Neutral Citation Number: [2016] EWHC 3275 (QB)

Case No: HQ13X04241

IN THE HIGH COURT OF JUSTICE

**QUEEN'S BENCH DIVISION**

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 19/12/2016

**Before**:

MR JUSTICE JAY

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**Between:**

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|  | **ECILA CLARE HENDERSON (A PROTECTED PARTY, BY HER LITIGATION FRIEND, THE OFFICIAL SOLICITOR)** | Claimant |
|  | **- and –** |  |
|  | **DORSET HEALTHCARE UNIVERSITY NHS FOUNDATION TRUST** | Defendant |

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**Nicholas Bowen QC and Katie Scott** (instructed by **Russell-Cooke LLP**) for the **Claimant**

**Angus Moon QC, Judith Ayling and** **Cecily White** (instructed by **DAC Beachcroft LLP**) for the **Defendant**

Hearing dates: 6th and 7th December 2016

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE JAY

**MR JUSTICE JAY:**

**Introduction**

1. On 25th August 2010 Ms Henderson (“the Claimant”) stabbed her mother to death. She was suffering from paranoid schizophrenia at the time, and her condition had recently worsened. It is common ground between the parties that this tragic event would not have happened but for the Defendant’s breaches of duty in failing to respond in an appropriate way to the Claimant’s mental collapse. The Claimant has now brought proceedings in the tort of negligence claiming general damages under various heads, special damages and future losses, and liability has been admitted. The Defendant’s position is that all of the claims should be defeated on illegality or public policy grounds, and that binding authority of the Court of Appeal and House of Lords compels that outcome.
2. The parties have sensibly agreed that the issues joined between them should be determined on agreed facts, and a trial of a preliminary issue has been ordered by the Court. Before I turn to grapple with those matters, I should provide a précis of the factual background to this case, the matters in dispute, and the procedural framework within which the preliminary issues arise.

**Essential Factual Background and Course of the Litigation**

1. I am appending to this Judgment a copy of the Agreed Statement of Facts. I have retained the parties’ nomenclature and abbreviations.
2. It is unnecessary to dwell on the events of 25th August 2010 but I should say a little more at this stage about the psychiatric evidence before the sentencing judge, Foskett J, as well as his sentencing remarks.
3. Dr Caroline Bradley MRCPsych, consultant forensic psychiatrist, provided a detailed report to the Court, dated 6th June 2011, on the instructions of the CPS. In her opinion, the Claimant was fit to plead, did not meet the test for insanity under the M’Naghten rules, but suffered from such abnormality of mind (viz. paranoid schizophrenia) that her mental responsibility should be regarded as “substantially impaired” for the purposes of section 2 of the Homicide Act 1957. More specifically:

“[the Claimant], albeit floridly psychotic and under the influence of auditory hallucinations and delusions about her mother, nevertheless knew what she was doing in terms of the act of stabbing her mother and she knew that this was legally wrong. She told me that she did not believe that her mother would die, but the determined nature of the assault suggests an intention to cause serious harm at the least.

…

… it is my opinion that, at the time of the alleged offence, [the Claimant] was floridly psychotic and was most probably experiencing psychotic symptoms such as auditory hallucinations, visual hallucinations, and delusions. … This, in my opinion, is an abnormality of mind. The underlying condition is schizophrenia, which is a disease of the mind for the purposes of section 2 of the Homicide Act 1957. Whether this abnormality of mind substantially impaired her mental responsibility for the alleged offence is properly a matter for the Court but for the sake of clarity I will state that it is my opinion that it did, and that this is what I will say if required to do so on oath.”

1. Dr Adrian Lord MRCPsych, consultant forensic general adult psychiatrist, provided two reports to the Court dated 2nd April 2011 and 14th June 2011 on the instructions of the Claimant. In his first report he said this:

“It would seem therefore that the *critical causal factor* in this homicide that *facilitated* and *permitted* and drove those underlying resentments and anger to manifest themselves in such a disproportionately ferociously lethal and sustained attack was her mental illness and the fact that she had relapsed into florid psychosis in the preceding few days.

…

It is clear from all the evidence – including her own self-report – that [the Claimant] knew what she was doing when she inflicted her stab wounds on her mother. She knew that she was going to stab her mother, knew that the victim was indeed her mother, and knew that such a ferocious and sustained attack involving 22 separate stab wounds until the victim collapsed would inevitably be fatal.

I am also compelled to conclude that she would have known that what she was doing was morally and legally wrong. She was not labouring under any *specific* delusion that obviated her subjective understanding of the moral and legal dimensions to her actions. … She knew the voice was telling her to do wrong and tried to resist it and the impulses, but failed.”

1. Dr Lord’s second report did not take the matter any further, nor did his oral evidence before Foskett J. It may be seen that Dr Lord went slightly further than did Dr Bradley in attributing to the Claimant subjective appreciation of the consequences of her actions.
2. Foskett J’s conclusion is set out in greater length in the Agreed Statement of Facts. At this stage I highlight the key matters:

“The very detailed and comprehensive reports I have seen from Dr Bradley and Dr Lord, to whom I express my appreciation, demonstrate clearly that your ability to act rationally and with self-control at the time of the incident was substantially and profoundly impaired, because of the psychotic episode to which I have referred, and to the extent that you had little, if any, true control over what you did.

…

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

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

I should say that there is no suggestion in your case that you should be seen as bearing a significant degree of responsibility for what you did. Had there been any such suggestion I would have given serious consideration to making an order under section 45(A) of the Mental Health Act 1983, however, on the material and evidence before me that issue does not arise.”

1. The course of this litigation to date has been helpfully summarised by Warby J on 25th November 2016 when he refused the Claimant’s application to amend her Particulars of Claim to include a claim under the HRA (see [2016] EWHC 3032 (QB)). I need not repeat it.
2. The Particulars of Claim did not itemise the Claimant’s losses. In what is described as a “Preliminary Schedule of Damages” dated 23rd September 2014, the following claims were advanced:
3. General damages for personal injury (a depressive disorder and PTSD) consequent on her killing of her mother.
4. General damages for her loss of liberty caused by her compulsory detention in hospital pursuant to sections 37 and 41 of the Mental Health Act 1983.
5. General damages for loss of amenity arising from the consequences to her of having killed her mother.
6. Past loss in the sum of £61,944 being the share in her mother’s estate which she is unable to recover as a result of the operation of the provisions of the Forfeiture Act 1982.
7. The cost of psychotherapy (by way of future loss).
8. The cost of a care manager/support worker (by way of future loss).
9. On 17th February 2016 Master Cook ordered that there be a trial of a preliminary issue to determine whether some or all of the foregoing six heads of claim are irrecoverable on the grounds of illegality. There are immaterial differences between the formulations as set out in the Court Order and those contained in my foregoing paragraph. It is the Defendant’s contention that the entirety of the claim (i.e. all six formulations) should be precluded on the ground of illegality. Nothing turns on the point that the Defendant has admitted liability rather than breach of duty.

**The Shape of this Judgment**

1. In my view, there are three main questions for me to consider within the agenda circumscribed by the preliminary issue: (1) the correct interpretation of the sentencing remarks of Foskett J, and the extent to which it is permissible, if at all, to go behind them; (2) whether there is binding authority of the Court of Appeal and House of Lords precluding some or all of these claims; and (3) if not, whether the law as accurately enunciated (there remains a dispute between the parties as to what it is) permits, or obviates, the maintenance of some or all of these claims.
2. I frame the questions in this manner because it is the Defendant’s submission that I am bound by the decision of the Court of Appeal in Clunis v Camden and Islington HA [1998] QB 978 and that of the House of Lords in Gray v Thames Trains Ltd [2009] 1 AC 1339. If I were to uphold the Defendant’s submission on *stare decisis*, the parties are agreed that I need not express a view on question (3) above on the hypothetical basis that I might be overruled. If, on the other hand, question (3) does properly arise for decision, the parties are agreed that the case should be listed for further argument on this point.

