IN THE SUPREME COURT OF JUSTICE **Claim No.**

(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

SKELETON ARUGMENT ON BEHALF OF THE DEFENDANTS

ISSUES:

1. 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. Furthermore, whether he can recover all the heads of loss he seeks, or only some of them, and, if only some, which ones.

2. Whether Mrs Patient and Mrs Zed were owed a duty of care or whether the Trust's strike out applications in relation to their claims should succeed.

FACTS:

3. On the 14th of November 2020, Mr Patient was involved in a rail crash wholly caused by the negligence of the Wild West Railway Company Limited, which it admitted to soon afterwards.

4. At the time of the crash Mr Patient was 19 years old, born on 1st January 2001, and had worked as a well-known and well-paid TV actor, free from any serious physical or mental illness.

5. After the rail crash, Mr Patient developed PTSD. Despite treatment, the PTSD got worse. He could not work, began to take illegal drugs, and he returned to live with his mother.

6. Following an incident where he threatened his mother, Mrs Patient, with violence, Mr Patient was detained for a short period under section 2 of the Mental Health Act 1983 and was released for treatment in the community.

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

8. On the 1st of June 2023, Mr Patient attempted to kill his mother, ran into the street and killed Mr Zed, someone who was not known to him or the Trust before the killing. Mr Zed's wife came upon the scene of the attack and saw Mr Zed as he was put into an ambulance and taken to hospital. He died 10 hours later.

9. After Mr Patient was arrested and charged with the attempted murder of his mother and the murder of Mr Zed, he was transferred to a psychiatric hospital.

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

11. Mr Patient was psychiatrically very unwell after the events. For the purposes of the criminal trial, however, he was able, with the assistance of his lawyers, to decide not to plead guilty to attempted and actual manslaughter by reason of diminished responsibility, but to plead that he was insane at the time of the attacks within the second limb of *M'Naghten* (i.e. he knew what he was doing but not that what he was doing was morally and legally wrong). That plea of insanity was supported by psychiatric evidence. Having heard the evidence of 3 psychiatrists, the jury accepted that plea and so Mr Patient was found not guilty by reason of insanity. He was therefore detained under sections 37 and 41 of the Mental Health Act 1983 and he will not be released for some time. Mr Patient was detained under sections 37 and 41 of the Mental Health Act 1983 and will not be released for some time.

12. Mr Patient seeks damages from the Wild West Railway Company and the Trust including;

    a. general damages for pain, suffering and loss of amenity;

    b. damages for lost earnings for before and after the killing; and

    c. for care from the point when he is released from psychiatric hospital.

13. 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. He also seeks an indemnity against any claim brought against him by Mrs Zed as if her claim against the Trust fails, she will seek to recover her losses from Mr Patient.

14. Mrs Patient contends that the Trust owed her a duty of care. She sues the Trust for;

a. failing to recall and detain Mr Patient;

b. for her own pain and suffering; and

c. for the care she now needs because she remains very disabled by the injuries she suffered.

15. The widow of Mr Zed also contends that the Trust owes her a duty of care and sues it for;

a. the losses suffered by his estate under the Law Reform (Miscellaneous Provisions) Act 1934; and

b. for her own loss of dependency (both services and earnings) under the Fatal Accidents Act 1976.

16. The Wild West Railway Company and the Trust applied to strike out Mr Patient's claim from the point of the attempted murder and murder. These applications failed at first instance, and the Court of Appeal upheld those decisions.

17. The Trust has also applied to strike out Mrs Patient's and Mrs Zed's claims on the basis that it did not owe them a duty of care. At first instance the strike out applications succeeded and this was unanimously upheld by the Court of Appeal.

FIRST GROUND:

18. There is no binding precedent on the issues before the Court under the First Ground.

19. The only previous case to consider these issues substantively, *Lewis-Ranwell v G4S Health Services (UK) Ltd and others* [2024] EWCA Civ 138, [2024] 2 WLR 1377 was decided by a 2:1 majority in the Court of Appeal and, as of May 2024, was granted permission to appeal to the Supreme Court.

20. It is respectfully submitted that the First Claimant's case does not meet the high threshold of overcoming the relatively recent decisions of *Henderson v Dorset Healthcare University NHS Foundation Trust* [2020] UKSC 43; [2021] AC 563 and *Gray v Thames Train Ltd* [2009] UKHL 33; [2009] 1 A.C. 1339.

<u>The First Claimant should not recover damages following from his unlawful killing:</u>

21. It is submitted that the First Claimant's reliance upon the second *M'Naghten* limb indicates a degree of responsibility for the unlawful killing, notwithstanding that this fell below the criminal *mens rea*. See *Lewis-Ranwell v G4S Health Services (UK) Ltd and others* [2024] EWCA Civ 138, [2024] 2 WLR 1377, [125]-[126] (Lady Andrews).

22. That the disposal used was not penal bears no relevance, as in *Henderson v Dorset Healthcare University NHS Foundation Trust* [2020] UKSC 43; [2021] AC 563, [109] (Lord Hamblen JSC).

23. The Court is invited to consider that the only justification for a bright line rule distinguishing 'not guilty by insanity' cases from 'manslaughter with diminished responsibility' cases rests in arbitrary legal formalism, as was expressed by Lady Andrews in *Lewis-Ranwell v G4S Health Services (UK) Ltd and others* [2024] EWCA Civ 138 at [123].

24. A formulation of the *ex turpi causa* rule based on turpitude is unsound. "Turpitude" implies an assessment of the *degree* of personal responsibility, which was not the basis of the Court's decision in *Gray* or *Henderson.* See *Lewis-Ranwell v G4S Health Services (UK) Ltd and others* [2024] EWCA Civ 138, [75] (Lord Underhill).

25. The Court is invited to consider that the same justification for denying recovery in diminished responsibility cases applies equally to insanity cases. See *Lewis-Ranwell v G4S Health Services (UK) Ltd and others* [2024] EWCA Civ 138, [2024] 2 WLR 1377, [136] (Lady Andrews).

26. Public policy considerations in preventing remuneration for unlawful killers should not be considered at the granular level. The Court is invited to place significant weight on the policy impacts of a distinguishment between the present case and the preceding position as it stands. See *Henderson v Dorset Healthcare University NHS Foundation Trust* [2020] UKSC 43; [2021] AC 563, [129], [131]; [134]-[137] (Lord Hamblen JSC).

<u>Policy as preventative of the First Claimant's recovery of the heads of loss sought:</u>

27. The First Claimant's unlawful killing and attempted killing were directly causative of his inability to make further earnings. Liability on a counter-factual basis is precluded. See *Gray v Thames Train Ltd* [2009] UKHL 33; [2009] 1 A.C. 1339, [48]-[49] (Lord Hoffmann).

28. Even though the First Claimant did not meet the standard of criminal *mens rea*, he chose to plead on the basis that he knew what he was doing, and was therefore responsible to some degree. Applying *Gray v Thames Train Ltd* [2009] UKHL 33; [2009] 1 A.C. 1339, [78] (Lord Rodger of Earlsferry), the civil courts ought to proceed on that basis.

29. Lord Hoffmann's "wider rule" precludes recovery of the other heads of loss, see *Gray v Thames Train Ltd* [2009] UKHL 33; [2009] 1 A.C. 1339 [55] and *Henderson v Dorset Healthcare University NHS Foundation Trust* [2020] UKSC 43; [2021] AC 563, [148] (Lord Hamblen JSC).

SECOND GROUND:

30. The Second Defendant's strike out applications against the Second and Third Claimant's claims should succeed.

Public authorities do not owe a duty of care to prevent the occurrence of harm:

31. It is respectfully submitted that the Second Defendant does not owe the Second or Third Claimant a duty of care to prevent harm caused by a third party.

32. In the Supreme Court case of *Poole Borough Council v GN and another* [2019] UKSC 25, [2019] 2 W.L.R. 1478 (*Poole*), Lord Reed upheld the general principle that there is no liability for the wrongdoing of a third party, even if that wrongdoing is reasonably foreseeable, unless one of the four outlined exceptions is met. [76]

33. The exceptions are not fulfilled because;

    a. the Second Defendant did not assume a responsibility to protect the Second or Third Claimant. Although the Second Claimant voiced her anxiety to the Second Defendant, Lord Reed stated in *Poole* that voicing an anxiety does not amount to reliance. Consequently, there is no assumption of responsibility; [79] [81]

    b. the Second Defendant plainly did not prevent another from preventing the harm caused to either the Second or Third Claimant;

    c. the Second Defendant's level of control over the First Claimant was insufficient to subject them to a duty of care. Section 17E of the Mental Health Act 1983 confers a discretionary power to the Second Defendant to recall individuals alongside two, as the case of *Palmer v Tees HA* [1999] EWCA Civ 1533, [2000] P.I.Q.R P1 found at [12], considerably restrictive threshold conditions. Although the Second Defendant had the power to recall the First Claimant, Lord Reed stated in *Poole* that public authorities do not owe a common law duty of care merely because they have statutory duties which could prevent someone from suffering harm; [65]

    d. the Second Defendant's status does not obligate them to protect the Second or Third Claimant. Lord Reed stated in the case of *Robinson v Chief Constable of West Yorkshire* [2018] UKSC 4, [2018] A.C. 736 (*Robinson*) that public authorities are subject to the same common law duties as private individuals. Consequently, the Second Defendant does not have a unique status that would obligate them to protect either the Second or Third Claimant. [32]

34. Therefore, the Second Defendant does not owe a duty of care to either the Second or Third Claimant.

A duty of care would encourage NHS Trusts to exercise its powers defensively:

35. It is respectfully submitted that the power to recall should not obligate the Second Defendant to owe a duty of care in order to prevent them from exercising it defensively.

36. In the case of *Robinson,* Lord Mance upheld the policy consideration that it is within the public interest to avoid public authorities utilising their powers in a defensive manner to avoid litigation. It was further held that this argument was too considered, authoritative, and powerful to be consigned to history. [110] [112] – [113]

37. If the Second Defendant is found to have owed a duty of care, it would increase the threat of litigation to NHS Trusts, which would encourage them to exercise its power defensively rather than for its primary function, which is outside the public interest.

38. The Second Defendant should therefore not owe a duty of care to either the Second or Third Claimant.

Conclusions:

39. For the reasons set out above, the Defendants respectfully submit that:

    a. Mr Patient should not recover damages from the point of his unlawful killing of Mr Zed and attempted unlawful killing of Mrs Patient. The heads of loss claimed ought to be precluded under both/either the narrower or wider construction of the *ex turpi causa* rule.

    b. The Trust does not have a duty of care towards Mrs Patient or Mrs Zed, and therefore their strike out applications should succeed.

