty of care in negligence is owed by the police to individual citizens for failure to comply with the public duty to prevent crime. That rule has been repeatedly and consistently stated by the courts in the 25 years since *Hill v Chief Constable of West Yorkshire (Secretary of State for Home Department intervening)* [1989] AC 53. Parliament has consistently decided that it is not appropriate as a matter of public policy that such a private law action should lie but instead has made provision by way of the Criminal Injuries Compensation Scheme for those who are victims of specific types of crime. There are two separate, but linked, reasons why, generally, no private law duty is owed: (i) there is (absent some special feature such as an assumption of legal responsibility) no sufficient relationship of proximity between a chief constable and a member of the public who seeks the police's assistance, since the police act for the benefit of the public generally rather than any individual, and (i) there are public policy reasons which make it undesirable to impose a duty of care: see analysis of policy by Lord Hope of Craighead in *Van Colle v Chief Constable of the Hertfordshire Police (Secretary of State for the Home Department intervening)* [2009] AC 225. There is a similar policy approach in other jurisdictions: see *Opuz v Turkey* (2009) 50 EHRR 695; *Riss v City of New York* (1968) 240 NE 2d 860 and *Sullivan v Moody* (2001) 207 CLR 562. Parliament has legislated to create rights for the victims of crime, and, in particular, the victims of domestic violence by way of the Domestic Violence, Crime and Victims Act 2004. In so doing it decided not to create duties of care enforceable by private law actions for damages.

There was no assumption of responsibility on the part of the police to make the instant case an exception to the principle in the *Hill* case [1989] AC 53. Such a claim fails at the outset on the facts as no responsibility was assumed by the police. It was a standard case of answering a 999 call with no assurance that any particular action would be taken. For the principles relating to assumption of responsibility see: *Van Colle v Chief Constable of the Hertfordshire Police* [2009] AC 225; *Brooks v*

Comr of Police of the Metropolis [2005] 1 WLR 1495; *Customs and Excise Comrs v Barclays Bank plc* [2007] 1 AC 181; *An Informer v A Chief Constable* [2013] QB 579; *Selwood v Durham County Council* [2012] PIQR P440 and *Kent v Griffiths* [2001] QB 36.

The mere fact that the instant case involves a 999 call does not take it outside the scope of the principle in the *Hill* case [1989] AC 53. If the Hill principle survives it would be unprincipled to say that it does not apply in the context of 999 calls. In the instant case the whole purpose of the 999 call was to report an assault and prevent another assault: see the analysis of

Longmore LJ in the Court of Appeal [2012] HRLR 789. Taking an emergency call is not an administrative or clerical procedure and even if it is there is a helpful Australian authority: see *Cran v State of New South Wales* [2004] NSWCA 92.

Domestic violence does not, in itself, create an exception to the *Hill* principle. Earlier cases have dealt with precisely that issue: see *Brooks v Comr of Police of the Metropolis* [2005] 1 WLR 1495; *Z v United Kingdom* (2001) 34 EHRR 97; *Rush v Police Service of Northern Ireland* [2011] NIQB 28 and Communication No 6/2005 of the Committee on the Elimination of Discrimination against Women, Thirty-ninth session (23 July—10 August 2007) (CEDAW/C/39/D/6/2005).

The arguments regarding amending the *Hill* principle in the light of the Convention for the Protection of Human Rights and Fundamental Freedoms was considered and rejected in *Van Colle v Chief Constable of the Hertfordshire Police* [2009] AC 225. It is simply unnecessary to develop the common law to provide a parallel cause of action to those provided under the Human Rights Act 1998. That reasoning is adopted.

As to the cross-appeal, Davis LJ was correct in his dissenting judgment [2012] HRLR 789. There is no dispute about the applicable legal principles: see *Osman v United Kingdom* (1998) 29 EHRR 245 and the *Van Colle* case [2009] AC 225.