**The Correct Interpretation of the Sentencing Remarks of Foskett J**

1. The Claimant’s plea to the offence of manslaughter on the ground of diminished responsibility was accepted by the Crown. It follows that the Claimant’s conviction in the Crown Court is conclusive evidence that she was suffering from an abnormality of mental functioning which “substantially impaired” her ability to understand the nature of her conduct, to form a rational judgment and to exercise self-control. Here, I am cleaving to the language of section 2 of the Homicide Act 1957.
2. If the Claimant’s mental functioning had been wholly impaired, that would have been a complete defence to the criminal charge under the M’Naghten Rules of 1843. It is not the Claimant’s contention that this was so; nor could it be because her plea of guilty to the offence of manslaughter must be treated as conclusive proof that she possessed the mental pre-requisites of criminal responsibility, namely the ability to form the intention to kill or seriously injure her mother. In any event, all the psychiatric evidence in this case, including the report of Dr Paul Courtney and his replies to the Defendant’s Part 35 questions, establishes that the Claimant was capable of forming the requisite intention.
3. Another way of expressing the conclusive proof point is to say that it would be inimical to the policy of the law to permit the Claimant to re-open the basis of her conviction in the criminal court in these proceedings. In my view, it matters not how exactly the issue is articulated: an insurmountable barrier exists.
4. There is a minor dispute arising out of the psychiatric evidence as to whether the Claimant appreciated or foresaw that stabbing her mother 22 times would inevitably lead to her death. It is not necessary for me to resolve this issue, and Mr Angus Moon QC for the Defendant urged me not to, reserving his position as to the weight to be given to Dr Courtney’s evidence. Even on the more favourable interpretation of the Claimant’s state of mind (from her forensic perspective), she undoubtedly possessed the intention to inflict grievous bodily harm.
5. In my view, there must be a range of culpability within the span of substantial impairment cognised by the 1957 Act. Whether this is relevant to the present debate raises a separate issue. In R v Golds [2016] UKSC 61 the Supreme Court stated that although the adverb “substantially” means in this context “important or weighty” it should not ordinarily be defined for juries; that the issue is one of degree; and that it was not the law that any impairment beyond trivial would suffice. I think that the law and modern psychiatry recognises that across the relevant spectrum there must be cases where an individual’s mental state just about brings him or her within the definition, and others where an individual’s mental illness or disorder easily brings him or her within the definition - perhaps (and depending on the precise circumstances) not that far away from the complete defence of insanity.
6. Foskett J stated that he considered that the Claimant had little if any true control over what she did. I do not interpret him as holding that she had no personal responsibility whatsoever. Such an interpretation would be inconsistent with the binary framework I have set out under paragraphs 14 and 15 above, and Mr Nicholas Bowen QC for the Claimant did not suggest that I should go that far.
7. However, I do read Foskett J’s sentencing remarks, taken as a whole, as supporting the interpretation that this case fell towards the lower end of the spectrum of personal responsibility. That interpretation would be consistent with all the expert evidence before him, in particular the convergent view that the Claimant’s schizophrenia was florid and severe (my gloss on all the evidence) at the material time. That interpretation is also supported by Foskett J’s reference to section 45A of the Mental Health Act 1983, and his observation that he would have made a hybrid order under that provision had he concluded that the Claimant did bear a significant degree of responsibility for what she did.
8. Mr Moon submitted that Foskett J’s sentencing remarks must be read in the context of the exercise he was conducting under section 2 of the 1957 Act and sections 37, 41 and 45A of the 1983 Act. I agree that Foskett J was not addressing the more nuanced question of responsibility in the context of the civil law, but it does seem to me that – unless he should be taken as being oblivious to the notion that these cases fall across a notional spectrum (a proposition which I cannot accept) – the sentencing judge was placing the instant case at its lower end.
9. In my judgment, whether or not it is open to the parties to undermine or impugn Foskett J’s finding in these proceedings, I would decline to do so. The Claimant’s mental illness was severe, her psychosis florid, and both Dr Bradley and Dr Lord were in no doubt that her case fell within section 2. It follows that I should proceed on the footing that the Claimant’s personal responsibility was low and/or less than significant.
10. Mr Bowen submitted that a hospital order under section 37, whether or not combined with a restriction order under section 41 of the Mental Health Act 1983, does not contain a penal element. In my view, it would be preferable to address this submission in the context of my consideration of the decision of the House of Lords in Gray.

**Binding Authority?**

1. Mr Moon reminded me of the famous dictum of the Earl of Halsbury in Quinn v Leathem [1901] AC 495:

“… every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. [at 506]”

1. I turn to consider the two authorities which Mr Moon submitted are binding at first instance level, if not above.
2. In Clunis the plaintiff, a man with a history of mental health problems which included schizoaffective disorder (being in the same diagnostic class as schizophrenia in DSM V), was released from detention under section 3 of the Mental Health Act 1983 and subject to after-care by the heath authority under section 117. He killed a man by stabbing him, and pleaded guilty to manslaughter on the ground of diminished responsibility. He was sentenced to a hospital order under sections 37 with an indefinite restriction order under section 41. The plaintiff contended that the defendant was in breach of duty to him in failing to treat his worsening condition. His case on causation was that, but for the defendant’s breach of duty, he would not have killed his victim and would not have been convicted of the offence of manslaughter. His case on damages was that he would now be detained for longer than would otherwise been the position under section 3.
3. On the defendant’s appeal, the Court of Appeal struck out the whole of the claim, holding that it was barred by public policy. In my view, the *ratio* of the decision is contained in the following passages taken from the judgment of Beldam LJ (giving the sole judgment of the Court):

“We do not consider that the public policy that the court will not lend its aid to a litigant who relies on his own criminal or immoral act is confined to particular causes of action. [987A]

In our view the plaintiff’s claim does arise out of and depend upon proof of his commission of a criminal offence. [987B-C]

In the present case the plaintiff has been convicted of a serious criminal offence. In such a case public policy would in our judgment preclude the court from entertaining the plaintiff’s claim unless it could be said that he did not know the nature and quality of his act or that what he was doing was wrong. The offence of murder was reduced to one of manslaughter by reason of the plaintiff’s mental disorder but his mental state did not justify a verdict of not guilty by reason of insanity. … A plea of diminished responsibility accepts that the accused’s mental responsibility is substantially impaired but it does not remove liability for his criminal act. We do not consider that in such a case a court can or should go behind the conviction and, even if it could, we do not see in the medical report attached to the statement of claim any statement which would justify the court taking the view that this plaintiff had no responsibility for the serious crime to which he pleaded guilty. [989D-G]

In the present case we consider the defendant has made out its plea that the plaintiff’s claim is essentially based on his illegal act of manslaughter; he must be taken to have known what he was doing and that it was wrong, notwithstanding that the degree of his culpability was reduced by reason of mental disorder. The court ought not to allow itself to be made an instrument to enforce obligations alleged to arise out of the plaintiff’s own criminal act and we would therefore allow the appeal on this ground. [990D-E]”