JAMES CAIRNS (LEADING COUNSEL)
BERENGER VOEGT (JUNIOR COUNSEL)
17 JUNE 2024

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INDEX OF AUTHORITY

House of Lords

Gray *v* Thames Trains Ltd and another

[2008] EWCA Civ 713

[2009] UKHL 33

2008	Feb 4, 5; June 25	Sir Anthony Clarke MR, Tuckey, Smith LJJ
2009	March 24, 25; June 17	Lord Phillips of Worth Matravers, Lord Hoffmann, Lord Scott of Foscote, Lord Rodger of Earlsferry, Lord Brown of Eaton-Under-Heywood

Negligence — Causation — Loss of earnings — Claimant injured in railway accident caused by defendants' negligence — Claimant suffering post-traumatic stress disorder causing severe depression and psychological changes — Claimant killing man whilst suffering from disorder and pleading guilty to manslaughter due to diminished responsibility — Damages for loss of earnings resulting from post-traumatic stress disorder — Whether claim for loss of earnings sustained after date of killing barred on grounds of public policy — Whether detention breaking chain of causation — Whether other heads of claim barred on grounds of public policy from date of killing

The claimant was a passenger on a train involved in a major railway accident. He suffered post-traumatic stress disorder which he alleged had been caused by the accident. Whilst suffering from that disorder he killed a man. His plea of guilty to manslaughter on the ground of diminished responsibility was accepted by the Crown and he was ordered to be detained in a hospital under sections 37 and 41 of the Mental Health Act 1983. The claimant brought an action in negligence against the defendants, a train operator and the company responsible for the rail infrastructure. The relief claimed included damages for loss of earnings after his detention, for loss of liberty and damage to reputation, and for feelings of guilt and remorse consequent on the killing, all of which he claimed had resulted from the post-traumatic stress disorder caused by the defendants. He also sought an indemnity against any claims which might be brought against him by dependants of the man he had killed. The defendants admitted negligence but claimed, in reliance on the maxim ex turpi causa non oritur actio, that public policy precluded the recovery of losses incurred after the date of the manslaughter. At the outset of the trial the judge ruled that since the claim was reliant on the commission of a serious offence by the claimant the maxim precluded recovery for both loss of earnings and general damages after and in consequence of the killing. On the claimant's appeal, the Court of Appeal held that the claimant was precluded from claiming general damages but not loss of earnings.

On the defendants' appeal and the claimant's cross-appeal—

Held, (1) allowing the appeal, that, by reason of the need to avoid inconsistency in the justice system, as a manifestation of the public policy expressed by the maxim ex turpi causa non oritur actio a civil court would not award damages to compensate a claimant for an injury or disadvantage which the criminal courts had imposed on him by way of punishment for a criminal act for which he was responsible; that such policy therefore precluded a claim for damages for loss of earnings after imprisonment for an offence notwithstanding that the tortious act of the defendant had led the claimant to commit that offence, since the criminal court by its sentence had found the claimant to have had personal responsibility for the crime and it would be inconsistent for a civil court then to compensate him for the consequences of that act, even if he had acted with diminished responsibility; that, moreover, the

A inconsistency of requiring someone to be compensated for a sentence imposed because of his own personal responsibility for a criminal act. The Court of Appeal said nothing about this aspect of the matter.

45 The Court of Appeal, ante, para 51 produced an imaginary example which appeared to them to reveal an anomaly in the rule stated in *Clunis's* case:

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

46 I find this example puzzling. There seems to me no reason of public policy why the dependants of the man pushed off the building should not recover damages against the tortfeasor if (as the example assumes) there was a causal connection between the tort and his death and it is regarded as having been a foreseeable consequence. The dependants are not seeking D compensation for a consequence of the victim's own crime, still less for the consequence of a sentence imposed for that crime. The victim did not commit any crime at all. As for the claim by the dependants of the suicide, there might until *Corr's* case [2008] AC 884 have been some doubt about whether they could recover, but that has now been settled. So I cannot see any anomaly. It seems to me to illustrate the fact that the Court of Appeal E took the rule in *Clunis's* case to be based upon some eccentric view of causation rather than public policy.

47 Despite holding that the rule applied, the Court of Appeal said that Mr Gray was entitled to compensation for loss of earnings after his arrest for the killing. They said, at para 20, that the question was "whether the relevant loss is inextricably linked with the claimant's illegal act" and came to the conclusion, at para 22, that it was not:

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

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

49 It is true that even if Mr Gray had not committed manslaughter, his earning capacity would have been impaired by the post-traumatic stress disorder caused by the defendants' negligence. But liability on this

counter-factual basis is in my opinion precluded by the decision of this House in *Jobling v Associated Dairies Ltd* [1982] AC 794. In that case, the plaintiff suffered an injury caused by his employer's breach of statutory duty. It caused him partial disablement which reduced his earning capacity. Three years later he was found to be suffering from unrelated illness which was wholly disabling. The question was whether he could claim for the disablement which hypothetically he would have continued to suffer if it had not been overtaken by the effects of the supervening illness. The answer was that he could not. The fact that he would in any event have been disabled from earning could not be disregarded. Likewise in this case, in assessing the damages for the effect of the stress disorder upon Mr Gray's earning capacity, the fact that he would have been unable to earn anything after arrest because he had committed manslaughter cannot be disregarded.

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

51 I must therefore examine a wider version of the rule, which was applied by Flaux J. This has the support of the reasoning of the Court of Appeal in *Clunis's* case [1998] QB 978 as well as other authorities. It differs from the narrower version in at least two respects: first, it cannot, as it seems to me, be justified on the grounds of inconsistency in the same way as the narrower rule. Instead, the wider rule has to be justified on the ground that it is offensive to public notions of the fair distribution of resources that a claimant should be compensated (usually out of public funds) for the consequences of his own criminal conduct. Secondly, the wider rule may raise problems of causation which cannot arise in connection with the narrower rule. The sentence of the court is plainly a consequence of the criminality for which the claimant was responsible. But other forms of damage may give rise to questions about whether they can properly be said to have been caused by his criminal conduct.

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

53 This decision seems to me based upon sound common sense. The question, as suggested in the dissenting judgment of Sedley LJ, is how

A the case should be distinguished from one in which the injury is a consequence of the plaintiff's unlawful act only in the sense that it would not have happened if he had not been committing an unlawful act. An extreme example would be the car which is damaged while unlawfully parked. Sir Murray Stuart-Smith, at para 70, described the distinction:

> "The operation of the principle arises where the claimant's claim is
B founded upon his own criminal or immoral act. The facts which give rise to the claim must be inextricably linked with the criminal activity. It is not sufficient if the criminal activity merely gives occasion for tortious conduct of the defendant."

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

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

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LORD SCOTT OF FOSCOTE

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

LORD RODGER OF EARLSFERRY

57 My Lords, up until October 1999 Mr Kerrie Gray led a perfectly ordinary life: he was in regular employment, was in a long-term relationship

77 In *British Columbia v Zastowny* [2008] 1 SCR 27, 38, para 23, Rothstein J treated the need to preserve the integrity of the justice system, by preventing inconsistency in the law, as a matter of judicial policy that underlay the ex turpi causa doctrine. In other words, in the circumstances of that case the application of the ex turpi causa doctrine helped to promote the more fundamental legal policy of preventing inconsistency in the law. That such a policy exists is beyond question. In *Zastowny* and the preceding cases, the need was to ensure that the civil and criminal courts were consistent in their handling of the plaintiff's criminal conduct and its consequences. But that is simply one manifestation of a desirable attribute of any developed legal system. In classical Roman law the jurists were at pains to ensure that the various civil law and praetorian remedies worked together in harmony in relation to the same facts. One of the hallmarks of a good modern code is that its provisions should interrelate and interact so as to achieve a consistent application of its overall policy objectives. Complete harmony may well be harder to achieve in an uncodified system—hence the constant attention paid by the classical jurists to the problem—since different remedies will have developed at different times and in response to particular demands. But the gradual drawing together of law and equity in English law illustrates the same pursuit of harmony and consistency. And, certainly, the courts are conscious that inconsistencies should be avoided where possible. So, for instance, a court should not award damages in tort if a contractual claim based on the same events would be excluded by some term in the contract between the parties. Similarly, a court should not give a remedy on the ground of unjust enrichment if this would be tantamount to enforcing a contract which the law would treat as void in the circumstances. Likewise, in the present case, when considering the claim for loss of earnings, a civil court should bear in mind that it is desirable for the criminal and civil courts to be consistent in the way that they regard what the claimant did. As Samuels JA observed in *State Rail Authority of New South Wales v Wiegold* 25 NSWLR 500, 514, failure to do so would generate the sort of clash between civil and criminal law that is apt to bring the law into disrepute.

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

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Supreme Court

Henderson *v* Dorset Healthcare University NHS Foundation Trust

[2018] EWCA Civ 1841

B

[2020] UKSC 43

2018 July 10, 11; Aug 3 — Sir Terence Etherton MR, Ryder, Macur LJJ

2020 May 11, 12; Oct 30 — Lord Reed PSC, Lord Hodge DPSC, Lady Black, Lord Lloyd-Jones, Lady Arden, Lord Kitchin, Lord Hamblen JJSC

C

Public policy — Illegality — Civil claim — Mental health patient killing mother during psychotic episode — Patient pleading guilty to manslaughter on ground of diminished responsibility and detained in secure hospital — Patient bringing claim in negligence against care provider — Damages sought for losses consequent on manslaughter and patient's subsequent detention — Whether claim barred on grounds of illegality — Whether claim barred where claimant lacking any significant responsibility for illegal act

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The claimant, who had a history of schizophrenia with paranoia, killed her mother by stabbing her during a psychotic episode. At the time of the killing she was under the care of a community mental health team managed and operated by the defendant NHS trust. She pleaded guilty to manslaughter on the ground of diminished responsibility and was detained in a secure hospital pursuant to a hospital

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order with restrictions made under sections 37 and 41 of the Mental Health Act 1983. The claimant brought an action in negligence against the trust, contending that she would not have killed her mother if it had not been for the trust's breach of duty in failing to return her to hospital when her condition deteriorated. She sought damages for loss of liberty and loss of amenity, consequent on her detention, and damages for having developed a depressive illness and lost her share in her mother's estate pursuant to section 1 of the Forfeiture Act 1982, consequent on her having

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killed her mother. The trust admitted breach of duty but contended that since the damages claimed were the consequence of the sentence imposed on her by the criminal court and/or her criminal act of manslaughter, they were irrecoverable on illegality or public policy grounds. The judge dismissed the claim, holding that the facts were materially identical to those in *Gray v Thames Trains Ltd*, in which the House of Lords had held that damages for losses which resulted from a sentence

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imposed for a criminal offence or from an intentional criminal act for which the claimant had been held responsible were irrecoverable on public policy grounds. The Court of Appeal dismissed the claimant's appeal. The claimant appealed on the grounds that *Gray* was either distinguishable as having only concerned claimants with significant personal responsibility for their crimes or should be overruled as being incompatible with the approach to illegality adopted by the Supreme Court in *Patel v Mirza* which required a court to have reference to a trio of considerations,

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namely (i) whether the underlying purpose of the prohibition which had been transgressed would be enhanced by denial of the claim, (ii) whether there existed any other relevant public policy on which the denial of the claim might have an impact and (iii) whether denial of the claim would be a proportionate response to the illegality.

