Insane killers and their claims for compensation: *Lewis-Ranwell* heads to the Supreme Court

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Abstract: This article explores the forthcoming Supreme Court case of *Lewis-Ranwell v G4S Health Services*, which will clarify whether a claimant acquitted of murder by reason of insanity can bring tort claims for losses caused by their own unlawful acts. The case will test the scope of the illegality defence under the framework established in *Patel v Mirza*, and raises fundamental questions about the relevance of criminal responsibility, moral culpability, and legal coherence to the illegality defence. The article argues that the Court of Appeal majority reached the right result in permitting the claim, though it could have applied *Patel* more rigorously. It highlights the risks of denying compensation to individuals failed by institutional actors and identifies key issues for the Supreme Court: the role of moral blameworthiness, the meaning of "public confidence" in law, and whether causation analysis might help resolve the illegality conundrum. The case offers a further opportunity to clarify a difficult and important area of law.

Introduction

When can a Claimant recover compensation from a Defendant for losses caused by their own illegal acts? A seven strong Supreme Court reworked the legal test designed to answer this general question as recently as 2016 in the case of *Patel v Mirza*.[1] On 15 July 2025, the Supreme Court will revisit this test in *Lewis-Ranwell v G4S Health Services*.[2] Perhaps counter-intuitively, the Court must decide whether criminal acts are illegal acts if the Claimant is not found to be criminally responsible for them. In *Lewis-Ranwell*, the Claimant killed three men a few hours after he released from custody. At his criminal trial, he was acquitted of murder on the ground of insanity. That is, he was not found to be criminally responsible for killing his victims. The Claimant is suing the Defendants for various losses flowing from his criminal acts. His claims include compensation for his loss of liberty for being indefinitely confined to a secure hospital, for his loss of reputation and feelings of guilt and remorse, and for an indemnity in case he is sued by his victims' estates. The Defendants resist the claims on various grounds. Three of the four Defendants also applied to strike out the Claimant's claims relying on the defence of illegality. For that application, it is assumed that the Claimant's claim is otherwise legally sound. That is, it is assumed that the Defendants negligently caused his losses.

At first instance, Garnham J dismissed the Defendants' application to strike out the claims. According to Garnham J, for the illegality defence to bite, the Claimant had to be guilty of a criminal or quasi-criminal act or acts that engaged the public interest. Whilst the killings were deliberate acts, there was no "knowing wrongfulness" because the Claimant did not know that

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[1] *Patel v Mirza* [2016] UKSC 42.

[2] *Lewis-Ranwell v G4S Health Services (UK) Ltd and others* [2024] EWCA Civ 138 ('Lewis-Ranwell').

what he was doing was wrong. His conduct did not therefore have the necessary element of "turpitude".[3] The Defendants appealed to the Court of Appeal. By a majority (Sharp P and Underhill VP, Andrews LJ dissenting), the Court of Appeal upheld Garnham J's decision. The Supreme Court granted the Defendant agencies permission to appeal that decision.[4]

This article will describe, analyse, and evaluate the differences between the reasoning of the majority and the minority in a classically "hard" case. It was a hard case because there was no governing rule. The article will show how the judges used the available legal material, in particular, *obiter* statements from closely connected case law, and legal reasoning tools, in particular, appeals to principle and policy, to craft a rule that, for now, has the status of binding law. The rule that emerges from the case is unusually clear: if a person has been acquitted of murder by reason of insanity, the illegality defence will not preclude them from making claims in tort for losses caused by their own criminal acts. The article argues that the majority reached the correct solution. However, the reasoning is doctrinally unsatisfactory would have benefited from a closer application of *Patel v Mirza*.

The context of the claim

On 10 February 2019, Lewis-Ranwell killed three elderly men in their homes with a hammer. He was under the delusional belief that they were paedophiles. His delusion was caused by a serious psychotic episode. At his criminal trial for their murder, Lewis-Ranwell, successfully proved he was insane when he killed them. The court committed him to Broadmoor Hospital for indeterminate detention for public protection. In the two days before the tragic events that led to his trial, the Devon and Cornwall Police had twice arrested him. The second arrest followed a saw-attack by him on another elderly man who Lewis-Ranwell also wrongly believed to be a paedophile. Whilst in police custody, he was obviously mentally unwell and violent. Mental health professionals employed by G4S and the local NHS Trust saw or spoke to him. The need for a Mental Health Act Assessment by an approved mental health professional employed by the Council was discussed but not arranged. The police then released him on bail despite his own mother expressing deep concerns about what might happen if he were released.[5] A few hours after his release from custody, Lewis-Ranwell went on to kill the three men.