1. In my judgment, if the *ratio* of Clunis still represents the law, I would be bound to conclude that the whole of the Claimant’s case should fail on the ground of public policy, because there are no discernible matters or aspects of factual differentiation between this Claimant and Mr Clunis. Adopting the language of Beldam LJ, the claim must be seen as “essentially based on [the Claimant’s] illegal act of manslaughter”. It may be conjectured that this Claimant’s paranoid schizophrenia was (at the material time) more severe than Mr Clunis’ schizoaffective disorder, and that his personal responsibility was significant; but (a) there is no basis for determining the accuracy of this piece of speculation in the absence of sight of the psychiatric evidence in Mr Clunis’ case, (b) there is no clear and obvious reason why that should be the case, and (c) the Court of Appeal did not distinguish between degrees of personal responsibility. There was nothing in the medical report which could be understood as stating that Mr Clunis had no personal responsibility, but even had there been that could not have cut across his guilty plea. The passage from Beldam LJ’s judgment at 989E-G treats the question as being monist, not as one capable of differential factual evaluation – at least for the purposes of the ascription of civil liability.
2. The identification of the true *ratio* of Clunis is not a difficult exercise. The process has not proved to be as straightforward in relation to the true *ratio* of Gray.
3. In Gray the claimant suffered PTSD as a result of the Ladbroke Grove rail disaster in 1999. Whilst suffering from this disorder he killed a man; his plea to the offence of manslaughter on the ground of diminished responsibility was accepted by the Crown; and he was sentenced by Rafferty J to a hospital order under section 37 with a restriction order under section 41 of the Mental Health Act 1983. Breach of duty by the rail operator and another was admitted.
4. Mr Gray was examined by two psychiatrists for the purposes of determining the section 2 Homicide Act 1957 question. Sir Anthony Clarke MR (giving the judgment of the court) stated that the claimant was suffering from a “serious psychological disorder, namely PTSD” but he did not specify the level of its severity or the extent of his impairment, beyond it meeting the statutory test of being “substantial”. I draw the inference that this information was not available: Lord Rodger stated in terms that “the House has been supplied with no detailed information about the criminal proceedings” [paragraph 59]. I may take judicial notice of the fact that PTSD is one of the family of anxiety disorders within ICD 10 and DSM V; it is a psychological condition or disorder[[1]](#footnote-1); and it varies significantly across a range of symptomatic intensities.
5. According to the headnote and the opinion of Lord Hoffmann, the losses claimed were for: (i) general damages for loss of liberty and damage to reputation; (ii) general damages for feelings of guilt and remorse consequent on the killing; (iii) special damages for past loss of post-detention earnings, and (iv) damages for future loss of such earnings. He also sought an indemnity against any claim brought against him by the victim’s dependants.
6. Flaux J ([2007] EWHC 1558 (QB)) held at trial that all claims relating to the period after the commission of Mr Gray’s act of manslaughter must be dismissed, whereas (as the defendant conceded to be the case) all losses suffered by him before that date should in principle be recoverable (no such losses are being claimed in the present case).
7. I have read Flaux J’s judgment with care and have not been able to find any reference by him to a claim being advanced for general damages for loss of liberty. The better view is that Mr Gray conceded that he could not advance such a claim. Even if I am wrong about that, I believe that Flaux J’s reasoning would have operated to preclude it, had it been advanced.
8. In Flaux J’s view:
9. Mr Gray’s principal argument that he did not have to plead or rely on his own illegality in order to recover his losses should be rejected: this was not the correct test. The right question was whether Mr Gray’s claim was so closely or inextricably bound up with his own criminal conduct that the court should not permit him to recover compensation without appearing to condone it [paragraphs 27, 30 and 40].
10. Mr Gray could not circumvent this by contending that his loss of earnings claims, both past and future, were independent of the manslaughter. Not merely was this contention “unreal”, it faced the obvious difficulty that Mr Gray’s manslaughter, regardless of whether it was attributable to his PTSD, was the real and effective cause of the loss of earnings claims [paragraphs 31 and 32].
11. Mr Gray’s alternative argument that recovery would not be an “affront to public conscience” was one which was tenuous and in any event could not be pursued at first instance [paragraphs 52 and 53].
12. Mr Gray’s further alternative argument that he would have suffered the same loss irrespective of the manslaughter involved speculation about a hypothetical situation, and was trumped by House of Lords authority [paragraphs 54-59].
13. I note from paragraph 8 of the judgment of Sir Anthony Clarke MR that Mr Gray is recorded as not advancing a claim for general damages to reflect the consequences of being detained in a mental hospital pursuant to sections 37 and 41, because he accepted that it was not open to him to do so. I note too that this is consistent with the first sentence of paragraph 5 of Lord Phillips’ opinion in the House of Lords, although this is not consistent with the first sentence of paragraph 43 of Lord Hoffmann’s opinion. Further, Lord Rodger did not mention any claim for general damages for loss of liberty.
14. Mr Gray’s primary case on appeal to the Court of Appeal was that Flaux J had applied the wrong test, or alternatively that his claim was not connected with or inextricably bound up with the manslaughter such as to be precluded by *ex turpi causa* [paragraph 9]. In the further alternative, he submitted that his loss crystallised when he suffered injury at the time of his accident [paragraph 11].
15. My reading of the Court of Appeal’s judgment is that the second alternative argument was rejected [paragraph 12], and that the real question was the inextricable link issue [paragraphs 8 and 20]. Sir Anthony Clarke MR accepted part of Mr Gray’s case on this question, concluding that the claim for loss of earnings was not inextricably bound up or linked with his criminal conduct [paragraphs 28-35]. It followed that the claim for loss of earnings was not precluded by any public policy objection. On the other hand, the claims for general damages for loss of reputation and for guilt and remorse, and the claim for an indemnity, were said to be inextricably linked with the illegal conduct [paragraph 24].
16. By the time the case came before the House of Lords on the defendant’s appeal and Mr Gray’s cross-appeal, it is not altogether clear from the Law Reporter’s brief note of Counsels’ arguments exactly what matters were being advanced, and in what order. I also detect differences in the way three of their Lordships characterised the issues before them, and the course of the litigation below: see Lord Phillips at paragraphs 5-7; Lord Hoffmann at paragraphs 23-26; and Lord Rodger at paragraphs 61-62, 64, 69 (rejecting what he called the first version of the claim) and 70 (what he called the claimant’s alternative version, in effect a variant of the alternative version which the Court of Appeal had on my understanding rejected). Further, Mr Gray’s alternative case (at least, in one of its iterations) was advanced in the House of Lords in a slightly different way to below, because he was now saying that his act of manslaughter was not the cause of the hospital order and his detention under it: rather, he needed treatment (see Lord Phillips at paragraphs 7 and 16).
17. Mr Moon recommended the use of the metaphorical wet towel to work out precisely what was argued at each stage of the litigation, and how such arguments were countered. I am not convinced that I have successfully drilled down to the very bottom of these matters. I suspect that part of the problem may lie in the fact that Mr Gray’s case developed as it progressed upwards. Ultimately, though, this does not matter, because the essential point must be that Mr Gray’s claims failed in all their iterations. Equally, it makes no difference to the outcome whether Lord Hoffmann addressed a claim that was not being advanced. He held that the narrow rule precluded a claim for general damages for loss of liberty [paragraph 50], the majority agreed with his opinion, and in any event it is clear that their express reasoning would be apt to cover such a claim whether or not it was a live issue in the appeal.
18. My search for the *ratio* of Gray must begin with the opinion of Lord Hoffmann given in his last case before his retirement. Mr Bowen was critical of it, as indeed has been at least one academic commentator[[2]](#footnote-2). It would be *lèse-majesté* for me to participate in this discussion: the duty of the first instance judge is to parse and then apply the law. However, I continue to admire the brilliant clarity of Lord Hoffmann’s exposition.
19. My interpretation of Lord Hoffmann’s opinion in Gray is as follows:
20. The claimant pleaded guilty to manslaughter on the ground of diminished responsibility [paragraph 22]. I would interpose that Lord Hoffmann did not discuss the extent of the claimant’s impairment, and did not seek to draw any inferences about it.
21. The maxim *ex turpi causa* “expresses not so much a principle but a policy. Furthermore, that policy is not based upon a single justification but on a group of reasons, which vary in different situations” [paragraph 30].
22. The rule of public policy distils into two forms: a narrow form (or rule), which holds that damages cannot be claimed for loss of liberty lawfully imposed in consequence of one’s own unlawful act; and a wide form (or rule) which holds that recovery is barred for loss suffered in consequence of one’s own criminal act [paragraph 29][[3]](#footnote-3).
23. The narrow rule is based on the notion that it would be inconsistent for the civil law to permit recovery when the criminal law authorises the very loss of liberty from where the loss springs [paragraphs 29 and 37 in particular].
24. Although Clunis supports the wide rule [paragraph 51, second sentence], subsequent decisions of the Court of Appeal have interpreted it as expressing the narrow rule: see Worrall v BRB [paragraphs 36 and 37] and Gray itself [paragraph 43].
25. The narrow rule is sufficient to dispose of the majority of Mr Gray’s claims, albeit not his claims for general damages for feelings of guilt and remorse, and for an indemnity [paragraph 50].
26. The wide rule, however expressed, is sufficient to cover the remaining heads of damage [paragraph 55].
27. There are four aspects of Lord Hoffmann’s opinion which warrant further consideration. First, he pointed out that the issue of causation simply does (or should) not arise at all in relation to the narrow rule: not merely does it address the wrong question, it is plain (*pace* the decision of the Court of Appeal) that there was causal connection between the tort and the killing, the killing and the criminal sentence, and the criminal sentence and the posited inability to earn [paragraphs 44 and 48]. Secondly, he rejected the submission that Mr Gray should be compensated for any loss of earning capacity which would have arisen on account of his PTSD in any event, on the basis that this counter-factual was stymied by decisions in the House of Lords such as Jobling v Associated Dairies Ltd [1982] AC 794. Thirdly, he agreed that problems of causation might arise in connection with the wide rule [paragraph 51], although these did not exist in the instant case [paragraph 55]. Fourthly, in his view the hospital order made in Mr Gray’s case reflected the various purposes underlying a criminal sentence, and it is otiose to consider which of these purposes might have predominated.
28. This fourth point emanates from paragraph 41 of Lord Hoffmann’s opinion, which was subjected by Mr Bowen to close analysis. I therefore set out the salient passages:

“The narrower rule is thus well-established and the only cases in which it has been questioned are those in which some judges have felt that it was hard on the plaintiff because his conduct had not been as blameworthy as all that. Perhaps an extreme example is the dissent of Kirby P in State Rail Authority of New South Wales v Wiegold 25 NSWLR 500 ... Likewise it has been submitted in this case that the sentence of detention in a hospital reflected the fact that Mr Gray was not really being punished but detained for his own good to enable him to be treated for post-traumatic stress disorder. But the sentence imposed by the court for a criminal offence is usually for a variety of purposes: punishment, treatment, reform, deterrence, protection of the public against the possibility of further offences. It would be impossible to make distinctions on the basis of what appeared to be its predominant purpose. In my view it must be assumed that the sentence (in this case, the restriction order) is what the criminal court regarded as appropriate to reflect the personal responsibility of the accused for the crime he had committed. .… This was plainly the view of the Court of Appeal in Clunis in which the plaintiff had also been sentenced to detention in hospital. I agree.”

1. My interpretation of this paragraph is that a hospital order (with or without a restriction order) always has a punitive component, and that no inquiry should be made into the degree or extent of the subject’s personal responsibility. Lord Hoffmann had earlier pointed out [paragraph 27] that “the stress disorder diminished Mr Gray’s responsibility but did not extinguish it”.
2. Lord Hoffmann did not comment on paragraph 15 of Lord Phillips’ opinion. He did not address earlier Court of Appeal authority (see paragraph 49(1) below) which suggested that hospital orders do not contain a penal element. Mr Bowen boldly submitted that this omission led him into error, and serves to undermine a major plank of his reasoning. In my view, that submission should have been reserved for another occasion. At this judicial rung, and given in particular the framework within which these submissions were being put forward (see paragraphs 60 and 61 below), it amounts to the *lèse-majesté* I have sedulously abjured. It is not open to Mr Bowen to make that submission. In any event, I must point out that Lord Rodger came to the same overall conclusion without perpetrating this alleged solecism (see paragraph 78 of his opinion), from which it may be concluded that Lord Hoffmann’s specific comment about hospital orders was probably *obiter*. I think that the real point which should be drawn from paragraph 41 of Lord Hoffmann’s opinion is that gradations of personal responsibility are irrelevant and all that need be said is that the claimant’s responsibility was diminished.
3. Clearly, if Lord Hoffmann’s opinion represents the law, I would be bound to determine the preliminary issue in the Defendant’s favour in relation to all six formulations of claim. The losses claimed would be precluded by the application of the narrow and wide forms of the rule of public policy. As I have already said, given that Lord Hoffmann did not explore the extent of Mr Gray’s mental impairment, it must be treated as irrelevant to the core reasoning of his decision.
4. Lord Phillips, who has a particular interest in this area, agreed with “Lord Hoffmann’s identification of a wider and narrower rule of public policy, applicable in this case” [paragraph 7]. In other words, he agreed that all Mr Gray’s claims should fail. Importantly for Mr Bowen’s submission, he disagreed with the *general* applicability of paragraph 41 of Lord Hoffmann’s opinion, although he did agree that what the latter said about hospital orders was applicable to the circumstances of the instant case [paragraph 8, final sentence].
5. Lord Phillips’ reasoning was essentially along the following lines:
6. A hospital order is not penal in nature [paragraph 9: see R v Birch [1989] 11 Cr App R (S) 202, at 210] but it may be imposed, particularly in conjunction with a restriction order, in situations where there is an element of personal culpability and a dangerous and disordered person requires detention in a secure setting [paragraph 11, and Birch at 210-211].
7. It is clear on the authorities that a hospital order may be imposed where the offender has no significant responsibility for his offence [paragraph 14, first sentence]. It may also be imposed in exceptional cases where the offence leading to the conviction is so trivial or minor that it should be viewed as possibly having no relevance to the decision to make the hospital order [penultimate sentence, paragraph 14].
8. After Rafferty J imposed her hospital and restriction orders in this case in 2003, amendments were made to section 45A of the Mental Health Act 1983 (as originally amended in 1997) enabling a combined hospital direction and penal sentence to be imposed in relation to those suffering from mental disorders (the original amendment applied only to psychopathic disorders) [paragraph 13]. I would add that the relevance of this latest amendment is that cases of significant personal responsibility are now likely to attract a section 45A combined or hybrid order.
9. The “stark” choice faced by Rafferty J was between a hospital order together with a restriction order and a discretionary sentence of life imprisonment. The fact that she imposed the former “is no indication that she did not consider that Mr Gray had to accept significant responsibility for his actions” [paragraph 17].
10. Paragraph 15 of Lord Phillips’ opinion has been subjected to particular scrutiny, and I therefore set it out in full:

“In such an extreme case, where the sentencing judge makes it clear that the defendant’s offending behaviour has played no part in the decision to impose the hospital order, it is strongly arguable that the hospital order should be treated as being a consequence of the defendant’s mental condition and not of the defendant’s criminal act. In that event the public policy defence of *ex turpi causa* would not apply. More difficult is the situation where it is the criminal act of the defendant that demonstrates the need to detain the defendant both for his own treatment and for the protection of the public, but the judge makes it clear that he does not consider that the defendant should bear significant personal responsibility for his crime. I would reserve judgment as to whether *ex turpi causa* applies in either of these situations, for we did not hear full argument in relation to them. In so doing I take the same stance as Lord Rodger.”

1. I will be returning to this crucial passage at paragraphs 70-76 below.
2. Turning now to the opinion of Lord Rodger, he noted that Mr Gray’s first formulation was that the defendant’s breach of duty “caused him to develop psychological problems, which in turn led him to committing manslaughter, and so being detained … under the 1983 Act, and losing earnings as a result” [paragraph 64]. In Lord Rodger’s view, this first formulation was clearly thwarted by the *ex turpi causa* maxim in its narrow iteration [paragraph 69], although Lord Rodger did not expressly use Lord Hoffmann’s taxonomy. I should add that in reaching his conclusion on this issue Lord Rodger expressly approved the reasoning and conclusion of the Court of Appeal in Clunis [paragraphs 65, 66 and 69].
3. Mr Gray’s alternative formulation was that his loss of earnings or loss of earning capacity crystallised the moment he started to suffer from his PTSD, and that the manslaughter and resulting custody were irrelevant [paragraphs 70-71]. Lord Rodger considered that this sort of claim encountered major difficulties in the light of well-known House of Lords authority, but that it was unnecessary to express a concluded view upon this since the alternative claim failed on more fundamental grounds [paragraphs 73-76]. In particular, the claim failed because “the civil court should cleave to the same policy as the criminal court” [paragraph 82].
4. I read Lord Rodger’s core reasoning on this issue is set out at paragraphs 78 and 79. Given its importance, I set out the relevant passages in full:

“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 from serious harm", having regard, in particular, to the claimant's violent attack on Mr Boultwood.

By imposing the hospital order with a restriction, the judge was ensuring that, because he had committed manslaughter, the claimant would not be free to move around in the community unless and until authorised to do so by the Secretary of State. This meant, among other things, that he was not to be free to work and earn while subject to the orders. In other words, his earning capacity was removed for as long as they were in force. In my view, it would be inconsistent with the policy underlying the making of the orders for a civil court now to award the claimant damages for loss of earnings relating to the period when he was subject to them.”

1. Contrary to Mr Moon’s submission, and accepting Mr Bowen just on this aspect, I agree that Lord Rodger was applying Lord Hoffmann’s narrow rule.
2. Lord Rodger applied what was in effect Lord Hoffmann’s wide rule to defeat the claims for an indemnity and for general damages for feelings of guilt and remorse [paragraphs 84-88]. At paragraph 88 Lord Rodger said that he was in agreement with Lord Hoffmann.
3. Paragraph 83 of Lord Rodger’s opinion has given rise to much debate at the Bar, and I therefore set it out in full:

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

1. On my reading of his opinion, Lord Brown applied the inconsistency principle (i.e. the narrow rule), and causation arguments, as the means of blocking the whole of Mr Gray’s claims. Neither Counsel chose to dedicate oral argument to Lord Brown, and although I always value his analysis I feel able to move straightaway to what is salient for present purposes, namely paragraph 103:

“I do not think that any of these observations are at odds with anything said by others of your Lordships. On the contrary, I am in substantial agreement with all that others have said—including not least the reservations expressed by my noble and learned friend Lord Phillips of Worth Matravers at paragraph 15 of his opinion. Sympathetic though I am to the respondent, the disputed elements of his claim do indeed fall foul of the *ex turpi causa* principle.”