On the appeal—

A 103 As to how it should be determined whether a claimant bears no significant personal responsibility, it is submitted that this is essentially a matter of fact for the trial judge hearing the civil claim. If, however, a test is required then it should be: "did the claimant lack capacity to conform his/her behaviour to the demands imposed by the criminal law?"

104 These are formidable arguments persuasively presented by Mr Bowen QC on behalf of the appellant and supported by some academic B commentary, in particular the writings of Dr Dyson. I am, however, unable to accept that they meet the high hurdle of justifying departure from the House of Lords' relatively recent decision in *Gray* [2009] AC 1339.

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 C 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* [1998] QB 978, 989, "he must be taken to have known what he was doing and that it was wrong".

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

107 Whilst the wider rule may not involve, as the application of the narrower rule does, the law giving with one hand what it takes away with the other, it does involve, as Lord Hughes JSC said in *Hounga v Allen* [2014] 1 WLR 2889, para 55, the law condoning "when facing right what it condemns when facing left".

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

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

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

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

125 As explained above, this stage involves identification of policy reasons which support denial of the claim. Considering first general policy considerations rather than the purpose of the prohibition, for the reasons B 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 C 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 D 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 E 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 F 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 G 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 H manslaughter cases. Looking at the matter more broadly there may well be some deterrent effect in a clear rule that unlawful killing never pays and any such effect is important given the fundamental importance of the right to life. To have such a rule also supports the public interest in public condemnation and due punishment.

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

132 The appellant suggests four countervailing public policies.

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

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

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

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

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

(c) Stage (c)—whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is for the criminal courts

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

139 As to the seriousness of the conduct, this was a very serious offence. It involved culpable homicide committed with murderous intent. As was acknowledged on behalf of the appellant, unlawful killing is the most serious conduct imaginable. The appellant knew what she was doing and that it was legally and morally wrong.

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

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

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

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

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

(iv) Conclusion on issue (2)

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

VIII Issue (3)—whether all heads of loss claimed are irrecoverable

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

147 In oral submissions there appeared to be some retreat from this position, although the only head of loss addressed in any detail was that relating to the Forfeiture Act 1982.

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

stated to be the consequence to the appellant of the killing of her mother (heads (i) and (iii)).

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

IX Conclusion

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

Appeal dismissed.

COLIN BERESFORD, Barrister

A Court of Appeal

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

[2024] EWCA Civ 138

2023 June 20, 21;
B 2024 Feb 20

Dame Victoria Sharp P, Underhill, Andrews LJJ

Public policy — Illegality — Civil claim — Claimant tried for murder but found not guilty by reason of insanity — Claimant bringing claim in negligence in respect of his care prior to killings — Claimant seeking to recover for damage suffered by him as consequence of killings — Whether claim barred on grounds of illegality — Trial of Lunatics Act 1883 (46 & 47 Vict c 38), s 2(1) — Criminal Procedure
C *(Insanity) Act 1964 (c 84), s 5*

The claimant, who had a history of mental health problems, was arrested on suspicion of causing grievous bodily harm but released on police bail after being seen by medical professionals. Shortly thereafter, while in a delusional state, the claimant attacked and killed three men in their homes, resulting in him being charged with murder. At trial he was found not guilty by reason of insanity, pursuant to section 2
D of the Trial of Lunatics Act 1883[1], on the basis that although he had known the nature and quality of his acts he had not known that what he was doing was wrong. Acting in accordance with section 5 of the Criminal Procedure (Insanity) Act 1964[2] the court ordered that he be detained in hospital. The claimant brought a claim in negligence against two healthcare providers, the police authority and the local authority seeking 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
E consequence of his violence towards others in the days preceding the killings. The judge refused an application by the healthcare providers and the local authority to strike out the claim on the ground of illegality.

On appeal by the healthcare providers and the local authority—

Held, dismissing the appeal (Andrews LJ dissenting), that where an accused was found not guilty of murder by reason of insanity in respect of his actions, pursuant to section 2 of the Trial of Lunatics Act 1883, the doctrine of illegality would not bar a
F claim brought by the accused to recover for damage that was a consequence of those actions; that, in particular, allowing such a claim (i) would not give rise to inconsistency with the criminal law, since an accused who was found not guilty by reason of insanity pursuant to section 2 of the 1883 Act was not treated by the criminal law as being responsible for his actions, (ii) would not give rise to inconsistency within the civil law, since the question of the accused's liability in tort to his victims (for which insanity was no defence) was self-evidently different from
G the question of the liability of others towards the accused, (iii) would not undermine public confidence in the law, since the considered view of right-thinking people would be that someone who was insane should not be debarred from compensation for the consequences of their doing an unlawful act which they did not know was

[1] Trial of Lunatics Act 1883, s 2(1): see post, para 12.

[2] Criminal Procedure (Insanity) Act 1964, s 5: "(1) This section applies where— (a) a special
H verdict is returned that the accused is not guilty by reason of insanity; or (b) findings have been made that the accused is under a disability and that he did the act or made the omission charged against him. (2) The court shall make in respect of the accused— (a) a hospital order (with or without a restriction order); (b) a supervision order; or (c) an order for his absolute discharge. (3) Where— (a) the offence to which the special verdict or the findings relate is an offence the sentence for which is fixed by law, and (b) the court have power to make a hospital order, the court shall make a hospital order with a restriction order (whether or not they would have power to make a restriction order apart from this subsection) . . ."

A 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 B not psychotic. Lord Hamblen JSC 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 JSC addresses the claimant's case of incompatibility with *Patel v Mirza* under three headings, which I take in C turn.

77 Heading (i) is "Whether the reasoning in *Gray* cannot stand with the approach to illegality adopted by the Supreme Court in *Patel v Mirza*" (paras 89–96). Lord Hamblen JSC 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.

D 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 JSC 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 E 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 F removed. It was not an insanity case and so, as Beldam LJ pointed out in *Clunis* [1998] QB 978, 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 G 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 v Mirza* leads to a different outcome". Lord Hamblen JSC addresses those considerations in turn.

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

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 defendants 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 defendants, 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.

ANDREWS LJ

121 I have had the advantage of reading in draft the judgment of Underhill LJ. 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 *Hunter Area Health Service v Presland* (2005) 63 NSWLR 22 (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 defendants 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 v Camden and Islington Health Authority* [1998] QB 978, *Gray v Thames Trains Ltd* [2009] AC 1339 and *Henderson v Dorset Healthcare University NHS Foundation Trust* [2021] AC 563.

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 defendant would involve pleading and relying upon acts which were illegal and to which civil liability attaches. As Santow JA observed in *Presland* at para 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* [1952] 1 All ER 925 and *Dunnage v Randall* [2016] QB 639. Indeed, were that not so, there would be nothing for which he could seek an indemnity from the defendants. 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

A view that the fact that the defendant knew that what she was doing was morally and legally wrong was central to Lord Hamblen JSC'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 B Hamblen JSC's analysis at para 112. The focus was very much on the nature of the act itself. Indeed Lord Hamblen JSC refers to the fact that by her guilty plea the defendant in that case accepted that she possessed the mental prerequisites of criminal responsibility for murder, namely an intention to kill or to cause grievous bodily harm (as the claimant did in the present case). He then says that in that case, her psychiatrists *also* agreed that she knew that what she was doing was wrong. That appears to me to be something he C is treating as an additional factor rather than the essential factor behind the policy.

134 In para 119, when discussing the consistency principle and the public confidence principle, Lord Hamblen JSC 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, D 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.)

E **135** He went on to say, in para 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 defendants. 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, F 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 JSC in *Henderson* as supporting denial of the claim are equally present here. The unlawful acts were of the same nature and gravity G 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 JSC 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 H 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" (para 131). I respectfully agree.

Poole Borough Council v GN (through his litigation friend "The Official Solicitor") and another

Positive/Neutral Judicial Consideration

Court
Supreme Court

Judgment Date
6 June 2019

On appeal from: [2017] EWCA Civ 2185

SC

[2019] UKSC 25, 2019 WL 02373146

before Lady Hale , President Lord Reed , Deputy President Lord Wilson Lord Hodge Lady Black

6 June 2019

Heard on 16 and 17 July 2018

Representation

Appellants Elizabeth-Anne Gumbel QC Iain O'Donnell Duncan Fairgrieve Jim Duffy (Instructed by Leigh Day & Co).
Respondent Lord Faulks QC Paul Stagg Katie Ayres (Instructed by Wansbroughs Solicitors (Devizes)).
1st Intervener (The AIRE Centre) Andrew Bagchi QC Philip Havers QC Hannah Noyce (Instructed by Allen & Overy LLP).
2nd and 3rd Intervener (Article 39 and Care Leavers Association) Caoilfhionn Gallagher QC Aswini Weereratne QC Nick Brown (Instructed by Simpson Millar LLP).
4th Intervener (Coram Children's Legal Centre) Deirdre Fottrell QC Martin Downs Tom Wilson (Instructed by Coram Children's Legal Centre).

Judgment

Lord Reed: (with whom Lady Hale, Lord Wilson, Lord Hodge and Lady Black agree)

social worker's conclusion that the mother would be unable to protect the child from her partner, the child was taken into compulsory care and placed with foster parents, where she remained for almost a year. Eventually the mother obtained sight of a transcript of the interview, from which it was apparent that the child had not identified her partner as the abuser. She then informed the local authority, and the child was returned to her care.

