"No responsibility is different to diminished responsibility"

Lewis-Ranwell v. G4S Health Services & ors. [2024] EWCA Civ 138

The nature of the claim

This is a claim for damages brought in 2021 against providers of mental health care ("MH providers") by a man who had killed 3 elderly men (and seriously injured 2 other people) in a psychotic episode. These killings had taken place in February 2019 just hours after the claimant had been released from police custody. This had been his second police detention in 24 hours and he had been exhibiting psychotic behaviour before and during that second detention. The defendants are the responsible bodies for the provision of mental health care to someone such as the claimant. The allegation (in broad terms) is that but for negligent failings in such provision the claimant would not have been released into the community to carry out the killings.

The claimant is seeking damages for "loss of liberty and reputation" and unspecified pecuniary losses. He is also seeking an indemnity against any claims against him that may arise from his attacks.

Criminal proceedings

The claimant had been tried in the Crown Court on 3 counts of murder. He admitted the acts of killing. He called evidence from 3 appropriately qualified and experienced psychiatrists to the effect that his state of mind at the time of the killings was such that he did not know his acts to be wrong. The jury accepted that evidence and returned a "special verdict" - not guilty by reason of insanity. The claimant was made the subject of an indefinite hospital order with restrictions - effectively indefinite detention in a special hospital.

Strike-out application

The MH providers sought to strike out the claims against them in negligence on the grounds of illegality - sometimes described as the "*ex turpi causa*" rule[1].

The relevant police force, also named as a defendant, did not join in the application. Furthermore the MH providers accepted that a separate claim by the claimant brought under the Human Rights Act 1998 could not be struck out.

[1] The defence of illegality is complex and difficult to define quickly - as a reading of the judgments in this case will demonstrate. The analysis in this note is simplified for brevity.

The MH providers argued that this claim in negligence is indistinguishable from those of *Clunis*, *Gray* and *Henderson* and should therefore be struck out[2].

Result

At first instance Garnham J. dismissed the strikeout application.

In a judgment handed down on 20 February 2024, having heard argument in late June 2023, the Court of Appeal by majority of 2 to 1 dismissed the MH providers' appeal and thus held that the claims in negligence could continue.

The leading majority judgment was given by Underhill LJ. Dame Victoria Sharp P. expressed herself to be entirely in agreement with Underhill LJ but nonetheless gave a detailed judgment of her own. The dissenting judgment came from Andrews LJ who acknowledged (at [122]) that she had changed her mind from her initial view.

The reasoning

This short note could not possibly do justice to the judgment of Underhill LJ, which (with respect) is both thorough and a model of concise clarity. To quote the cliché it is a judgment which "repays reading". Included is a review of authorities on the defence of illegality, and the reasoning underpinning the decisions, not only in this jurisdiction but also in Australia and the United States, which Andrews LJ justifiably described in her judgment as "masterly".

Rather than seek to restate all of that I focus upon the 2 broad areas of argument and the court's approach. I accept the risk of oversimplification, but this note is meant to give simply an overview.

I would describe the 2 areas as the legal ground and the policy ground.

Legal ground

The legal ground was whether there was a valid distinction between the cases of diminished responsibility – which had all resulted in strike-out – and a case of insanity. The MH providers argued there was not. They said the act of killing was unlawful and it mattered not that the claimant had an excuse for unlawful behaviour. They relied upon the established principle that liability rests in tort even for injury caused when psychotic.

The majority did not accept that argument. It was held to be a crucial distinction that in a case of insanity the criminal defendant bore no responsibility, whereas in a case of diminished responsibility there is (by definition) some responsibility. Underhill LJ's review of the

[2] In all of those cases the claimant had pleaded guilty to manslaughter by diminished responsibility and was subsequently seeking to recover damages from those alleged to have caused (by act or omission) mental injury leading to the claimant's state of mind at the time of the killing.

authorities showed that they pointed towards that distinction being crucial - although he expressly held that there was no authority as such and he reached the conclusion for himself on principle. Although the killings were "unlawful" in the sense of being wrongful acts, because the claimant bore no responsibility in law the defence of illegality did not arise.

That conclusion met the fundamental basis of the defence of illegality of the need for consistency in the law. Whereas it would be inconsistent for the claimants in *Clunis*, *Gray* and *Henderson* to be punished by one court but recover damages in another, that problem did not arise where the verdict of insanity meant that it was not a case for punishment.

With respect I doubt that many would disagree with the distinction being held to be crucial in that way.

Policy ground

More difficulty and complexity arises on the policy ground.

By "policy" I mean (paraphrasing) a more broad and not technically legal question of whether notwithstanding his severe mental illness at the time it is "right and proper" for someone such as this claimant to recover damages for the consequences of his killing. Reference was made in argument to the potential for perpetrators of serious attacks to recover compensation greater than their victims (or their victims' estates), to pressures upon the NHS and to the need for an overarching deterrent against unlawful killing.

Consideration of that policy question had tipped the balance against a claimant in the Australian case of *Presland*, where the New South Wales Court of Appeal (by majority of 2 to 1) had struck out an essentially similar claim. Reference was made in that claim to the public perception of whether the law should permit such a claim.

Underhill LJ was clearly unimpressed by the majority reasoning in Presland (saying in the case of both judgments of the majority that they were "not entirely easy to follow"). He felt that the minority judgment was a much better decision on such a policy question. As I have said Dame Victoria Sharp P. expressly agreed with Underhill LJ.

I cannot improve on Underhill LJ's concise summary of his conclusion on this difficult question and so I quote it:

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

> 104. However, I have come to the conclusion that, although that first reaction is entirely understandable, the values of our society are not reflected by debarring a claimant from seeking compensation in this kind of case. It is necessary, as Santow JA accepted, to go beyond "instinctive recoil" and to consider what justice truly requires in a situation which most humane and fair-minded people would recognise as far from straightforward. Taking that approach, although of course those who are killed or injured must always be treated as the primary victims, it is fair to recognise that the killer also may be a victim if they were suffering from serious mental illness and were let down by those responsible for their care.

Andrews LJ, however, took the opposite view on the broad policy question and found herself persuaded that the majority approach in *Presland* was correct, that a claim of this nature should not be permitted on policy grounds.

An appeal to the Supreme Court?

There are two reasons why it seems to me the case is likely to head to the Supreme Court.

Firstly it was expressly acknowledged there is no direct authority on the question of whether a claim such as this can run where the jury accepted a defence of insanity. Secondly the question of policy was so central to the Court of Appeal's decision - and particularly the broader policy question of whether such a claim offends public conscience - that I would think it likely that the Supreme Court would want to pronounce.

That gives rise to an interesting question as to whether the Supreme Court will follow what I perceive to be a recent trend of hemming in liabilities and use the "broader policy question" as a basis to prohibit such claims in future.

Balancing against that is the fact that the defence of insanity is only very rarely successfully run, and (one would hope) it would only be in a very small minority of those cases where there was a potential claim against others for allegedly creating the relevant circumstances. Furthermore Underhill LJ's conclusion quoted above reads very persuasively – the Supreme Court may take the same view.

A sad postscript

In his judgment Underhill LJ recorded that the jury in the Crown Court at Exeter had when returning their verdict of not guilty by insanity sent the judge the following note:

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

Underhill LJ cited that after the passage I have quoted above as a reason why he felt that public perception would not see this claim as improper. However, in its eloquent brevity it reveals a sad truth all its own.

Dominic Nolan KC

Hailsham Chambers

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Disclaimer: this article is not to be relied on as legal advice. The circumstances of each case differ and legal advice specific to the individual case should always be sought