1. Lord Scott agreed with both Lords Hoffmann and Rodger [paragraph 56]. He did not mention Lord Phillips.
2. Mr Bowen’s submissions on the *stare decisis* issue evolved somewhat as the case progressed, but I now understand his essential argument to proceed along the following pathway:
3. The majority of their Lordships in Gray (viz. Lords Phillips, Rodger and Brown) have expressly reserved their judgment in relation to someone who shares this Claimant’s characteristics but not Mr Gray’s: namely, an individual who does not have significant personal responsibility for her actions. It follows that the *ratio* of Gray must be taken to exclude someone who did not have significant personal responsibility for her actions [STAGE 1].
4. It also follows that the only candidate for binding authority in this particular domain is Clunis [STAGE 2].
5. Clunis should not be treated as binding authority, even at first instance, because its reasoning is wholly inconsistent with the more fluid, discretionary approach laid down by the majority of the Supreme Court in Patel v Mirza [2016] 3 WLR 399. The court should refuse to follow a decision of the Court of Appeal which, although not overruled, cannot stand with a decision of the House of Lords (see Young v Bristol Aeroplane Co Ltd [1944] 1 KB 718) [STAGE 3].
6. It is important to recognise that Mr Bowen’s contention was that Clunis is incompatible with Patel, not that Gray is incompatible with Patel. He accepted that if he is unable to persuade me of the correctness of his argument at what I have called Stage 1, he must lose this case at this judicial level. As he put the matter in his Reply, “I cannot use my undermining argument to eviscerate Gray”.
7. Mr Bowen deployed a mass of subordinate submission, authority and academic commentary in support of these primary submissions. I have taken all of these into account. In my judgment, however, the *stare decisis* point is reasonably straightforward and Mr Bowen’s argument clearly fails at Stage 1.
8. This is because the majority of their Lordships in Gray did not seek to quantify the claimant’s “substantial impairment” or to place him at any particular location along the notional spectrum. It may be that the evidential basis to do so was lacking; it may be that the majority considered that the exercise was legally irrelevant: this matters not. Lord Hoffmann clearly treated the issue as being unitary or monist (see paragraphs 22 and 27, and – by implication – paragraph 41). I asked Mr Bowen to tell me exactly where Lord Rodger adopted any different approach, and in my view he could not to do so. In my judgment, two possible inferences may be drawn from paragraphs 78-79 of Lord Rodger’s opinion, but neither avails the Claimant. The first is that he did not know on the material before him whether Mr Gray had significant personal responsibility for his actions, and was unwilling to draw inferences about it; the second (and my preferred reading) is that it was legally sufficient to state that he must have some personal responsibility, because that flows inexorably from the manslaughter conviction. As it happens, in my view Lord Rodger would have come to the same conclusion even should these paragraphs bear the interpretation that he thought that Mr Gray’s personal responsibility was significant.
9. Given that Lord Rodger did not state in terms that the position would or might have been different if Mr Gray’s personal responsibility had been less than significant, it would be surprising if paragraph 83 of his opinion, so heavily relied on by Mr Bowen, should bear the interpretation he strives to place upon it. In any event, I do not think that it bears that construction at all. The “for instance” in the first sentence of paragraph 83 is not a promising basis for a submission that Lord Rodger was somehow intending to embrace Lord Phillips’ second reservation. Lord Rodger only mentions the first reservation; he covers it in some detail; and he uses the singular pronoun “it” at the end of paragraph 83. Had he intended to join with Lord Phillips’ second reservation, he would have said so.
10. Further, Lord Scott would not have agreed with just Lord Hoffmann and Lord Rodger had he thought that the latter was wholly *ad idem* with Lord Phillips. If that had been his understanding of Lord Rodger’s opinion, Lord Scott would also have expressly agreed with Lord Phillips. It was the senior law lord who had supplied all the reasoning on the point.
11. When one examines paragraphs 28-31 of Lord Toulson’s judgment in Patel, it is clear that he thought that Lord Phillips and Lord Brown were reserving their judgment on two matters, whereas Lord Rodger was doing so on only one. Further, Lord Toulson stated that the leading opinion was given by Lord Hoffmann, “with whose reasoning Lord Phillips (subject to certain additional observations) and Lord Scott agreed”. In my view, and with appropriate diffidence and respect, these passages are more authoritative than the opinions of an academic commentator, textbook writers and even the Law Commission.
12. It is true that at the end of paragraph 15 of his opinion in Gray, Lords Phillips stated that “in so doing [reserving these matters] I take the same stance as Lord Rodger”. I accept that it is just arguable that he may have interpreted Lord Rodger as making two reservations, not one; but in any event I am not bound by this part of Lord Phillips’ opinion and I would respectfully disagree with it (on the assumption most favourable to Mr Bowen, that this was what Lord Phillips was in fact saying).
13. It follows that the majority in Gray (Lords Hoffmann, Scott and Rodger) did not reserve their judgment in a case where the claimant had no significant responsibility for her or his offence. On this basis alone, I would hold that I am bound by Gray and that all six formulations of the claim[[4]](#footnote-4) must fail at this judicial level. It also follows that I am bound by Clunis because the majority in Gray specifically endorsed the reasoning of the Court of Appeal, both in relation to the wide and the narrow rule.
14. Although this foregoing conclusion is sufficient to determine the preliminary issue in favour of the Defendant, in my view I should proceed to examine the position on the alternative footing that I may have misinterpreted Lord Rodger’s opinion in Gray, and that he should be taken as having subscribed to Lord Phillips’ second reservation.
15. On this footing, it is necessary to locate the true *ratio* of Lord Phillips’ opinion on the premise that it represents the majority viewpoint of the House of Lords. If it does not, the issue is academic. It is also necessary to put to one side Lord Hoffmann’s unitary analysis of the concept of substantial impairment, since that must now be seen as constituting the minority opinion.
16. Mr Moon’s submission was that, given that Lord Phillips was dealing with hypothetical facts (c.f. the actual facts of Gray), I should regard his reservation as being *obiter dictum* rather than as part of the *ratio* of his decision.
17. I took a careful note of Mr Bowen’s submissions on this aspect of the case. He submitted that he was driven to accept that the second reservation was not part of the *ratio*. However, he also submitted that the majority of their Lordships “have limited the application of the *ratio* to those who are significantly responsible”.
18. I confess that I was left rather confused at this stage of the debate, but I accept that the point has an inherent tendency to elude. I have concluded that Mr Bowen is correct, but maybe not quite on the analysis that he advanced.
19. In my judgment, Lord Phillips was saying that in principle there may be cases where a claimant’s personal responsibility is not significant, although the case under scrutiny did not fall within such a category. Lord Phillips treated Mr Gray as possessing significant personal responsibility for his actions. I gather this from the final sentence of paragraph 8, and from paragraph 17, although the use of the double negative in the latter paragraph suggests that the material before Rafferty J may have been limited. Given his personal interest in this whole area, it is possible to infer that Lord Phillips thought that it would require an extreme case of PTSD (c.f. paranoid schizophrenia) to reduce a sufferer’s personal responsibility to a level below significant. To my mind, Lord Phillips was therefore confining the *ratio* of the case before him to those with significant personal responsibility, leaving the position open in relation to those without it. I do not interpret Lord Phillips as expressing an opinion as to the strength of a claimant’s argument if s/he did fall within the category of less than significant personal responsibility, but he must have considered that the point was arguable otherwise it would not have been mentioned. (Lord Phillips clearly thought that the argument was stronger as regards his first reservation).
20. Thus, the correct analysis is to say that Lord Phillips’ second reservation is a limitation on the *ratio* of the House of Lords’ decision in that case. Any opinion he might be interpreted as expressing about the merits of any (future) case which did fall within that reservation on its facts was *obiter*.
21. Were the position otherwise, but only on the premise that Lord Phillips was speaking for the majority, uncomfortable results would flow in the context of the Practice Direction (see Practice Statement (Judicial Precedent) [1966] 1 WLR 1234).
22. It follows from the above that – again, only on the premise that I am wrong about the ratio of Gray because I have misunderstood Lord Rodger – Stage 2 of Mr Bowen’s analysis falls to be addressed.
23. The premise for Stage 2 is that the only potentially binding authority blocking Mr Bowen’s submission is Clunis in the Court of Appeal. That case followed what I have called a unitary or monist approach to the substantial impairment question (in reality, the same approach as Lord Hoffmann’s) whereas for the purposes at least of this submission the House of Lords (Lords Phillips, Rodger and Brown) in Gray must be understood as questioning the correctness of that analysis. However, it is important to recognise that the House of Lords did not say that it was incorrect.
24. Mr Bowen was constrained to submit that Clunis was plainly inconsistent with the reasoning of the Supreme Court in later cases. He did not submit that Clunis was expressly disapproved or overruled. His headline submission was that Clunis does not survive the discretionary and flexible approach mandated by the Supreme Court in Patel, that the mechanistic application of the Clunis rule-based approach leads to injustice in cases such as the present, and that it would be disproportionate to deny a claimant compensation in a situation where her responsibility is less than significant whereas the tortfeasor’s is so much greater.
25. There are four decisions of the Supreme Court which post-date Clunis and Gray. I have already pointed out that Patel treats Lord Hoffmann as being part of the majority in Gray. It is somewhat artificial to predicate that he was in fact part of the minority, although in one sense I am assuming that he was, otherwise the whole of my discussion on Stage 2 should be seen as supererogatory. Even so, I will mention the occasions on which subsequent Supreme Court decisions address Gray since these may throw light on Clunis.
26. In Hounga v Allen [2014] 1 WLR 2889, Clunis was cited to the Supreme Court [2890G/H] but it did not feature in the leading judgment of Lord Wilson. At paragraph 36 he commented on the “inextricable link” test covered by Lord Hoffmann and Lord Rodger, but in my view nothing he said casts any doubt on the core reasoning of Gray.
27. In Les Laboratoires Servier v Apotex Inc [2015] AC 430 Clunis was not cited to the Supreme Court. At paragraph 29 of the leading judgment of Lord Sumption, mention was made of the first reservation in Gray but not the second – and in the context of Lord Rodger’s opinion and not Lord Phillips’. In the same paragraph Lord Sumption mentioned Lord Hoffmann’s narrow rule without commenting on it.
28. In Bilta (UK) Ltd (in liquidation) v Nazir [2016] AC 1, Clunis was not cited to the Supreme Court. Paragraph 170 of the joint judgment of Lords Toulson and Hodge briefly mentions Gray and expressly endorses Lord Hoffmann’s “number of policy objectives” approach.
29. A nine-bench court was convened in Patel in order to revisit the issue of illegality in the context of an unjust enrichment case. The parties before me were wide apart as to the breadth and reach of the Supreme Court’s decision, but in my view I do not have to reach a conclusion about that at this stage. Counter-intuitively, it should be noted that the stronger is Mr Bowen’s case that Patel amounts to a comprehensive excursus across the whole range of illegality cases, including tort cases such as the present with a criminal law component, the weaker becomes his submission that a “Patel-compliant” approach should lead to a different conclusion on these facts. This is because of the way in which both Clunis and Gray were discussed by the Supreme Court – without qualification or criticism. (In fact, and to be fair to Mr Bowen in the light of his ambitions for this case at a higher echelon, I do not read Patel as intending to supply a complete answer to all illegality cases).
30. I have already referred to paragraphs 28-31 of the judgment of Lord Toulson. I do not interpret these passages as being critical of Gray in any way, or of lending support to Lord Phillips’ reservations. Indeed, I read paragraph 32 of his judgment, read in conjunction with his summary of Lord Hoffmann’s opinion, as generally supportive of an approach which examined the “policy reasons which justified the application of the illegality defence and to explain why those policies applied to the facts of the case”.
31. At paragraph 129 of his judgment, Lord Kerr cited with apparent approval paragraph 30 of Lord Hoffmann’s opinion (see paragraph 36(2) above).
32. At paragraph 155 of his judgment, final sentence, Lord Neuberger cited with implicit approval Lord Rodger’s statement at paragraph 82 of his opinion in Gray that “the civil court should cleave to the same policy as the criminal court”.
33. At paragraph 232 of his judgment, Lord Sumption (who was in the minority, favouring a rule-based approach) examined Gray with approval, emphasising the importance of the principle of the internal coherence of the law. He mentioned Clunis in passing at paragraph 234. At paragraph 262(iii) Lord Sumption expressly addressed the first reservation in Gray, in the context of Lord Rodger’s opinion (paragraph 83) and not Lord Phillips’; and opined:

“One would expect most if not all such offences [trivial offences] to be covered by the exception for cases in which the illegality principle would be inconsistent with the legal rule which makes the act illegal.”

Lord Sumption did not comment on the second reservation.

1. In my judgment, it is clear from the foregoing review of subsequent Supreme Court authority that no express criticism has been made of either Clunis or Gray. If anything, there may be merit in Mr Moon’s submission that Gray has been treated by the Supreme Court as a sound application of a flexible, policy-based approach. I fully recognise that the Supreme Court has not addressed Lord Phillips’ second reservation, but that is a point in the Defendant’s favour, not the Claimant’s. Further, I also recognise that, were this case to be examined by the Supreme Court, the Claimant would seek to argue, in line with the discretionary approach outlined by Lord Toulson at paragraph 120 of his judgment, that a rule-based approach is overly mechanistic and that “denial of the claim would [not] be a proportionate response to the illegality”. I say nothing about the merits of that argument, because I did not hear full submissions about it - although much of Mr Bowen’s address was directed to this issue. In my judgment the fact that this argument could be advanced does not mean that Clunis should *at this stage* be regarded as flatly inconsistent with subsequent Supreme Court authority.
2. In my judgment, it means the opposite. For Clunis to be frankly inconsistent with the Supreme Court, Mr Bowen has to point to reasoning in Patel which is based expressly on like or materially similar facts to Clunis; and I consider that there is no such reasoning. The doctrine of precedent is about the identification and then the application of the explicit reasoning of a higher court upon actual or assumed facts; it is not about attempting to draw logical inferences from statements of general application, or anticipating how that higher court might decide the case at issue with the benefit of full argument upon it. Thus, the highest that Mr Bowen’s submission can realistically be put is that the application of Lord Toulson’s multifactorial approach to these facts might lead to a different outcome. I cannot accept that it does, or must, lead to a different outcome. The distinction between “might” and “does” is critical. The former anticipates Mr Bowen’s prospects on appeal; the latter affirms that he has no prospect of success at this juncture. In this regard I am giving full weight to the whole of the Earl of Halsbury’s dictum in Quinn v Leathem.
3. Mr Bowen has to bring this case within the second category in Young v Bristol Aeroplane Co Ltd and persuade me that, although Clunis has not been expressly overruled, it “cannot stand” with a decision of the Supreme Court. For the reasons I have given, he has failed to persuade me of that. In any event, I would hold that in this sort of case it is not open to a first instance judge to be so bold. Young only addresses how the Court of Appeal should deal with a previous decision of its own.
4. Mr Bowen drew my attention to a line of matrimonial cases where a first instance judge (Hodson J as he then was) refused to follow a decision of the Court of Appeal which had been expressly disapproved, but not overruled, by the House of Lords. These cases do not avail him, because Clunis has not been expressly disapproved by the Supreme Court.
5. Mr Bowen also submitted that the doctrine of precedent has loosened in recent years, and that I am not a Victorian judge. I am entirely comfortable with this second point, and recognise too that the common law has relaxed some of its more austere, self-imposed constraints in a number of respects. However, the doctrine of precedent retains its value in an ordered, hierarchical system, and the application of an appropriate degree of judicial discipline in the instant case leads to only one conclusion.
6. It follows that, even on the assumption that Lord Phillips was speaking for the majority in Gray, I would hold that the Claimant’s case fails at Stages 2 and 3 of Mr Bowen’s analysis.