38. It should be noted at the outset that the *Bedfordshire* and *Newham* cases were radically different from one another. In the former case, the allegation was that the council had failed to protect the children from harm inflicted by third parties. The question therefore arose whether there were circumstances, such as an assumption of responsibility to protect the children from harm, which placed the council under a common law duty to protect them. That question did not arise in the *Newham* case. There, the allegation was that the council's employee had himself harmed the child, by negligently causing her to be removed from her home and detained against her will, with the result that she suffered a psychiatric disorder. Unlike in the *Bedfordshire* case, there was no need to establish an assumption of responsibility towards the child: that is not a necessary ingredient either of the tort of wrongfully depriving a person of her liberty, or of the tort of negligently inflicting a psychiatric injury. No such distinction was however drawn between the two claims.

39. Lord Browne-Wilkinson gave the leading speech, with which Lord Jauncey of Tullichettle, Lord Lane and Lord Ackner agreed. He began by dispelling confusion about some aspects of the law governing the liability of public authorities, concluding at pp 734-735 that "in order to found a cause of action flowing from the careless exercise of statutory powers or duties, the plaintiff has to show that the circumstances are such as to raise a duty of care at common law. The mere assertion of the careless exercise of a statutory power or duty is not sufficient." He went on to explain at p 736 that the exercise of a statutory discretion could not be impugned unless it was so unreasonable as to fall outside the ambit of the discretion conferred:

> "It is clear both in principle and from the decided cases that the local authority cannot be liable in damages for doing that which Parliament has authorised. Therefore if the decisions complained of fall within the ambit of such statutory discretion they cannot be actionable in common law. However if the decision complained of is so unreasonable that it falls outside the ambit of the discretion conferred upon the local authority, there is no a priori reason for excluding all common law liability."

In these respects, Lord Browne-Wilkinson's approach accords with more recent authorities, as well as the older authorities to which he referred.

40. In relation to the *Bedfordshire* case, Lord Browne-Wilkinson convincingly rejected the contention that the statutory provisions created a cause of action for breach of statutory duty. In considering whether the circumstances were such as to impose a duty of care on the council at common law, Lord Browne-Wilkinson considered that questions arising from the policy/ operational distinction could not be resolved at that preliminary stage. Nor could the question whether the council had acted in the reasonable exercise of its discretion. There remained the three issues mentioned in *Caparo* : whether the defendants could reasonably foresee that the claimants might be injured, whether their relationship with the claimants had the necessary quality of proximity, and whether it was in all the circumstances just and reasonable that a duty of care should be imposed. The first two of these issues were conceded. The only question which required to be decided was whether it was just and reasonable to impose a duty of care.

41. In that regard, Lord Browne-Wilkinson concluded at pp 749-751 that there were a number of reasons of public policy for denying liability: the multi-disciplinary nature of the system of decision-making, the delicacy and difficulty of the decisions involved, the risk that local authorities would respond to the imposition of liability by adopting a defensive approach to decision-making, the risk of vexatious and costly litigation, and the availability of administrative complaints procedures. Lord Browne-Wilkinson also noted that *Caparo* required that, in deciding whether to develop novel categories of negligence, the court should proceed incrementally and by analogy with decided categories. The nearest analogies, in his view, were the cases where a common law duty of care had been sought to be imposed upon the police, in relation to the protection of members of the public, and upon statutory regulators of financial dealings, in relation to the protection of investors. In neither of those situations had it been thought appropriate to impose a common law duty of care: *Hill v Chief Constable of West Yorkshire* and *Yuen Kun Yeu v Attorney General of Hong Kong [1988] AC 175* .

42. No claim was made in the *Newham* case on the basis of direct liability. In relation to the question of vicarious liability raised by that case, and also potentially by the *Bedfordshire* case, Lord Browne-Wilkinson accepted at p 752 that the social worker and the psychiatrist exercised professional skills, and that in general a professional duty of care is owed irrespective of contract and can arise even where the professional "assumes to act for the plaintiff" pursuant to a contract with a third party, as in *Henderson v Merrett Syndicates Ltd [1995] 2 AC 145* and *White v Jones [1995] 2 AC 207* . The social worker and the psychiatrist had not, however, assumed any responsibility towards the claimants. Although the carrying out of their duties involved contact with or a relationship with the claimants, they were nevertheless employed or retained to advise

the local authority and the health authority respectively, not to advise or treat the claimants. The position was not the same as in *Smith v Eric S Bush [1990] 1 AC 831* , where the purchaser of a house had foreseeably relied on the advice given by the surveyor to the building society which was going to lend money on the security of the property. Even if the advice tendered by the social worker to the local authority came to the knowledge of the child or his parents, they would not regulate their conduct in reliance on the report. The effect of the report would be reflected in the way the local authority acted. Nor was the position the same as in *Henderson v Merrett Syndicates* , where the duty of care to the claimants was imposed by the terms of the defendants' contract with a third party; so also in *White v Jones* . Lord Browne-Wilkinson concluded at p 753:

> "In my judgment in the present cases, the social workers and the psychiatrist did not, by accepting the instructions of the local authority, assume any general professional duty of care to the plaintiff children. The professionals were employed or retained to advise the local authority in relation to the well-being of the plaintiffs but not to advise or treat the plaintiffs."

Lord Browne-Wilkinson added that in any event, the same policy considerations which led to the view that no direct duty of care was owed by the local authority applied with at least equal force to the question whether it would be just and reasonable to impose a duty of care on the social worker and the psychiatrist. The psychiatrist also benefited from witness immunity.

43. The fundamental problem with this reasoning, so far as relating to an assumption of responsibility, is that as explained in para 38 above, the liability of the social worker and the psychiatrist in the *Newham* case did not depend on whether they had assumed a responsibility towards the child.

44. Lord Browne-Wilkinson's conclusion that there was no assumption of responsibility in the child abuse cases can be contrasted with his conclusion in the education cases, which concerned failures to diagnose and address special educational needs. He concluded in the first of those cases (the *Dorset* case) that a direct claim could lie against the local authority on the basis that it was offering a service to the public, namely the provision of psychological advice, which the claimant had accepted. By holding itself out as offering a service, it came under a duty of care to those using the service, in the same way as a health authority conducting a hospital under statutory powers was under a duty of care to those whom it admitted. There could also be vicarious liability for negligence on the part of the educational psychologists which the local

House of Lords in *Smith v Chief Constable of Sussex Police* . The majority of the court agreed. As explained earlier, the reasoning of the Court of Appeal in the *East Berkshire* case was not that, because the European Court of Human Rights had found violations of the Convention, it followed that British courts should follow suit under the law of tort. Rather, the reasoning was that, since claims could be brought under the Convention, it followed that claims could also be brought under the Human Rights Act : a possibility which pulled the rug from under some of the policy-based reasoning in *X (Minors) v Bedfordshire* .

63. Most recently, the decision of this court in 2018 in the case of *Robinson v Chief Constable of West Yorkshire Police* drew together several strands in the previous case law. The case concerned the question whether police officers owed a duty to take reasonable care for the safety of an elderly pedestrian when they attempted to arrest a suspect who was standing beside her and was likely to attempt to escape. The court held that, since it was reasonably foreseeable that the claimant would suffer personal injury as a result of the officers' conduct unless reasonable care was taken, a duty of care arose in accordance with the principle in *Donoghue v Stevenson [1932] AC 562* . Such a duty might be excluded by statute or the common law if it was incompatible with the performance of the officers' functions, but no such incompatibility existed on the facts of the case. The court distinguished between a duty to take reasonable care not to cause injury and a duty to take reasonable care to protect against injury caused by a third party. A duty of care of the latter kind would not normally arise at common law in the absence of special circumstances, such as where the police had created the source of danger or had assumed a responsibility to protect the claimant against it. The decision in *Hill v Chief Constable of West Yorkshire* was explained as an example of the absence of a duty of care to protect against harm caused by a third party, in the absence of special circumstances. It did not lay down a general rule that, for reasons of public policy, the police could never owe a duty of care to members of the public.

64. *Robinson* did not lay down any new principle of law, but three matters in particular were clarified. First, the decision explained, as *Michael* had previously done, that *Caparo* did not impose a universal tripartite test for the existence of a duty of care, but recommended an incremental approach to novel situations, based on the use of established categories of liability as guides, by analogy, to the existence and scope of a duty of care in cases which fall outside them. The question whether the imposition of a duty of care would be fair, just and reasonable forms part of the assessment of whether such an incremental step ought to be taken. It follows that, in the ordinary run of cases, courts should apply established principles of law, rather than basing their decisions on their assessment of the requirements of public policy. Secondly, the decision re-affirmed the significance of the distinction between harming the claimant and failing to protect the claimant from harm (including harm caused by third parties), which was also emphasised in *Mitchell* and *Michael* . Thirdly, the decision confirmed, following *Michael* and numerous older authorities, that public authorities are generally subject to the same general principles of the law of negligence as private individuals and bodies, except to the extent that

legislation requires a departure from those principles. That is the basic premise of the consequent framework for determining the existence or non-existence of a duty of care on the part of a public authority.

65. It follows (1) that public authorities may owe a duty of care in circumstances where the principles applicable to private individuals would impose such a duty, unless such a duty would be inconsistent with, and is therefore excluded by, the legislation from which their powers or duties are derived; (2) that public authorities do not owe a duty of care at common law merely because they have statutory powers or duties, even if, by exercising their statutory functions, they could prevent a person from suffering harm; and (3) that public authorities can come under a common law duty to protect from harm in circumstances where the principles applicable to private individuals or bodies would impose such a duty, as for example where the authority has created the source of danger or has assumed a responsibility to protect the claimant from harm, unless the imposition of such a duty would be inconsistent with the relevant legislation.

Assumption of responsibility

66. It is apparent from the cases so far discussed that the nature of an assumption of responsibility is of importance in the present context. That topic should be considered before turning to the circumstances of the present case.

67. Although the concept of an assumption of responsibility first came to prominence in *Hedley Byrne* in the context of liability for negligent misstatements causing pure economic loss, the principle which underlay that decision was older and of wider significance (see, for example, *Wilkinson v Coverdale (1793) 1 Esp 75*). Some indication of its width is provided by the speech of Lord Morris of Borth-y-Gest in *Hedley Byrne* , with which Lord Hodson agreed, at pp 502-503:

> "My Lords, I consider that it follows and that it should now be regarded as settled that if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon such skill, a duty of care will arise. The fact that the service is to be given by means of or by the instrumentality of words can make no difference. Furthermore, if in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry, a person takes it upon himself to give information or advice to, or allows his information or advice to be

> passed on to, another person who, as he knows or should know, will place reliance upon it, then a duty of care will arise."