After his criminal trial and detention at Broadmoor, Lewis-Ranwell commenced civil proceedings against four protective agencies who had dealings with him on or before 10 February. One of the Defendants, G4S Health Services, provides healthcare services in police custody suites. One of their roles is to identify mental health conditions and to refer individuals for further assessment or care if needed. The other Defendants are the Devon & Cornwall Police, the Devon Partnership NHS Trust and Devon County Council. The Claimant's case against the Defendants is that the real risk of injury should have been obvious to them all.[6] He sued them in the Tort of Negligence and under the Human Rights Act 1998. The claim in Negligence is that the Defendants failed to

[3] Lewis-Ranwell [7].
[4] Lords Reed, Hamblen, and Richards JJSC granted permission on 23 May 2024: [2024] 1 WLR 2775. The hearing is listed for 15th July 2025.
[5] Lewis-Ranwell [152].
[6] ibid [4].

provide him adequate mental health services when in police custody. Had the Defendants not been negligent, they would have detained him under the Mental Health Act 1983, and he would not have gone on to injure or kill the six men on 9 and 10 February that have resulted in his claimed losses.[7]

It is in the context of his civil claims against the protective agencies that the latter have raised the illegality defence. The defendants accept that the defence does not apply to the Human Rights claim.[8] That claim therefore proceeds even if the defendants are permitted rely on the illegality defence in the tort claim. The gist of the illegality defence is that even if the Claimant proves that he has a valid claim against them, it is based on his criminal conduct and therefore as a matter of law, he is precluded from claiming against them.

Distinguishing the defences

It may be useful to pay closer attention to the two defences we have mentioned: insanity and illegality. Insanity can be raised as a defence in response to allegations of any criminal offence and was raised successfully in criminal proceedings against Lewis-Ranwell. When he then sued the agencies that he alleged negligently failed to detain him, three defendants raised the defence of illegality against him. This defence is only available to defendants in civil proceedings and could be raised as a defence to any number of civil claims including breach of contract, breach of trust, unjust enrichment or claims in tort (as was the case here) as a slew of recent cases in the Supreme Court demonstrates.[9] In both criminal and civil law, then, the defences are raised by alleged wrongdoers, but the alleged wrongdoer is not the same person. The Defendants in the civil case *Lewis-Ranwell* are alleged by him to be wrongdoers, but they in turn are alleging that since his claim is based on *his* wrongdoing he should not be permitted to sue them despite *their* wrongdoing.

What is more, these two defences have very different natures best understood by considering the conventional role of a defence in a criminal context. Proof of an offence is proof of criminal responsibility. If the prosecution proves the elements of a criminal offence, then the defendant is criminally responsible for their acts. Criminal responsibility means the defendant must answer or account for those criminal acts. Proof of criminal responsibility thereby raises a presumption of criminal *liability*. As Duff puts it there is a presumptive inference from criminal responsibility to criminal liability.[10] A defendant can raise a full or partial block to criminal liability by providing an exculpatory account. Exculpatory accounts conventionally take the form either of a justification or an excuse. Justifications (eg self-defence) and excuses (eg duress or diminished responsibility) are defences in these different senses. In the civil case of *Lewis-Ranwell*, Underhill LJ did not find this distinction raised by the Appellants helpful in the context of a claim for compensation.[11] In that context, Underhill LJ is right. That is because when considering the

[7] *En passant* it should be noted that the Claimant claims include the injuries on 9 February. This distinction is not explored in the decisions of Garnham J nor later, by the Court of Appeal.
[8] Lewis-Ranwell [149].
[9] For a relatively recent overview, see Nathan Tamblyn, 'The Defence of Illegality in Private Law' (2022) 43 Liverp L Rev 33.
[10] R A Duff *Answering for Crime: Responsibility and Liability in the Criminal Law* (Hart 2009) 207.
[11] Lewis-Ranwell [20].

illegality defence in civil proceedings, it is important to remember that it is not a defence in the conventional criminal sense. The Defendants in *Lewis-Ranwell* are not raising a defence that attempts to justify or excuse their behaviour for which they would otherwise be civilly responsible. Rather as Sedley LJ pointed out in *Al Hassan-Daniel*, what he called the criminality defence is "more correctly understood as a control on jurisdiction."[12] Similarly, the Supreme Court in *Apotex* pointed out that it is a rule of judicial abstention: it is not about regulating the consequences of illegal acts as such, but about whether remedies should be withheld.[13] It is a jurisdictional or procedural defence akin to abuse of process or limitation, and one that a court could raise of its own motion. However, since the illegality defence has strong connections with criminality (note Sedley LJ's labelling above) and criminal responsibility, it is helpful to bear in mind these differences when considering the doctrine in civil proceedings.