**Application for a Certificate under Section 12 of the Administration of Justice Act 1969**

1. A copy of my Judgment was provided to the parties in draft, and I invited submissions on this application, being one which Mr Bowen had at the oral hearing indicated that he would make in the event that he was unsuccessful before me.
2. The application is made under both limbs of section 12(1)(a), namely the fulfilment of the “relevant conditions” (as per section 12(3)) as well as the “alternative conditions” (as per section 12(3A)). I can say at once that the alternative conditions are not satisfied because this is not a matter of national importance (c.f. R (oao Miller and others) v Secretary of State for Exiting the EU [2016] UKSC 0196).
3. In my judgment, section 12(3)(b) is fulfilled in this case. It has two aspects. The first is whether a point of law of general public importance is involved. I agree with Mr Bowen that the issues I have traversed in my Judgment raise matters of general public importance, particularly given my finding that the Claimant’s personal responsibility was not significant. The second is whether I am bound by Court of Appeal or House of Lords authority which fully considered the point of general public importance I have identified. Both parties are in agreement that this condition is fulfilled: I have held that I am bound by the decisions of the House of Lords in Gray and of the Court of Appeal in Clunis. I have also held that the reasoning of these decisions does not differentiate between cases of significant and less than significant personal responsibility, in which circumstances I must conclude that the point at issue was fully argued.
4. The real issue which arises is whether the Claimant has made out a sufficient case for an appeal to the Supreme Court. In my view, I have to make some sort of assessment of the Claimant’s prospects of persuading the Supreme Court that a “Patel-compliant approach” should lead to a result different from Clunis and Gray on these particular facts. I also have to consider whether the Supreme Court would benefit from reasoning of the Court of Appeal on this issue.
5. I have no doubt that the application of a “Patel-compliant approach” in the Supreme Court would lead to the same outcome on facts indistinguishable from Clunis and Gray. Or, put another way, I have no doubt that these cases are “Patel-compliant” on their particular facts, being cases where the claimants’ personal responsibility could not be regarded as insignificant. I also consider that the Claimant has no real prospect of persuading the Court of Appeal that my analysis of *stare decisis* principles, and of their application to the present case, is incorrect.
6. Before granting a section 12 certificate, I would have to be satisfied that the case is a proper one for the grant of permission to appeal to the Court of Appeal (see section 15(3) of the Administration of Justice Act 1969). In my judgment, but only on the premise that I am minded to grant the certificate, this does not raise a separate issue in the circumstances of the present case.
7. I think that the real question here is whether the Claimant has made out a sufficient case before me (*per* section 12(1)(b)) that the Supreme Court might overrule Gray in a case involving insignificant personal responsibility, or at least confine its *ratio* to cases which do involve significant personal responsibility. Mr Bowen submitted that:

“It is plainly arguable that, in light of Patel, (i) the rule based approach as adopted by the Court of Appeal in Clunis and Lord Hoffmann in Gray should give way to the range of factors approach of the majority in Patel, and (ii) it is not proportionate to allow the defendant to rely on the illegality defence where the claimant was not significantly responsible for her actions despite her criminal conviction for manslaughter by way of diminished responsibility.”

1. Mr Moon submitted that the present case is unlike other cases where section 12 certificates have been granted because the Supreme Court in Patel has at least discussed the very jurisprudence which constitutes the precedential obstacle. Moreover, the Supreme Court has not expressly doubted or questioned those cases in any way, and has made no mention of Lord Phillips’ second reservation.
2. I do not accept the Claimant’s submission that the test applied by the Supreme Court in relation to applications for permission to appeal to itself applies to applications for section 12 certificates. The sub-section requires the ascertainment of a “sufficient case” which, to my mind, entails a range of considerations, some merits-based, some discretionary.
3. I do not accept Mr Moon’s submission that there would be some value in the Court of Appeal considering this issue. I have boldly stated that the Court of Appeal would be constrained to agree with me that it is bound by the majority in Gray.
4. Overall, I see some merit in the Claimant’s core contention that it is disproportionate on the facts of her case to deny recovery on public policy grounds. However, I am not persuaded that she has made out a sufficient case that this is so. To my eyes, the key point is the manner in which the Supreme Court has looked at Gray in its subsequent jurisprudence, and in particular has failed to say anything about Lord Phillips’ second reservation.
5. It follows that I must refuse to issue a certificate under section 12 of the Administration of Justice Act 1969. I also refuse permission to appeal to the Court of Appeal for the reason indicated under paragraphs 99 and 104 above.

**Conclusion**

1. There must be judgment for the Defendant on the preliminary issue.

**APPENDIX**

**The Agreed Statement of Facts**

**Background to the claim**

1. EH, the Claimant ("C") was born on 10 August 1971. She has been diagnosed at different times as suffering from paranoid schizophrenia or schizoaffective disorder.
2. C began experiencing problems with her mental health in 1995. From about 2003 she had various formal (pursuant to the Mental Health Act (MHA) 1983)) and informal hospital admissions.
3. Between April 2006 – June 2008 C was detained in hospital pursuant to s3 MHA.
4. In June 2008 C was granted leave from hospital pursuant to s17 MHA to enable her to live in the community. She was subsequently discharged from detention and placed on a Community Treatment Order (‘CTO’) made under s17(a) MHA on 14 January 2009. Her care plan stated that there should be a low threshold for recall to hospital pursuant to s17(E)(1) MHA.
5. In August 2010 C was living in supported accommodation, Queensland Lodge pursuant to the CTO. She had resided there since November 2009. During this period C was under the care of the Southbourne Community Mental Health Team (SCMHT), managed and operated by the Defendant ("D").
6. On or around the 13 August 2010 C began to experience a relapse of her psychiatric condition. In particular on that date she missed her depot appointment with her Community Psychiatric Nurse (‘CPN’).
7. On 16 August 2010 the missed depot injection was administered to C on a relief visit.
8. On 20 August 2010 C failed to attend her voluntary work at the CRUMBS bakery project.
9. On 23 August 2010 C missed an appointment with the Occupational Therapist in Vocational Services.
10. At around 16.15 on 23 August 2010 C was visited by a Housing Support Worker, Ms Loynes, from the supported living accommodation in Queensland Lodge. At first C would not answer the door. When she did she would either not make eye contact or would stare intensely. She appeared agitated. C disclosed that she felt unwell, wanted the SCHMHT to be contacted and had not slept the previous night.
11. Ms Loynes made contact with SCMHT and reported to Rochella Harvey, a Community Mental Health Nurse that C's mental state was deteriorating and that she had not seen her like this before. Ms Loynes was asked if C was at risk of suicide or self-harm. Ms Loynes was unable to express a view on these matters. Ms Loynes asked for someone to come out and assess C but was told that as C did not appear to be at immediate risk the SCMHT would wait until the 25th August to carry out any assessment when C's previous care co-ordinator would be available.
12. Ms Harvey discussed C's case with Shane Sadler, who agreed to review her case the following day having consulted with Emer Kelly (CPN) from the SCMHT who knew C well and had provided her with the depot injection on 16 August 2010.
13. At 9 am on the 24 August 2010 Ms Loynes again telephoned the SCMHT for an update on the plan for C. She was told a plan was being put in place and she would be contacted.
14. On 24 August 2010, the plan devised by Mr Sadler was to involve C's care co-ordinator to assess her mental health on 25 August 2010.

**The offence**

1. At approximately midday on 25 August 2010 one of C's work colleagues, (Samantha) attended Queensland Lodge out of concern for C whom she had not seen for a couple of days. Samantha rang on C's door bell but she would not answer it, despite Samantha being able to see C pacing around inside her flat.
2. Samantha contacted Ms Loynes to express her concerns about C's mental health.
3. C's mother then arrived outside her flat. She informed Samantha that she had been trying to get hold of C for several days without success. C's mother knocked on the door demanding to be let in, she then went down to the garden to make a phone call to Ms Loynes to express her concern about the C's mental health and ask if she could be let into the flat.
4. At this point Samantha looked through the C's letter box and saw that C had picked up a large kitchen knife. C came to the door with the knife. Samantha described C as looking like a different person to the one she knew. Samantha ran down the stairs to the garden and shouted to C's mother to ring the police as C had a knife. C's mother was in the back garden of the flats at this point.
5. While C's mother was on the phone to the police C approached her mother and stabbed her. C's mother is described as trying to get away while C continued to stab her. C stabbed her mother 22 times.
6. C then walked out of the garden into an alleyway and onto the street. She walked into Boscombe and was seen by several people, covered in blood and carrying the knife. One witness described her as twirling the knife in her hand. Other witnesses described her as walking in an odd way with a detached crazy look as though she were mentally ill.
7. C was approached by the police. She would not put the knife down. The police used an incapacitant spray on her. She was then taken into custody at the Bournemouth Police station.
8. Meanwhile, Ms Loynes again contacted the SCMHT. In particular she reported that she had received telephone calls from a friend of C and her mother, both reporting concerns.
9. At or about 14.27 on the 25 August 2010 (at least one hour after C had killed her mother) the SCMHT agreed to Emer Kelly carrying out an assessment of C later that afternoon.