It is also apparent from well-known passages in the speech of Lord Devlin, at pp 528-529 and 530:

> "I think, therefore, that there is ample authority to justify your Lordships in saying now that the categories of special relationships which may give rise to a duty to take care in word as well as in deed are not limited to contractual relationships or to relationships of fiduciary duty, but include also relationships which in the words of Lord Shaw in *Norton v Lord Ashburton [1914] AC 932* , 972 are 'equivalent to contract,' that is, where there is an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract…I shall therefore content myself with the proposition that wherever there is a relationship equivalent to contract, there is a duty of care. … Where, as in the present case, what is relied on is a particular relationship created ad hoc, it will be necessary to examine the particular facts to see whether there is an express or implied undertaking of responsibility."

68. Since *Hedley Byrne* , the principle has been applied in a variety of situations in which the defendant provided information or advice to the claimant with an undertaking that reasonable care would be taken as to its reliability (either express or implied, usually from the reasonable foreseeability of the claimant's reliance upon the exercise of such care), as for example in *Smith v Eric S Bush* , or undertook the performance of some other task or service for the claimant with an undertaking (express or implied) that reasonable care would be taken, as in *Henderson v Merrett Syndicates Ltd* and *Spring v Guardian Assurance plc [1995] 2 AC 296* . In the latter case, Lord Goff observed at p 318:

> "All the members of the Appellate Committee in [*Hedley Byrne*] spoke in terms of the principle resting upon an assumption or undertaking of responsibility by the defendant towards the plaintiff, coupled with reliance by the plaintiff on the exercise by the defendant of due care and skill. Lord Devlin, in particular, stressed that the principle rested upon an assumption of responsibility when he said, at p 531, that 'the essence

> "The question of whether the order can have generated a duty of care is comparable with the question of whether a statutory duty can generate a common law duty of care. The answer is that it cannot: see *Gorringe v Calderdale Metropolitan Borough Council [2004] 1 WLR 1057* . The statute either creates a statutory duty or it does not. (That is not to say, as I have already mentioned, that conduct undertaken pursuant to a statutory duty cannot generate a duty of care in the same way as the same conduct undertaken voluntarily.) But you cannot derive a common law duty of care directly from a statutory duty. Likewise, as it seems to me, you cannot derive one from an order of court."

73. There are indeed several leading authorities in which an assumption of responsibility arose out of conduct undertaken in the performance of an obligation, or the operation of a statutory scheme. An example mentioned by Lord Hoffmann is *Phelps v Hillingdon* , where the teachers' and educational psychologists' assumption of responsibility arose as a consequence of their conduct in the performance of the contractual duties which they owed to their employers. Another example is *Barrett v Enfield* , where the assumption of responsibility arose out of the local authority's performance of its functions under child care legislation. The point is also illustrated by the assumption of responsibility arising from the provision of medical or educational services, or the custody of prisoners, under statutory schemes. Clearly the operation of a statutory scheme does not automatically generate an assumption of responsibility, but it may have that effect if the defendant's conduct pursuant to the scheme meets the criteria set out in such cases as *Hedley Byrne* and *Spring v Guardian Assurance plc* .

The present case

74. In the light of the cases which I have discussed, the decision in *X (Minors) v Bedfordshire* can no longer be regarded as good law in so far as it ruled out on grounds of public policy the possibility that a duty of care might be owed by local authorities or their staff towards children with whom they came into contact in the performance of their functions under the 1989 Act, or in so far as liability for inflicting harm on a child was considered, in the *Newham* case, to depend upon an assumption of responsibility. Whether a local authority or its employees owe a duty of care to a child in particular circumstances depends on the application in that setting of the general principles most recently clarified in the case of *Robinson* . Following that approach, it is helpful to consider in the first place whether the case is one in which the defendant is alleged to have harmed the claimant, or one in which the defendant is alleged to have failed to provide

a benefit to the claimant, for example by protecting him from harm. The present case falls into the latter category.

75. Understandably, the reasoning of Irwin LJ in the Court of Appeal in the present case did not follow the approach set out in *Robinson* , which was decided after the Court of Appeal had given its decision. The first consideration on which Irwin LJ placed particular emphasis, namely the concern expressed in *X (Minors) v Bedfordshire* and *Hill v Chief Constable of West Yorkshire* that liability in negligence would complicate decision-making in a difficult and sensitive field, and potentially divert the social worker or police officer into defensive decision-making, has not been treated as sufficient reason for denying liability in subsequent cases such as *Barrett v Enfield* , *Phelps v Hillingdon* and *D v East Berkshire* . His view that the decision of the Court of Appeal in *D v East Berkshire* had been implicitly overruled by *Michael* was mistaken: the decision in *D v East Berkshire* has not been overruled by any subsequent decision. In *Michael* , as explained earlier, this court rejected an argument which was said to be supported by *D v East Berkshire* , but it did not disapprove of the true ratio of that decision. More fundamentally, in cases such as *Gorringe* , *Michael* and *Robinson* both the House of Lords and this court adopted a different approach (or rather, reverted to an earlier approach) to the question whether a public authority is under a duty of care. That approach is based on the premise that public authorities are prima facie subject to the same general principles of the common law of negligence as private individuals and organisations, and may therefore be liable for negligently causing individuals to suffer actionable harm but not, in the absence of some particular reason justifying such liability, for negligently failing to protect individuals from harm caused by others. Rather than justifying decisions that public authorities owe no duty of care by relying on public policy, it has been held that even if a duty of care would ordinarily arise on the application of common law principles, it may nevertheless be excluded or restricted by statute where it would be inconsistent with the scheme of the legislation under which the public authority is operating. In that way, the courts can continue to take into account, for example, the difficult choices which may be involved in the exercise of discretionary powers.

76. The second consideration on which Irwin LJ based his decision, namely the principle that in general there is no liability for the wrongdoing of a third party even where that wrongdoing is reasonably foreseeable, is plainly important but, as he recognised, not conclusive in itself. In *Robinson* , this court cited at para 34 a helpful summary by Tofaris and Steel, "Negligence Liability for Omissions and the Police" (2016) 75 CLJ 128, of the situations in which a justification commonly exists for holding that the common law imposes such a liability:

> "In the tort of negligence, a person A is not under a duty to take care to prevent harm occurring to person B through a source of danger not created by A unless (i) A has assumed a responsibility to protect B from that danger,

> (ii) A has done something which prevents another from protecting B from that danger, (iii) A has a special level of control over that source of danger, or (iv) A's status creates an obligation to protect B from that danger."

77. The present case is not brought on the basis that the council was in the second, third or fourth of these situations. It was suggested in argument that a duty of care might have arisen on the basis that the council had created the source of danger by placing Amy and her family in housing adjacent to the neighbouring family. The difficulty of sustaining such an argument is however apparent from *Mitchell* , paras 41, 61-63, 76-77 and 81-82. As Lord Brown pointed out in the last of these passages, there is a consistent line of authority holding that landlords (including local authorities) do not owe a duty of care to those affected by their tenants' anti-social behaviour. It is also necessary to remember that there is no claim against the council based on its exercise of its functions under housing legislation.

78. The claim against the council is based instead on an assumption of responsibility or "special relationship". The particulars of claim state:

> "In purporting to investigate the risk that the claimants' neighbours posed to the claimants and subsequently in attempting to monitor the claimants' plight as set out in the sequence of events above, the defendant had accepted a responsibility for the claimants' particular difficulties and/or there was a special nexus or special relationship between the claimants and the defendant. The defendant purported to protect the claimants by such investigation and in as far as such investigation is shown to have been carried out negligently and/or negligently acted on the defendant is liable for breach of duty."

The "sequence of events" referred to is a chronology of events. In relation to investigation and monitoring by the council's social services department, it refers to the assignment of social workers to the claimants, to the various assessments of their needs, and to meetings at which the appropriate response to Graham's behaviour was discussed.

79. Irwin LJ rejected the contention that there was an assumption of responsibility by the council on the ground that there was an insufficient basis to satisfy the approach of the Court of Appeal in *X v Hounslow London Borough Council* and *Darby v Richmond-upon-Thames London Borough Council [2017] EWCA Civ 252* . I have also come to the conclusion that the particulars of claim do not provide a basis on which an assumption of responsibility might be established, for the following reasons.

80. As Lord Browne-Wilkinson explained in relation to the educational cases in *X (Minors) v Bedfordshire* (particularly the *Dorset* case), a public body which offers a service to the public often assumes a responsibility to those using the service. The assumption of responsibility is an undertaking that reasonable care will be taken, either express or more commonly implied, usually from the reasonable foreseeability of reliance on the exercise of such care. Thus, whether operated privately or under statutory powers, a hospital undertakes to exercise reasonable care in the medical treatment of its patients. The same is true, mutatis mutandis, of an education authority accepting pupils into its schools.

81. In the present case, on the other hand, the council's investigating and monitoring the claimants' position did not involve the provision of a service to them on which they or their mother could be expected to rely. It may have been reasonably foreseeable that their mother would be anxious that the council should act so as to protect the family from their neighbours, in particular by re-housing them, but anxiety does not amount to reliance. Nor could it be said that the claimants and their mother had entrusted their safety to the council, or that the council had accepted that responsibility. Nor had the council taken the claimants into its care, and thereby assumed responsibility for their welfare. The position is not, therefore, the same as in *Barrett v Enfield* . In short, the nature of the statutory functions relied on in the particulars of claim did not in itself entail that the council assumed or undertook a responsibility towards the claimants to perform those functions with reasonable care.

82. It is of course possible, even where no such assumption can be inferred from the nature of the function itself, that it can nevertheless be inferred from the manner in which the public authority has behaved towards the claimant in a particular case. Since such an inference depends on the facts of the individual case, there may well be cases in which the existence or absence of an assumption of responsibility cannot be determined on a strike out application. Nevertheless, the particulars of claim must provide some basis for the leading of evidence at trial from which an assumption of responsibility could be inferred. In the present case, however, the particulars of claim do not provide a basis for leading evidence about any particular behaviour by the council towards the claimants or their mother, besides the performance of its statutory functions, from which an assumption of responsibility might be inferred. Reference is made to an email written

in June 2009 in which the council's anti-social behaviour co-ordinator wrote to Amy that "we do as much as it is in our power to fulfil our duty of care towards you and your family, and yet we can't seem to get it right as far as you are concerned", but the email does not appear to have been concerned with the council's functions under the 1989 Act, and in any event a duty of care cannot be brought into being solely by a statement that it exists: *O'Rourke v Camden London Borough Council [1998] AC 188* , 196.

