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

Supreme Court (Lord Reed P, and Lords Hodge, Lloyd-Jones, Kitchin, Hamblen and Ladies Black, Arden)

30 October 2020

[2020] UKSC 43

*Paranoid schizophrenia – negligent failure to return claimant to hospital – manslaughter – diminished responsibility – hospital* *order – illegality*

Ecila Henderson (E) suffers from paranoid schizophrenia or schizoaffective disorder. She had been previously detained in hospital under section 3 of the Mental Health Act 1983 (the 1983 Act), but had been discharged and placed on a Community Treatment Order. Her care plan specified that there should be a low threshold to recall her to hospital. Whilst living in supported accommodation operated and managed by the Dorset Healthcare University NHS Foundation Trust (D), E experienced a relapse in her condition. D negligently failed to return E to hospital. Whilst suffering from a serious psychotic episode E stabbed her mother to death. Had D returned E to hospital she would not have killed her mother.

Initially charged with murder, the prosecution agreed to E pleading to manslaughter by reason of diminished responsibility, which was accepted by the court. She was sentenced to a hospital order pursuant to section 37 of the 1983 Act and an unlimited restriction order under section 41 of the 1983 Act. E remains subject to this detention.

E brought a claim against D in negligence, claiming the following damages: general damages for personal injury and loss of amenity following her killing her mother, loss of her share in her mother’s estate (subsequent to the Forfeiture Act 1982), general damages for her loss of liberty, and also damages for future costs of psychotherapy and for a care manager/support worker. D admitted negligence, but denied liability on the basis of illegality since the damages claimed by E resulted from E’s criminal act, and the sentence imposed on her by the criminal court.

On trial of the preliminary issue of the recoverability of the heads of loss Jay J ([2016] EWHC 3275 (QB); [2017] 1 W.L.R. 2673) held that the loss was irrecoverable on the grounds of illegality since he was bound by *Clunis v Camden and Islington Health Authority* [1998] Q.B. 978 (*Clunis*) and *Gray v Thames Trains Ltd* [2009] UKHL 33; [2009] A.C. 1339 (*Gray*), both of which had materially identical facts to the present case. The Court of Appeal (Sir Terence Etherton MR, Ryder, and Macur LJJ) ([2018] EWCA Civ 1841; [2018] 3 W.L.R. 1651) held that they too were bound by *Clunis* and *Gray*, and that E’s losses were irrecoverable.

E appealed to the Supreme Court arguing that *Gray* was distinguishable, or if not that alternatively following *Patel v Mirza* [2016] UKSC 42; [2017] A.C. 467 (*Patel*) *Gray* should be departed from and *Clunis* overruled.

**Held:** The appeal should be dismissed,

1. *Gray* cannot be distinguished from the present case. It involved the same offence and sentence. Further, it applies irrespectively of the degree of the claimant’s personal responsibility for offending. The court should be very circumspect in departing from a decision pursuant to the Practice Statement (Judicial Precedent) [1966] 1 W.L.R. 1234 since it is important not to undermine the certainty that precedent promotes ([83]-[88]).
2. *Patel* was intended to provide guidance on common law illegality across civil law claims, but does not represent “year zero” for illegality. Earlier decisions remain of precedential value unless it can be shown that they cannot stand or were wrongly decided in the light of the reasoning in *Patel* (*Okedina v Chikale* [2019] EWCA Civ 1393; [2019] I.C.R. 1635, considered) ([76]-[78]).
3. *Gray* and *Patel* are based on the same underlying fundamental policy consideration of consistency so as to maintain the legal system’s integrity. *Gray* is consistent with the reasoning in *Patel*, was cited with apparent approval in *Patel*, and was correctly considered in *Patel* to be a decision based on a public policy approach to illegality rather than a reliance based approach. Whilst it did not expressly consider proportionality as required by *Patel*, the factual circumstances of *Gray* do not give rise to this issue ([90]-[91], [93]-[95]).
4. Inconsistency would arise not only if the claimant were to recover damages which result from the imposition of their criminal sentence (the narrow rule) but also if damages resulted from their intentional criminal act for which they had been held responsible (the wider rule). A conviction of manslaughter on the grounds of diminished responsibility means that the claimant’s criminal responsibility is diminished, not removed. The conviction still involves blame, and is punitive. However, the fact that a sentence imposed by a criminal court has no penal element does not alter matters ([105]-[106], [109]).
5. Whilst there may be exceptional cases where criminal acts do not have sufficient turpitude to engage the illegality defence, for instance trivial or strict liability offences, manslaughter by reason of diminished responsibility is a serious offence that clearly engages the defence (*Les Laboratoires Servier v Apotex Inc* [2014] UKSC 55; [2015] A.C. 430, and *Gray* considered) ([112]).
6. Denial of the claim in the present case is not disproportionate. The offence was a culpable homicide committed with murderous intent. E knew what she was doing, and that it was wrong. Further, E’s offence was central to the heads of losses claimed. *Gray* is *Patel* compliant, and represents how *Patel* is applied in this particular type of case. It should be followed in comparable cases ([139]-[143], [145]).

**Cases referred to in the opinion:**

*M’Naghten’s case* (1843) 10 Cl. & F. 200, 8 E.R. 718

*R. v National Insurance Comr, Ex p Hudson* [1972] A.C. 944

*R. v Eaton* [1976] Crim. L.R. 390

*R. v Secretary of State for the Home Department, Ex. p Khawaja* [1984] A.C. 74

*Meah v McCreamer (No 2)* [1986] 1 All E.R. 943

*R v Birch (Beulah)* (1989) 11 Cr. App. R. (S.) 202

*Hall v Hebert* [1993] 2 S.C.R. 159

*Tinsley v Milligan* [1994] 1 A.C. 340

*Clunis v Camden and Islington Health Authority* [1998] Q.B. 978

*Hall v Woolston Hall Leisure Ltd* [2001] 1 W.L.R. 225

*British Columbia v Zastowny* [2008] 1 S.C.R. 27

*Gray v Thames Trains Ltd* [2009] UKHL 33; [2009] A.C. 1339

*Hounga v Allen (Anti-Slavery International intervening)* [2014] UKSC 47; [2014] 1 W.L.R. 2889

*Les Laboratoires Servier v Apotex Inc* [2014] UKSC 55; [2015] A.C. 430

*Knauer v Ministry of Justice* [2016] UKSC 9; [2016] A.C. 908

*Patel v Mirza* [2016] UKSC 42; [2017] A.C. 467

*R v Golds* [2016] UKSC 61; [2016] 1 W.L.R. 5231

*R v Edwards* [2018] EWCA Crim 595; [2018] 4 W.L.R. 64

*Okedina v Chikale* [2019] EWCA Civ 1393; [2019] I.C.R. 1635

**Appeal** from a decision of the Court of Appeal dated August 3, 2018 ([2018] EWCA Civ 1841; [2018] 3 W.L.R. 1651).

*Nicholas Bowen QC*, *Katie Scott*, and *Duncan Fairgrieve* (instructed by Russell-Cooke LLP (Putney)) for the Appellant

*Angus Moon QC*, *Cecily White*, *Judith Ayling*, and *James Goudkamp* (instructed by DAC Beachcroft LLP (Bristol)) for the Respondent

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