Bowen QC in reply

The primary basis for the rule in *Hill v Chief Constable of West Yorkshire* [1989] AC 53 is the court's policy concerns about defensiveness and police resources. Those concerns are founded not on empirical evidence but on judicial intuition. The primary policy consideration which the law takes into account is that wrongs should be remedied. It is incumbent on a party who seeks to exclude the application of that primary policy to justify it: see *Jones v Kaney* [2011] 2 AC 398. Those who rely on policy concerns to justify the denial of a duty of care bear the burden of proving that those policy concerns are valid: see *Spring v Guardian Assurance plc* [1995] 2 AC 296. There is no empirical evidence to justify concerns about the prospect of defensive policing. The lack of empirical evidence was cited as a reason for the Canadian courts distinguishing *Hill v Chief Constable of West Yorkshire* [1989] AC53 in *Hill v Hamilton-Wentworth Regional Police Services Board* [2007] 3 SCR 129. [Reference was made to *Gorringe v Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057; the *Law Commission's Remedies Against Public Bodies: A Scoping Report* (2006) and the Law Commission Report *Administrative Redress: Public Bodies and the Citizen* (2010) (Law Com No 322) (HC 6).] Change to the law in this area is a matter for the courts not Parliament and there is no suitable alternative remedy.

In the absence of cogent evidence to support the *Hill* immunity, it is open to the court to remove it. There is a series of cogent tests which do not suffer from the problems of the *Hill* case [1989] AC 53 and which properly balance the policy issues in play. First, Lord Bingham of Cornhill's liability principle in *Van Colle v Chief Constable of the Hertfordshire Police* [2009] AC 225 does not impose an unrealistic resources burden on the police and reflects the parallel duty under article 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The application of that test on future

fact scenarios and the constituent parts of the test will be subject to incremental development over time

in the tradition of the common law. Secondly and alternatively the test put forward by Tofaris and Steel in “Police Liability in Negligence for Failure to Prevent Crime: Time to Rethink”, University of Cambridge Faculty of Law Research Paper No 39/2014 (July 2014), pp 23, 29—30, is adopted. The additional benefit of that test over the liability principle is that it contains further control mechanisms. The third option, suggested by Lord Phillips of Worth Matravers CJ in the *Van Colle* case, para 100, is not adopted because Lord Phillips CJ has stripped out the control factors from Lord Bingham's liability principle and it is too broad. The *Hill* immunity should be abolished and replaced with a liability principle based on the tests of Lord Phillips CJ and Lord Bingham, adapted as follows. Liability should attach to a negligent act or omission where the police are aware of a serious and special risk of physical harm to the person in respect of an individual or the member of an identifiable and delineated class, “special” meaning that the person concerned is particularly vulnerable to the risk in question, because under those circumstances they owe a duty to that person or identifiable class to take such action as is in all the circumstances reasonable to protect that person. Further control mechanisms could be added by reference to the level of breach required. [Reference was made to the egregious breach approach/faute lourd and to the Law Commission's proposals in *Administrative Redress: Public Bodies and the Citizen* (2010) (Law Com No 322).]

The present case is not one of pure omission. It concerns a series of positive acts: see the analysis of Tofaris and Steel, pp 5—9. Omissions liability is not unique to the police; child abuse cases involve third party perpetrators, a failure to assess risk or not identify raises exactly the same problems. The police are, currently, getting special treatment. Comparative law (such as the Canadian cases) imposes positive duties to act: see *Hill v Hamilton-Wentworth Regional Police Services Board* [2007] 3 SCR 129. Any limitation to the current common law on omissions is very limited. It is wrong to say that there is always no liability for pure omissions: see, for example, parent/child, teacher/pupil.

An assumption of responsibility creates an exception to the decision in the *Hill* case [1989] AC 53. The claimants' case is that an assumption of responsibility involves a person or public authority voluntarily assuming or undertaking a series of steps on which the other party can reasonably rely. Express words are not required (see *An Informer v A Chief Constable* [2013] QB 579): an assumption of responsibility can be inferred from all of the circumstances. Applying that test, the police have assumed responsibility to respond adequately to a 999 call; that means that they need to deal with a request for emergency assistance without delay; alternatively or additionally that involves handling the call adequately, passing on information accurately and calling back. In the present case there was clear assumption of responsibility because the defendant police forces separately and together accepted the 999 call and, looked at objectively and taking account of all the circumstances, assumed responsibility to respond competently and timeously to the 999 call. The acceptance and thereafter individualisation is the trigger for liability.