83. I would therefore conclude, like the Court of Appeal but for different reasons, that the particulars of claim do not set out an arguable claim that the council owed the claimants a duty of care. Although *X (Minors) v Bedfordshire* cannot now be understood as laying down a rule that local authorities do not under any circumstances owe a duty of care to children in relation to the performance of their social services functions, as the Court of Appeal rightly held in *D v East Berkshire* , the particulars of claim in this case do not lay a foundation for establishing circumstances in which such a duty might exist.

84. The council is also sought to be held liable on the basis of vicarious liability for the negligence of its employees. That is an aspect of the case to which the Court of Appeal did not give separate consideration.

85. The particulars of claim state:

> "Each of the social workers and/or social work managers and other staff employed by the defendant who was allocated as the social worker or manager for the claimants or tasked with investigating the plight of the claimants owed to the claimants a duty of care."

It appears from the particulars of claim that social workers carried out assessments of the claimants' needs on the council's instructions, and provided the council (and others who may have been involved in decision-making) with information and professional advice about the children for the purpose of enabling the council to perform its statutory functions.

86. There is no doubt that, in carrying out those functions, the social workers were under a contractual duty to the council to exercise proper professional skill and care. The question

*P1 Palmer v Tees Health Authority

Positive/Neutral Judicial Consideration

Court
Court of Appeal (Civil Division)

Judgment Date
2 July 1999

Report Citation
[2000] P.I.Q.R. P1

Court of Appeal

(Stuart-Smith , Pill and Thorpe L.JJ.):

July 2, 1999

Appeal by the claimant, Beverley Palmer, against the decision of Gage J. dismissing her appeal against the order of Master Hodgson striking out her claim for damages against the defendant Tees Health Authority.

Striking-out—child murdered by mental patient—whether duty owed by health authority.

In June 1994 the claimant's daughter Rosie was abducted, sexually assaulted, murdered and her body mutilated by a man called Armstrong. The defendant and its predecessors were responsible for the administration and management of Hartlepool General Hospital ("the Hospital") and for the provision of medical and nursing services, including psychiatric care and care in the community. The claimant alleged that between March 1992 and July 1994 Armstrong was under the care of the defendant's medical and nursing staff and was variously diagnosed or recorded as suffering from personality disorder or psychopathic personality. The claimant alleged that the defendant "failed to diagnose that there was a real, substantial and foreseeable risk of Armstrong committing serious sexual offences against children and of causing serious bodily injury to any child victims" , and consequently failed to provide him with adequate treatment to reduce the risk of him committing such offences. Negligence was alleged in a number of respects, including failing to take a proper history from Armstrong, failing to verify his history with police or social services, failing to carry out a proper assessment of his mental condition on his various admissions to hospital and causing or permitting him to be discharged from hospital when they should not have done. The claimant claimed damages for bereavement and funeral expenses in respect of Rosie, and also claimed damages on her own behalf for severe post-traumatic stress disorder and pathological grief reaction. The defendant applied to strike out the statement of claim as disclosing no cause of action, arguing that it owed no duty of care to Rosie or to the claimant, and that even if it did owe a duty of care to Rosie, on the pleaded facts, the claimant could not bring herself within the

> 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 apprehand 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."

While there are of course differences between *Hill's* case and the present, that was a case of the police and not psychiatrists, and the identity of the offender was unknown, the crucial point is that there is no relationship between the defendant and the victim.

Mr Sherman relied on the case of *Holgate v. Lancashire Mental Hospital Board [1937] 4 All E.R. 19* . The facts bear a striking resemblance to those in the present case. L was a defective who had been convicted of serious crimes and sentenced to detention during His Majesty's pleasure. In due course he was transferred to the defendant's institution. He was allowed out on licence without any proper inquiry being made, and the licence was subsequently extended. During the period of his extended licence L visited the plaintiff's house and savagely assaulted her. The action was tried by a jury and the report contains the summing-up of Lewis J. It appears to have been assumed that the defendant owed a duty of care to the claimant. The summing-up is concerned only with the issue of want of care. It can be said that this decision received some qualified support from Lord Morris in the *Dorset Yacht* case (see 1040–1041) and even more qualified support from Lord Reid (1031H). ***P12*** But Lord Diplock reserved his opinion as to its correctness. The other two

members of the House did not mention it. The case occurred at a time when the essential elements of a duty of care were much less clearly defined than is the position today. In my judgment the case cannot be reconciled with *Hill* on the question of proximity.

Mr Sherman referred to a number of American cases. In *Peterson v. State of Washington (1983) 671 Pacific Reports 2nd Series 230* , the Supreme Court of Washington held in somewhat similar circumstances that a duty was owed to an unidentified and unidentifiable victim. But the case proceeds on the premise that it is sufficient that there is a special relationship between the defendant and either the third party or the foreseeable victims. In English law it is plainly not sufficient that this relationship exists only between the defendant and third party. Armstrong in this case. That case was followed in the same Court in *Taggart v. State of Washington (1992) 822 Pacific Reports 243* .

But different conclusions were reached in the Supreme Court of California (*Tarasoff v. Regents of University of California (1976) 551 P2d 334* , where the court held that there was a duty to warn an identified victim, but by implication no duty to do so where the victim is unidentifiable. *Thompson v. County of Almeda 614 P2d 728*) and the Federal Court of Appeals 10th Circuit (*Brady v. Hopper 751 F2d 329*). In these cases actions brought by unidentified or unidentifiable victims failed.

Mr Moon submitted that in order for there to be proximity there had to be an assumption of responsibility to the victim and there was clearly none in this case. He submitted that except in the conventional case of personal injury such as accidents involving traffic, employers or occupiers liability, the test of assumption of responsibility is the appropriate one for determining proximity. This test has undoubtedly been used not only in cases of economic loss, but also cases involving physical damage to property and personal injury, including cases of failure to diagnose and treat appropriately a congenital condition (see *X (Minors) v. Bedfordshire County Council [1995] A.C. 633 at 752–753 per* Lord Browne-Wilkinson referring to a psychiatrist advising a local authority or doctor reporting to insurers; *Capital and Counties plc v. Hampshire CC [1997] Q.B. 1004 (the Fire Brigade case) 1035–1036* ; *Phelps v. Hillingdon London Borough Council [1999] 1 W.L.R. 500 at 514H* , an educational psychologist advising a local education authority). But these are all cases where there is a direct contact between the claimant and defendant, but there is no assumption of responsibility or undertaking by the defendant to treat or advise the claimant. I would wish to reserve my opinion as to whether it would be an appropriate test if the victim in such a case as this was identified or identifiable, as for example a child in the household of the abuser.

An additional reason why in my judgment in this case it is at least necessary for the victim to be identifiable (though as I have indicated it may not be sufficient) to establish proximity, is that it seems to me that the most effective way of providing protection would be to give warning to the victim, his or her parents or social services so that some protective measure can be made. As Mr Moon pointed out, the ability to restrict and restrain a psychiatric patient is subject to considerable restriction under the Mental Health Act 1985 (see particularly section 3) and are not unlimited in time. Moreover treatment, especially drug treatment of the patient, depends on his or her co-operation when an out-patient, and is limited when an ***P13** in-patient. It may be a somewhat

novel approach to the question of proximity, but it seems to me to be a relevant consideration to ask what the defendant have done to avoid the danger, if the suggested precautions, *i.e.* committal under section 3 of the Mental Health Act or treatment are likely to be of doubtful effectiveness, and the most effective precaution cannot be taken because the defendant does not know who to warn. This consideration suggests to me that the Court would be unwise to hold that there is sufficient proximity.

For these reasons I would uphold the judge's conclusion that there is no proximity between the defendants and Rosie. The claim in respect of her injury and death must fail and so must the claimant's brought on her own behalf. It is not therefore strictly necessary to consider the second point, namely whether the claimant can bring herself within the ambit of those who can recover damages for psychiatric injury. But since the judge decided the case against the claimant on this ground as well and the matter has been fully argued, I will state my conclusions as shortly as possible.

Nervous Shock

Served with the statement of claim was a medical report from Dr M. D. Beary, a consultant psychiatrist. It was his opinion that the claimant was suffering from post-traumatic stress disorder and a pathological grief reaction. It is quite clear from his report that the onset of the condition started as soon as the claimant realised that Rosie was missing, when she began to imagine what had happened to her. That was on June 30, 1994. She suffered from visions and nightmares almost immediately. Rosie's body was found in Armstrong's house on July 3. Mrs Palmer was not allowed to see the body being removed from the house, but she evidently knew that it had been discovered there. She attended the mortuary on July 6 or 7 to identify the body. There is no doubt that Rosie's death has had a devastating effect on Mrs Palmer, so much so that when this appeal was first due to be heard, the Court had to make an order for the Official Solicitor to carry on the appeal, as Mrs Palmer was not capable of managing her affairs. Fortunately her condition was considerably improved and she is now able to carry on with the appeal.

Although at one stage Mr Sherman suggested that the claimant was a primary victim, he did not seriously argue the point; in my judgment she clearly was not. In his skeleton argument Mr Sherman rightly enunciates the main requirements for establishing a claim for nervous shock by a secondary victim, namely that:

(a) the claimant suffered not merely grief, distress and sorrow but a recognised psychiatric illness; on the basis of Dr Beary's report this is satisfied;
(b) it resulted from shock, *i.e.* the sudden appreciation by sight or sound of a horrifying event or events;
(c) there was propinquity in time or space to the accident or its immediate aftermath;
(d) the injury was reasonably foreseeable; it is accepted for the purpose of this appeal by Mr Moon that is arguable;

Robinson v Chief Constable of West Yorkshire Police

Positive/Neutral Judicial Consideration

Court
Supreme Court

Judgment Date
8 February 2018

On appeal from: [2014] EWCA Civ 15

Supreme Court

[2018] UKSC 4, 2018 WL 00747028

before Lady Hale Lord Mance Lord Reed Lord Hughes Lord Hodge

Judgment Given on 8 February 2018

Heard on 12 July 2017

Representation

Appellant Nicholas Bowen QC David Lemer Duncan Fairgrieve (Instructed by Grieves Solicitors).
Respondent Jeremy Johnson QC Ian Skelt (Instructed by West Yorkshire Police Legal Services).

Judgment

Lord Reed: (with whom Lady Hale and Lord Hodge agree)

1. On a Tuesday afternoon in July 2008 Mrs Elizabeth Robinson, described by the Recorder as a relatively frail lady then aged 76, was walking along Kirkgate, a shopping street in the centre of Huddersfield, when she was knocked over by a group of men who were struggling with one another. Two of the men were sturdily built police officers, and the third was a suspected drug dealer whom they were attempting to arrest. As they struggled, the men knocked into Mrs Robinson and they all fell to the ground, with Mrs Robinson underneath. She suffered injuries as a result.

