

# Supreme Court refuses to diminish the doctrine of Illegality

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30 October 2020

In a leading judgment by Lord Hamblen in *Ecila Henderson v Dorset Healthcare University NHS Foundation Trust*, the Supreme Court has again considered the thorny issue of whether the common law doctrine of illegality should preclude a claimant who commits a criminal offence during a psychotic episode from recovering damages for losses arising out of that offence.

## The Facts

The Claimant had suffered from schizophrenia for 15 years before tragically stabbing to death her mother in 2010. It was common ground that had the Defendant Hospital Trust acted appropriately, the Claimant would not have stabbed her mother.

The Claimant was found guilty of manslaughter by reason of diminished responsibility, such that, at the time of the killing, her ability to act rationally and with self-control was found to have been substantially and profoundly impaired. Significantly, she was found to have retained some elements of personal responsibility.

The Claimant was made subject to a hospital order under Section 37 and detention under Section 41 of the Mental Health Act 1983. She remains detained under that order.

## The Claimant's Case

The Claimant claimed damages in tort for loss of liberty in relation to the hospital detention and damages in respect of losses arising from the killing of her mother, including the forfeiture of inheritance from her mother's estate and post-traumatic stress disorder.

## The Judgment

The Supreme Court declined to allow the Claimant's appeal. It reaffirmed that ensuring consistency between the criminal and civil courts remained vital in preserving the integrity of the legal system.

The Claimant had argued that the decision in *Gray v Thames Trains Ltd* - that public policy should preclude a claim by someone convicted of unlawful killing from recovering damages in negligence - should be departed from (and the previous similar decision of the Court of Appeal in *Clunis v Camden and Islington Health Authority* overruled). The Claimant had contended that, instead, the courts should apply the more flexible "trio of considerations" policy test set out in *Patel v Mirza* [2016], which she argued should lead to a successful civil recovery of damages in her case.

The Supreme Court rejected the Claimant's appeal. The essential reasoning in *Gray* was consistent with the approach adopted in *Patel* and the application of the "trio of considerations" did not lead to a different outcome.

The consistency principle was reaffirmed to be central to the legal system's integrity. The civil courts could not be seen to be allowing recovery where the counterpart criminal courts had imposed punishment. Such a result would produce inconsistency and disharmony in

the law.

The Supreme Court found that a conviction for manslaughter by diminished responsibility did not remove a person's personal responsibility. The Claimant was found to have still known that her actions were legally and morally wrong. She therefore continued to hold some degree of responsibility. No significance could be attached to the fact that no penal sentence had been imposed by the Criminal Court.

The Supreme Court also rejected arguments that the civil and criminal courts should approach the issue of personal responsibility differently. Allowing civil courts to determine responsibility for illegal acts risked inconsistency and unnecessary additional complexity.

As to the issue of deterrence, the Claimant had contended that it was absurd to suppose that a person suffering from diminished responsibility would be deterred from killing by the prospect of not being able to recover compensation for any losses suffered as a result of committing the offence.

Whilst acknowledging the force of those points, Lord Hamblen stressed that the question should not be considered at the granular level of diminished responsibility manslaughter cases. There was deterrent effect in a clear rule that unlawful killing never pays and that such an effect was important, given the fundamental importance of the right to life.

Lord Hamblen did not consider that denial of the claim would be disproportionate. Rather, it was a proportionate response to the illegality. The crime was very serious, there was murderous intent and denial of the claim in all the circumstances was proportionate.

Despite formidable arguments put forward by the Claimant, the Supreme Court was unable to accept that they met the high hurdle required to justify departure from Gray. The decision in Gray was in fact affirmed as being "Patel compliant".

In the future, the clearly stated public policy rules set out in Gray should be applied and followed in comparable cases.

This article was co-written by Becky Wyld and [Jonathan Fuggle](#). If you wish to discuss any of the themes raised in it please contact the team using their contact details in the above links.

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