It is accepted that some element of reliance is required, but not detrimental reliance as argued by the defendants, although that was present

on the facts. Alternatively there is still potential liability based on the reliance the deceased placed on the 999 service to do what the call handler said she would do (pass on information/call back). The citizen is plainly entitled to place reliance on the police in those circumstances. That is the purpose of the police and of the 999 service. To hold otherwise would be tantamount to encouraging citizens to take the law into their own hands.

There is no magic about who makes the call, so the trigger for the assumption of responsibility can come via a third party, although that is plainly fact sensitive, as long as the relevant criteria of assumption of responsibility are satisfied. For a clear example see *Kent v Griffiths* [2001] QB 36, in which it was a doctor, rather than the claimant, who telephoned 999.

Caoilfhionn Gallagher and ***Conor McCarthy*** (instructed by *Hopkin Murray Beskine*) for the third intervener, by written submissions only.

LORD KERROF TONAGHMORE JSC

Introduction

141 Three principal reasons have been given for the conclusion that liability should not attach to the police in this case. The first is that a well-established line of authority dating back to (at least) *Hill v Chief Constable of West Yorkshire* [1989] AC 53 precluded such liability. The second is grounded on what are said to be general principles of common law. And the third depends on considerations of public policy.

Authorities

142 In the *Hill* case Lord Keith of Kinkel held that at common law police officers owed the general public a duty to enforce the criminal law but there were "no specific requirements as to the manner in which the obligation is to be discharged": p 59. On that account an intention to create a duty towards individual members of the public could not be readily inferred. But such a duty could, in appropriate circumstances, arise. It was not enough that police could or should have foreseen that harm to an individual would occur. A further ingredient was required. The nature of that necessary ingredient varied from case to case. In *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004 the ingredient was the special relationship that existed between, on the one hand, prison officers and the Borstal boys who carried out the damage to the boats and, on the other hand, between the prison officers and the owners of the yachts. The prison officers had brought the Borstal boys into the locality where the yachts were moored. In that way they had created a potential situation of danger for the owners of the yacht.

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These circumstances supplied the necessary extra ingredient which allowed a finding of liability to be made. No such features were present in the *Hill* case [1989] AC 53, 62C, per Lord Keith. As he pointed out, the perpetrator in the *Hill* case was not in police custody at any material time and the victim was "one of a vast number of the female general public who…was at no special distinctive risk…unlike the owners of [the] yachts" in the *Dorset Yacht* case.

143 Lord Keith went on to suggest that there was another reason, grounded in public policy, that an action for damages in negligence should not lie against the police. As Lord Toulson JSC has pointed out, Lord Keith expressed that as a matter of immunity. I will consider the public policy arguments in a later section of this judgment and will mention in passing the dichotomy that has arisen as to whether police should not be held liable for the manner in which they discharge their duties because of an immunity or because an extra ingredient is required beyond foreseeability in order to establish negligence against them. In the meantime, it can be clearly stated that Lord Keith-s formulation of the primary basis on which the plaintiff failed was that an extra ingredient such as was present in the *Dorset Yacht* case [1970] AC 1004 was missing in the *Hill* case [1989] AC 53.

144 This extra ingredient has been described as a feature which creates a sufficient proximity of relationship between the claimant and the defendant. What "proximity of relationship" connotes has, perhaps understandably, not been precisely defined. It appears to me that it should consist of these elements: (i) a closeness of association between the claimant and the defendant, which can be created by information communicated to the defendant but need not necessarily come into existence in that way; (ii) the information should convey to the defendant that serious harm is likely to befall the intended victim if urgent action is not taken; (iii) the defendant is a person or agency who might reasonably be expected to provide protection in those circumstances; and (iv) he should be able to provide for the intended victim's protection without unnecessary danger to himself. This might, at first sight, appear to approximate to the "liability principle" articulated by Lord Bingham of Cornhill in *Van Colle v Chief Constable of the Hertfordshire Police*; *Smith v Chief Constable of Sussex Police (Secretary of State for the Home Department intervening)* [2009] AC 225. For reasons that I will give later, I consider that there is a distinct difference between the two.

145 This test is criticised on the basis that it is circular. But this is true of any test of proximity and of many other bases of liability, as in, for instance, the test of proportionality—something is disproportionate if it fails to strike a proportionate balance. The notion that any proximity standard inevitably involves an element of circularity is not