> plaintiff is attempting to establish some novel principle of liability, then the situation would be different."

It was in any event made clear in *Michael* that the idea that *Caparo* established a tripartite test is mistaken.

29. Properly understood, *Caparo* thus achieves a balance between legal certainty and justice. In the ordinary run of cases, courts consider what has been decided previously and follow the precedents (unless it is necessary to consider whether the precedents should be departed from). In cases where the question whether a duty of care arises has not previously been decided, the courts will consider the closest analogies in the existing law, with a view to maintaining the coherence of the law and the avoidance of inappropriate distinctions. They will also weigh up the reasons for and against imposing liability, in order to decide whether the existence of a duty of care would be just and reasonable. In the present case, however, the court is not required to consider an extension of the law of negligence. All that is required is the application to particular circumstances of established principles governing liability for personal injuries.

30. Addressing, then, the first of the issues identified in para 20 above, the existence of a duty of care does not depend on the application of a " *Caparo* test" to the facts of the particular case. In the present case, it depends on the application of established principles of the law of negligence.

(2) The police

(i) Public authorities in general

31. Before focusing on the position of the police in particular, it may be helpful to consider the position of public authorities in general, as this is an area of the law of negligence which went through a period of confusion following the case of *Anns* , as explained in paras 22-23 above. That confusion has not yet entirely dissipated, as courts continue to cite authorities from that period without always appreciating the extent to which their reasoning has been superseded by the return to orthodoxy achieved first in *Stovin v Wise [1996] AC 923* and then, more fully and clearly, in *Gorringe v Calderdale Metropolitan Borough Council [2004] UKHL 15; [2004] 1 WLR 1057* .

32. At common law, public authorities are generally subject to the same liabilities in tort as private individuals and bodies: see, for example, *Entick v Carrington (1765) 2 Wils KB 275* and *Mersey Docks and Harbour Board v Gibbs (1866) LR 1 HL 93* . Dicey famously stated that "every official, from the Prime Minister down to a constable or collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen": Introduction to the Study of the Law of the Constitution 3rd ed (1889), p 181. An important

exception at common law was the Crown, but that exception was addressed by the Crown Proceedings Act 1947, section 2 .

33. Accordingly, if conduct would be tortious if committed by a private person or body, it is generally equally tortious if committed by a public authority: see, for example, *Dorset Yacht Co Ltd v Home Office [1970] AC 1004* , as explained in *Gorringe* , para 39. That general principle is subject to the possibility that the common law or statute may provide otherwise, for example by authorising the conduct in question: *Geddis v Proprietors of Bann Reservoir (1878) 3 App Cas 430* . It follows that public authorities are generally under a duty of care to avoid causing actionable harm in situations where a duty of care would arise under ordinary principles of the law of negligence, unless the law provides otherwise.

34. On the other hand, public authorities, like private individuals and bodies, are generally under no duty of care to prevent the occurrence of harm: as Lord Toulson stated in *Michael* , "the common law does not generally impose liability for pure omissions" (para 97). This "omissions principle" has been helpfully summarised by Tofaris and Steel, "Negligence Liability for Omissions and the Police" (2016) 75 CLJ 128:

> "In the tort of negligence, a person A is not under a duty to take care to prevent harm occurring to person B through a source of danger not created by A unless (i) A has assumed a responsibility to protect B from that danger, (ii) A has done something which prevents another from protecting B from that danger, (iii) A has a special level of control over that source of danger, or (iv) A's status creates an obligation to protect B from that danger."

35. As that summary makes clear, there are certain circumstances in which public authorities, like private individuals and bodies, can come under a duty of care to prevent the occurrence of harm: see, for example, *Barrett v Enfield London Borough Council* and *Phelps v Hillingdon London Borough Council [2001] 2 AC 619* , as explained in *Gorringe* at paras 39-40. In the absence of such circumstances, however, public authorities generally owe no duty of care towards individuals to confer a benefit upon them by protecting them from harm, any more than would a private individual or body: see, for example, *Smith v Littlewoods Organisation Ltd [1987] AC 241* , concerning a private body, applied in *Mitchell v Glasgow City Council [2009] UKHL 11; [2009] AC 874* , concerning a public authority.

36. That is so, notwithstanding that a public authority may have statutory powers or duties enabling or requiring it to prevent the harm in question. A well-known illustration of that principle is the decision of the House of Lords in *East Suffolk Rivers Catchment Board v Kent [1941] AC 74* . The position is different if, on its true construction, the statutory power or duty is intended to give rise to a duty to individual members of the public which is enforceable by means of a private right of action. If, however, the statute does not create a private right of

action, then "it would be, to say the least, unusual if the mere existence of the statutory duty [or, a fortiori, a statutory power] could generate a common law duty of care": *Gorringe* , para 23.

37. A further point, closely related to the last, is that public authorities, like private individuals and bodies, generally owe no duty of care towards individuals to prevent them from being harmed by the conduct of a third party: see, for example, *Smith v Littlewoods Organisation Ltd* and *Mitchell v Glasgow City Council* . In *Michael* , Lord Toulson explained the point in this way:

> "It is one thing to require a person who embarks on action which may harm others to exercise care. It is another matter to hold a person liable in damages for failing to prevent harm caused by someone else." (para 97)

There are however circumstances where such a duty may be owed, as Tofaris and Steele indicated in the passage quoted above. They include circumstances where the public authority has created a danger of harm which would not otherwise have existed, or has assumed a responsibility for an individual's safety on which the individual has relied. The first type of situation is illustrated by *Dorset Yacht* , and in relation to the police by the case of *Attorney General of the British Virgin Islands v Hartwell [2004] 1 WLR 1273* , discussed below. The second type of situation is illustrated, in relation to the police, by the case of *An Informer v A Chief Constable [2013] QB 579* , as explained in *Michael* at para 69.

38. In *Anns* , however, it was decided that a local authority owed a duty of care at common law, when exercising its power to inspect building works, to protect the ultimate occupier of the building from loss resulting from defects in its construction. The House of Lords thus held a public authority liable at common law for a careless failure to confer a benefit, by preventing harm caused by another person's conduct, in the absence of any special circumstances such as an assumption of responsibility towards the claimant. It added to the confusion by importing public law concepts, and the American distinction between policy and operational decisions, into questions concerning duties arising under the law of obligations. Although the decision was overruled in *Murphy v Brentwood District Council [1991] 1 AC 398* on a limited basis (relating to the categorisation of the type of harm involved), its reasoning in relation to these matters was not finally disapproved until *Stovin v Wise* .

39. The position was clarified in *Gorringe v Calderdale Metropolitan Borough Council* , which made it clear that the principle which had been applied in *Stovin v Wise* in relation to a statutory duty was also applicable to statutory powers. Lord Hoffmann (with whom Lord Scott of Foscote, Lord Rodger of Earlsferry and Lord Brown of Eaton-under-Heywood agreed) said that he found it difficult to imagine a case in which a common law duty could be founded simply on the failure, however irrational, to provide some benefit which a public authority had power (or a public law duty) to provide (para 32). He was careful to distinguish that situation from cases where a public

> in every contact with a potential witness or a potential victim time and resources were deployed to avoid the risk of causing harm or offence. Such legal duties would tend to inhibit a robust approach in assessing a person as a possible suspect, witness or victim. By placing general duties of care on the police to victims and witnesses the police's ability to perform their public functions in the interests of the community, fearlessly and with despatch, would be impeded. It would, as was recognised in *Hill's* case, be bound to lead to an unduly defensive approach in combating crime."

62. As Lord Toulson noted in *Michael* , by endorsing the principle in the *Hill* case in the terms that he did, Lord Steyn confirmed that the functions of the police which he identified were public law duties and did not give rise to private law duties of care in the absence of special circumstances, such as an assumption of responsibility. Nothing in his reasoning is inconsistent with the existence of a duty of care to avoid causing physical harm in accordance with ordinary principles of the law of negligence. Lord Steyn plainly had no intention of undermining the confirmation in *Hill* that the police were under such a duty of care. The passage cited was directed towards a different issue.

63. Fourthly, reliance was placed on *Smith v Chief Constable of Sussex Police [2008] UKHL 50; [2009] AC 225* , one of two appeals which the House of Lords heard together, the other being *Van Colle v Chief Constable of the Herefordshire Police (Secretary of State for the Home Department intervening)* . The case of *Smith* concerned the question whether, where a person had informed the police that he had received threats of violence, the police then owed him a duty of care to prevent the threats from being carried out. Applying the established principles discussed earlier, the answer was no, in the absence of special circumstances such as an assumption of responsibility, and the House of Lords so held. The House was not however referred to the line of authority including *East Suffolk Rivers Catchment Board v Kent* , *Stovin v Wise* and *Gorringe* , which would have provided a basis for deciding the case; nor did it rely on the equivalent body of authority concerned with omissions by private individuals and bodies, such as *Smith v Littlewoods Organisation Ltd* . Those were the bases on which a very similar issue was subsequently decided in *Michael* .

64. In *Smith v Chief Constable of Sussex Police* , the majority of the House were in agreement that, absent special circumstances such as an assumption of responsibility, the police owed no duty of care to individuals affected by the discharge of their public duty to investigate offences and prevent their commission. Lord Hope, with whose reasoning the other members of the majority agreed, followed the approach adopted in *Brooks* in the passage cited in para 61 above, and emphasised the risk that the imposition of a duty of care of the kind contended for would inhibit a robust approach in assessing a person as a possible suspect or victim. He acknowledged that "[t]here are, of course, cases in which actions of the police give rise to civil claims in negligence in accordance with ordinary delictual principles", and cited *Rigby* as an example (para 79). Lord Phillips of Worth Matravers CJ summarised the core principle to be derived

> *of Northumbria Police Force [1997] QB 464* , 487, the greater public good outweighs any individual hardship. A principle of public policy that applies generally may be seen to operate harshly in some cases, when they are judged by ordinary delictual principles. Those are indeed the cases where, as Lord Steyn put it, the interests of the wider community must prevail over those of the individual.
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> 76. The risk that the application of ordinary delictual principles would tend to inhibit a robust approach in assessing a person as a possible suspect or victim, which Lord Steyn mentioned in the last sentence of the passage that I have quoted from his opinion in *Brooks* , is directly relevant to cases of the kind of which *Smith's* case is an example …
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> Police work elsewhere may be impeded if the police were required to treat every report from a member of the public that he or she is being threatened with violence as giving rise to a duty of care to take reasonable steps to prevent the alleged threat from being executed. Some cases will require more immediate action than others. The judgment as to whether any given case is of that character must be left to the police."