**The aftermath**

1. C was charged with the murder of her mother.
2. The police custody records show that C was acutely psychotic, muttering to herself, appearing vacant and preoccupied and drinking excessive amounts. On several occasions she attempted to drink from the toilet bowel (a symptom associated with schizophrenia). She was assessed in custody and deemed unfit for interview.
3. On the 25 August 2010 C was admitted to a high secure mental health unit in Hampshire.
4. On 28 August 2010 C was transferred to Cygnet hospital, Beckton, a medium secure unit. She was detained pursuant to s 2 and subsequently s3 MHA. On admission and for several weeks afterwards Dr Lord, Consultant Forensic Psychiatrist, describes C as very psychotic, pacing, responding to hallucinations hearing voices of friends and making stabbing gestures explaining she was stabbing her mother in the head. She showed no understanding of the gravity of what had happened and had a delusion that her mother had been resurrected as she herself had.
5. After the first court hearing C was detained pursuant to s48/49 MHA.
6. Medical evidence in the criminal proceedings was obtained from Dr Caroline Bradley, Consultant Forensic Psychiatrist and Dr Lord, Consultant Forensic Psychiatrist.
7. Dr Bradley was asked to express an opinion as to whether or not the grounds for the defence of insanity had been established. In doing so she expressed the opinion that C, albeit floridly psychotic and under the influence of auditory hallucinations and delusions about her mother, nevertheless knew what she was doing was wrong in terms of the act of stabbing her mother and she knew that this was legally wrong. Dr Bradley also considered whether or not there was sufficient psychiatric evidence to establish the defence of diminished responsibility. Dr Bradley concluded that there was and expressed her opinion that C’s mental state impaired her responsibility for the alleged offence.
8. Dr Lord expressed the view in relation to whether the psychiatric evidence supported the insanity defence that it was clear from all the evidence that C knew what she was doing when she inflicted the stab wounds on her mother, and that what she was doing was morally and legally wrong. He went on to say that she was nevertheless suffering from a profound abnormality of mental functioning at the time of the killing which at the material time substantially impaired her responsibility for the commission of the act and impaired her ability to form a rational judgement and exercise self-control, and so the defence of diminished responsibility was available to her.
9. Based upon their written evidence and the evidence at trial, the prosecution agreed to a plea of manslaughter by reason of diminished responsibility.
10. C's trial took place at the Winchester Crown Court on 8 July 2011 before Mr Justice Foskett who heard oral evidence from Dr Lord. His sentencing remarks read as follows:

“On whatever analysis is made, this is a desperately sad and tragic case. In August last year, shortly after your 39th birthday, you repeatedly stabbed your 69 year old mother, as a result of which she died.

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

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

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

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

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

The very detailed and comprehensive reports I have seen from Dr Bradley and Dr Lord, to whom I express my appreciation, demonstrate clearly that your ability to act rationally and with self-control at the time of the incident was substantially and profoundly impaired, because of the psychotic episode to which I have referred, and to the extent that you had little, if any, true control over what you did.

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

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

I should say that there is no suggestion in your case that you should be seen as bearing a significant degree of responsibility for what you did. Had there been any such suggestion I would have given serious consideration to making an order under section 45(A) of the Mental Health Act 1983, however, on the material and evidence before me that issue does not arise.

The joint recommendation of Drs Bradley and Lord is that you should be made the subject of a Hospital Order under section 37 of the Act, with an unlimited Restriction Order under section 41 of the Act.

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

Dr Lord says in his report that the effect of such an order would be that you would be ‘Detained in secure psychiatric services for a substantial period of time in order for such treatment and rehabilitation to be completed and to ensure the safety of the public.’ The restrictions imposed by section 41, he says in his report and has repeated in what he has said to me, would be ‘invaluable in protecting the public from the risk of serious harm in the future’.

Given those strong and firm recommendations from two experienced psychiatrists, who examined you and your psychiatric history with very considerable care, it seems to me that this is the order that I should make, and I will make it. .......”

1. The Judge made a Hospital Order with restrictions pursuant to s37/41 MHA.
2. C has remained subject to detention pursuant to the MHA ever since. She is not expected to be released for some significant time.
3. An independent investigation into the care and treatment of C by D was commissioned by the NHS South West and the Bournemouth and Poole Adults Safeguarding Board. This report (running to over 200 pages) made a number of findings and recommendations including:
	1. When C relapsed, the safety net of care that should have been provided failed to operate (page 195).
	2. The plan in place, that any deterioration in C's mental health would be monitored and an instant recall to hospital would be made if her mental health relapsed, was not monitored (page 195).
	3. The failure from the 23 August 2010 to send someone to assess C for 36 hours constituted neglect as defined in the local safeguarding policy (page 197).
	4. Whilst the killing of C’s mother could not have been predicted, a serious untoward incident of some kind was foreseeable based upon C’s previous behaviour when experiencing a psychotic episode. The killing of C’s mother was preventable and had a rapid response been forthcoming the tragic incident would probably not have occurred (page 203).

**The claim**

1. On 22 August 2013 the Claim Form was issued claiming damages for personal injury loss and damage pursuant to the common law and the Human Rights Act. This was served on 22 November 2013.
2. A pre-action letter of claim was sent on 28 January 2014. On 12 March 2014 D made admissions and consented to judgment being entered. The court approved a consent order dated 12 May 2014 entering judgment on the claim with damages to be assessed.
3. Particulars of Claim were served in September 2014 together with a schedule of loss claiming general damages both for pain suffering and loss of amenity together with general damages for loss of liberty, and special damages for losses arising out of the operation of the Forfeiture Act 1982, and for future losses for psychotherapeutic work, and a case manager/support worker.
4. D's defence was served in November 2014. This denied C's claim for loss and put her to proof as to her entitlement to damages. The defence also denied C's claim for ‘deprivation of liberty’ on the grounds of public policy. In response to a CPR 18 request D expanded upon this by stating that any Human Rights claim had been brought outside the limitation period and also that they denied the claim for ‘deprivation of liberty’ on the grounds of public policy. On 23 November 2016 the Claimant was denied permission to amend her Particulars of Claim to plead a Human Rights claim.
5. The parties and the Court have agreed that the issue of public policy should be tried as a preliminary issue.
1. For the purposes of the law of tort, it is regarded as “psychiatric injury” and has been described as such: see the *locus classicus* on the topic, Multiple Claimants v MoD [2003] EWHC 1134 (QB). The front-line treatments include psychological therapies, in particular CBT, and psychotherapeutic drugs, such as SSRIs. [↑](#footnote-ref-1)
2. “However, it will also be contended that the reasons given by Lord Hoffmann for embracing the rules that he laid down are suspect in certain respects and that those rules can be improved upon”: see James Goudkamp, *A Long Hard Look at* Gray v Thames Trains Ltd (in Paul Davies and Justine Pila (eds.), The Jurisprudence of Lord Hoffmann: A Festschrift in Honour of Lord Leonard Hoffmann (Oxford, Hart Publishing, 2015) chapter 4 (pp.31–58).  [↑](#footnote-ref-2)
3. At paragraph 29, Lord Hoffmann’s use of the term “rule” reflects the submissions made to the House of Lords. However, later in his opinion he used that term frequently, without qualification. This may be contrasted with his use of the terms “principle” and “policy” in paragraph 30. It may be that “rule” should be understood as convenient shorthand. [↑](#footnote-ref-3)
4. It is arguable that the claim in respect of the sum lost by operation of the Forfeiture Act 1982 is in any event precluded by the Consent Order, and that the Claimant is seeking to mount an impermissible collateral attack against it. However, this argument was not developed, and I say nothing further about it. [↑](#footnote-ref-4)