The doctrinal context in the Court of Appeal

The issue for the Court of Appeal was set out most fully in the judgment of Andrews LJ: should a Claimant who bears no criminal responsibility for unlawful killing by reason of insanity be precluded from claiming damages for losses arising from those his unlawful acts against someone else?[14] Underhill VP formulates the question explicitly as one of legal policy: what is, or should be, the policy of the law as regards the recovery of damages for the consequences of such an unlawful act?[15]

All the judges supported the idea of a clear rule about when the illegality defence applies in cases of unlawful killing. But the judges had different views about that rule. The majority favoured a rule that distinguishes between cases of unlawful killing by reason diminished responsibility and those involving insanity. For them, the illegality defence only applies in the former type of case. Andrews LJ in the minority favoured a rule that applies the illegality defence in all cases of deliberate unlawful killing.

The judges agreed that there was no binding authority on whether the illegality defence operates in insanity cases. The earlier Court of Appeal case of *Clunis*[16] held that the illegality defence barred the claim of a Claimant who had been convicted of manslaughter by reason of diminished responsibility. That case was upheld by the Supreme Court in both *Gray*[17] and *Henderson*[18] where the Claimants' claims were barred because they had been convicted of manslaughter by reason of diminished responsibility. As Underhill VP said, this trio of cases was "relevant but not determinative" because diminished responsibility is not insanity.[19] The issue had also been considered in the Commonwealth, in the US, and in o*biter* by the High Court in

[12] *Al Hassan-Daniel v HM Revenue and Customs* (2010) EWCA Civ 1443 [9].
[13] *Les Laboratoires Servier and another v Apotex Inc and others* [2014] UKSC 55 [23].
[14] Lewis-Ranwell [128]
[15] ibid [20]
[16] *Clunis v Camden and Islington Health Authority* [1998] 3 All ER 180.
17. [2009] 4 All ER 81
[18] Henderson *(a protected party, by her litigation friend the Official Solicitor) v Dorset Healthcare University NHS Foundation Trust* [2021] 2 All ER 257.
[19] Lewis-Ranwell [9].

Traylor.[20]

Dicta in the trio of domestic cases, particularly *Henderson*'s treatment of the two earlier cases, seem to converge on the conclusion that Defendants can rely on the illegality defence in civil proceedings involving unlawful killing by the Claimant *unless* the Claimant can prove (eg via the insanity defence) that they did not know that what they were doing was wrong. But as the cases did not involve the insanity defence, what was said about the potential relevance of the insanity defence to the applicability of the illegality defence is merely *obiter* or in Underhill's words, no more than a non-binding implication.[21] Furthermore, in commenting on the factually similar[22] Commonwealth case of *Presland*[23] in *Gray*, Lord Hoffmann expressly left open the issue of the scope of the illegality defence in insanity cases.[24] The non-applicability of the illegality defence in insanity cases has not therefore been decided as a matter of necessary implication in domestic law. This is why there was no governing rule which in turn made this a hard case.

The trio of domestic cases and *Presland* provided the doctrinal framework for much of the discussion in the Court of Appeal. But before considering the Court of Appeal's reasoning, it would be helpful to be reminded of the other part of the illegality defence jigsaw, namely the case of *Patel v Mirza* ('Patel').

Patel v Mirza[25]

In *Patel*, the Supreme Court set out the rationale[26] of the illegality defence: if enforcement of a claim would be harmful to the integrity of the legal system[27] then it would be contrary to the public interest to enforce the claim. The rationale is set out as a conditional if-then statement that provides a normative guide to judicial discretion. It is normative because the rationale expresses the idea that the legal system should not support a claim if doing so would undermine key values, for example its own integrity. But how should judges determine whether enforcement of a claim would harm the integrity of the legal system? Lord Toulson JSC proposed a trio of questions as a test of harm:

a) What policies would be enhanced by denying the claim? ('*Patel* stage (a)')
b) What policies would be less effective or ineffective if the claim is denied? ('*Patel* stage (b)')
c) Would denial of the claim be disproportionate?[28]

The policy of a prohibition is found by considering what the broken rule is for: what is the