108. At para 89 Lord Phillips observed that public policy has been at the heart of consideration whether a duty of care is owed by police officers to individuals. After reviewing the policy factors he concluded at para 97:

> "I do not find it possible to approach *Hill* and *Brooks* as cases that turned on their own facts. The fact that Lord Steyn applied the decision in *Hill* to the facts of *Brooks* , which were so very different, underlines the fact that Lord Steyn was indeed applying a 'core principle' that had been 'unchallenged … for many years'. That principle is, so it seems to me, that in the absence of special circumstances the police owe no common law duty of care to protect individuals against harm caused by criminals. The two relevant justifications advanced for the principle are (i) that a private law duty of care in relation to individuals would be calculated to distort, by encouraging defensive action, the manner in which the police would otherwise deploy their limited resources; (ii) resources would be diverted from the performance of the public duties of the police in order to deal with claims advanced for alleged breaches of private law duties owed to individuals."

109. At para 108 Lord Carswell said this:

> "The factor of paramount importance is to give the police sufficient freedom to exercise their judgment in pursuit of their objects in work in the public interest, without being trammelled by the need to devote excessive time and attention to complaints or being constantly under the shadow of threatened litigation. Over-reaction to complaints, resulting from defensive policing, is to be avoided just as much as failure to react with sufficient speed and effectiveness. That said, one must also express the hope that police officers will make good use of this freedom, with wisdom and discretion in judging the risks, investigating complaints and taking appropriate action to minimise or remove the risk of threats being carried out."

110. Lastly, Lord Brown added, at paras 131-133

> "131. Fourthly, some at least of the public policy considerations which weighed with the House in *Hill* and *Brooks* to my mind weigh also in the present factual context. I would emphasise two in particular.
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> 132. First, concern that the imposition of the liability principle upon the police would induce in them a detrimentally defensive frame of mind. So far from doubting whether this would in fact be so, it seems to me inevitable. If liability could arise in this context (but not, of course, with regard to the police's many other tasks in investigating and combating crime) the police would be likely to treat these particular reported threats with especial caution at the expense of the many other threats to life, limb and property of which they come to learn through their own and others' endeavours. They would be likely to devote more time and resources to their investigation and to take more active steps to combat them. They would be likely to arrest and charge more of those reportedly making the threats and would be more likely in these cases to refuse or oppose bail, leaving it to the courts to take

the responsibility of deciding whether those accused of making such threats should remain at liberty. The police are inevitably faced in these cases with a conflict of interest between the person threatened and the maker of the threat. If the police would be liable in damages to the former for not taking sufficiently strong action but not to the latter for acting too strongly, the police, subconsciously or not, would be inclined to err on the side of over-reaction. I would regard this precisely as inducing in them a detrimentally defensive frame of mind. Similarly with regard to their likely increased focus on these reported threats at the expense of other police work.

133. The second public policy consideration which I would emphasise in the present context is the desirability of safeguarding the police from legal proceedings which, meritorious or otherwise, would involve them in a great deal of time, trouble and expense more usefully devoted to their principal function of combating crime. This was a point made by Lord Keith of Kinkel in *Hill* and is of a rather different character from that made by Lord Steyn in para 30 of his opinion in *Brooks* - see para 51 of Lord Bingham's opinion. In respectful disagreement with my Lord, I would indeed regard actions pursuant to the liability principle as diverting police resources away from their primary function. Not perhaps in every case but sometimes certainly, the contesting of these actions would require lengthy consideration to be given to the deployment of resources and to the nature and extent of competing tasks and priorities."

111. In *Michael* Lord Toulson (at para 121) was inclined to accord force to criticism of the fear of defensive policing. But he held that it was possible to imagine that liability might lead to police forces changing their priorities, and that it was hard to see it as in the public interest that the determination of priorities should be affected by the risk of being sued. He added that the one thing of which any court could be sure is that the payment of compensation would have to come from police budgets, at the expense of spending on policing unless an increase in budgets from the public purse were to ensue.

112. It should be acknowledged that it is sometimes asserted that that part of the policy considerations which related to the danger of defensive policing lacks hard evidence. That may technically be so, since there has not existed the kind of duty of care which would test it in practice. But like Lord Brown in *Smith* I for my part would regard that risk as inevitable. It can scarcely be doubted that we see the consequences of defensive behaviour daily in the actions of

a great many public authorities. I do not see that it can seriously be doubted that the threat of litigation frequently influences the behaviour of both public and private bodies and individuals.

113. However that may be, the several statements of the policy considerations, especially in three different decisions of the House of Lords, are simply too considered, too powerful and too authoritative in law to be consigned to history, as I do not understand Lord Reed to suggest that they should be. Nor do I see it as possible to treat them as no more than supporting arguments. As all of them, and especially the speech of Lord Hope set out at para 10 above, make clear, the statements are intended as ones of general principle. No doubt *Hill* was decided at a time when *Anns v Merton London Borough Council* was understood to provide the test for the existence of a duty of care. But the error of *Anns* was exposed at the latest in 1991 in *Murphy v Brentwood Council* , whilst *Brooks* and *Smith* were decided in 2005 and 2008 respectively. In any event, the error of *Anns* lay chiefly in its effective imposition of an often impossible burden on a defendant to demonstrate that public policy ought to negate the existence of a duty of care. The *relevance* of considerations of public policy, such as those so fully adumbrated in *Hill* , *Brooks* and *Smith* , and the fact that they may indeed demonstrate that a duty of care is not owed, remains unchanged by the different formulation in *Caparo* .

114. In *Michael* (at para 97) Lord Toulson helpfully brought into the analysis the general reluctance of English law to impose liability in tort for pure omissions. *Smith v Littlewoods Organisation Ltd [1987] AC 241* , to which he referred, is a good example. There, the claimant suggested that the occupiers of a disused cinema, awaiting demolition and reconstruction as a shop, owed a duty to exclude vandals from getting in, so that they were liable to neighbours when the vandals started a fire which spread to adjoining properties. That was, no doubt, a case of pure omission, and was so analysed by Lord Goff, although not by the majority of the House of Lords, through Lord Mackay. It is clear that the reluctance of the common law to impose liability in tort for pure omissions is another reason why the police do not owe a duty of care to individuals who turn out to be the victims of crime (as in *Hill* or *Smith*) or to witnesses (as in *Brooks*) or to suspects (as in *Calveley v Chief Constable of Merseyside* and *Elguzouli-Daf*). But analysis in terms of omissions cannot be the only, or sufficient, reason why such duties of care are not imposed, nor why there is very clearly no duty owed to individuals in the manner in which investigations are conducted.

115. There are at least two reasons why this is so. First, the rule against liability for omissions is by no means general. In *Smith v Littlewoods Organisation Ltd* Lord Goff identified at any rate several situations where such liability is imposed. One is where there has been an assumption of responsibility towards the claimant. The law readily finds such an assumption in many common situations, such as employment, teaching, healthcare and the care of children, and imposes

liability for omitting to protect others. It could equally readily do so in the case of police officers with a general public duty to protect the peace, but it does not. Another was epitomised by *Goldman v Hargrave* and by *Thomas Graham Ltd v Church of Scotland* 1982 SLT (Sh Ct) 26, a case very similar to *Littlewoods* where the occupier knew of previous incursions by third parties and where Lord Goff accepted that liability was rightly imposed for omission to keep them out. If the occupation of land is treated as imposing liability for an omission, the law could, and might, have said that the same applies to police officers where they are aware of the risk posed by (or to) those they are investigating, but it does not.

116. For the same reasons, the question whether a statutory public duty gives rise to a private duty or not is a fluid one. *Stovin v Wise* and *Gorringe* are examples where no private duty of care was held to exist. *Barrett v Enfield London Borough Council* , decided after *Stovin v Wise* , accepted at least in principle the possibility of such a duty in relation to the different statutory scheme there in question.

117. Secondly, there is no firm line capable of determination between a case of omission and of commission. Some cases may fall clearly on one side of the line, and *Hill* may have been one of them. But the great majority of cases can be analysed in terms of either. *Michael* could be said to be a case of omission to respond adequately to the 999 call. But it was argued for the claimant as a case of a series of positive acts, such as, for example, misreporting the complaint when passing it from one police force to another. *Barrett v Enfield London Borough Council* was a case of mixed acts (allegedly negligent placements) and omissions (to arrange adoption). *Phelps v Hillingdon London Borough Council* similarly involved allegedly negligent examination, also a positive act.

118. The ultimate reason why there is no duty of care towards victims, or suspects or witnesses imposed on police officers engaged in the investigation and prevention of crime lies in the policy considerations examined above and, in the end, in the clear conclusion, as expressed by Lord Hope in *Smith* (see para 10 above) that the greater public good requires the absence of any duty of care.

119. Likewise the policy considerations will be directly relevant to any suggestion that a duty of care exists towards individuals such as victims, witnesses or suspects via the route of foreseeable risk of psychiatric harm. The law remains uncertain about when a claimant can properly be regarded as a primary or a secondary victim for the purposes of recovering damages for psychiatric harm: see *Frost v Chief Constable of South Yorkshire Police [1999] 2 AC 455* , *McLoughlin v Grovers [2001] EWCA Civ 1743* per Hale LJ as she then was, and *Alcock v*

Changes over time for: Section 17E

Changes to legislation:
Mental Health Act 1983, Section 17E is up to date with all changes known to be in force on or before 10 June 2024. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations.

▼ View outstanding changes

[F1 17E Power to recall to hospital

(1) The responsible clinician may recall a community patient to hospital if in his opinion—

(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.

(2) The responsible clinician may also recall a community patient to hospital if the patient fails to comply with a condition specified under section 17B(3) above.

(3) The hospital to which a patient is recalled need not be the responsible hospital.

(4) Nothing in this section prevents a patient from being recalled to a hospital even though he is already in the hospital at the time when the power of recall is exercised; references to recalling him shall be construed accordingly.

(5) The power of recall under subsections (1) and (2) above shall be exercisable by notice in writing to the patient.

(6) A notice under this section recalling a patient to hospital shall be sufficient authority for the managers of that hospital to detain the patient there in accordance with the provisions of this Act.**]**

Textual Amendments

F1 Ss. 17A-17G inserted (1.4.2008 s. 17F for certain purposes, otherwise 3.11.2008) by Mental Health Act 2007 (c. 12), **ss. 32(2)**, 56 (with Sch. 10); S.I. 2008/745, **art. 2(c)(i)**; S.I. 2008/1900, **art. 2(i)** (with art. 3, Sch.)

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