[20] *Traylor v Kent and Medway NHS Social Care Partnership Trust* [2022] EWHC 260 (QB), (2022) 190 BMLR 65.
[21] Lewis-Ranwell [50] and [78].
[22] A claimant there had also killed whilst insane a few hours after being released.
[23] *Hunter Area Health Service v Presland* [2005] NSWCA 33.
[24] Lewis-Ranwell [73].
[25] Fn 1.
[26] The underlying justification behind the principle. The 'why' the law takes a certain position ie its moral, social or policy-based foundation.
[27] Or, *obiter*, possibly certain aspects of public morality.
[28] Patel [101]

purpose or intended outcome of the rule? As such it is forward-looking which is why it is policy orientated. The purpose of a rule differs from its rationale which is about its justification: why it is important to achieve this purpose; or what are the (meta-)consequences if the purpose is frustrated or ignored? For example, in *Patel*, the prohibition broken was the rule against insider dealing.[29] One of the purposes of that rule is to promote fair and transparent markets. The rule hopes to achieve this by ensuring that markets reflect publicly available information, and by preventing exploitation of confidential information by persons who have privileged access to such information. The rationale or justification for this rule can be found by asking *why* does this purpose matter? If market fairness and transparency are not preserved, then people will lose confidence in financial markets which risks undermining the economic order. Whilst still outcome-oriented (like the purpose or indeed any form policy-reasoning), the rationale considers the outcome at a systemic level by asking what happens to the economic order, society, or the rule of law and so forth, if we don't take the purpose of a rule seriously. At its most abstract, the rationale of a rule will appeal to the public interest as is the case for the rationale of the illegality defence.

In *Henderson*, Lord Hamblen applied stage (a) of *Patel* by first identifying the purpose of the prohibition against unlawful killing.[30] The purposes of that rule are to deter killing and protect life, and to express moral condemnation and punishment of those who kill unlawfully.[31] As we have seen *Patel* requires courts to ask whether the purpose of the rule against unlawful killing would be enhanced by denial of the claim. Lord Hamblen recognised that the deterrent effect of applying the illegality defence against a person who kills with diminished responsibility might well be limited. But he suggested there "may well be some deterrent effect in a clear rule that unlawful killing never pays and any such effect is important given the fundamental importance of the right to life"[32] and that this also supported the purpose of moral condemnation.

In *Henderson* Lord Hamblen added that any policy factors that might impact the integrity of the legal system more generally should also be taken into account at *Patel* stage (a).[33] That is, not only should courts take into account the policies behind the rule that the Claimant has transgressed, but they must also take into account the policies behind the illegality defence. In *Patel*, those policies included such factors as whether allowing the Claimant to enforce their claim would produce inconsistency, disharmony,[34] or incoherence in law.[35] Taken together, both sets

[29] s.52 Criminal Justice Act 1993

[30] This includes murder and manslaughter.

[31] *Henderson* [129]. He could have added to maintain public order. Deterrence, public protection and condemnation are likely to be common policy factors behind many criminal prohibitions. For example, they also featured in *Grondona v Stoffel & Co* [2020] UKSC 42, [28-30].

[32] *Henderson* [131].

[33] *Henderson* [119].

[34] When mentioning harmony, Lord Toulson includes the well-recognised division of responsibility between criminal and civil law, with the former being responsible (along with some regulators) for punishment and the latter being responsible for the determination of private rights and obligations. Further, he refers to the "broad principle" that civil law should neither undermine the effectiveness of the criminal law nor impose an additional or disproportionate penalty. See *Patel* [108].

[35] *Patel* [99-100]. At [100] Lord Toulson said that the previously identified policy that a claimant should not profit from their own wrong should be better understood, after *Hall v Hebert* [1993] 2 SCR 159, in terms of inconsistency and disharmony to avoid asking whether the claimant would be "getting something". In

of policy factors are those that would support denial of the claim via the application of the illegality defence.[36] The idea behind *Patel* stage (a) is that the reasons for denying the claimant a remedy to which they would otherwise be entitled should be understandable to the claimant.[37]

Conversely, at *Patel* stage (b) the court must consider policies that may be rendered less effective or ineffective if the claim is denied. Examples include preventing unjust enrichment,[38] protecting vulnerable individuals and preventing their exploitation,[39] ensuring compensation for victims of tortious wrongs,[40] and statutory protection of the injured.[41] In *Stoffel*, Lord Lloyd-Jones also noted the incoherence of denying the claim in that case given that the law recognised the passing of an equitable interest despite the fraud.[42] Of these, the policy factor that wrongs should be remedied is likely to feature in all tort claims that involve the illegality defence. The basic idea here is to consider whether the defendant will understand the policy factors that support denying them the benefit of the illegality defence.

A variety of policy factors might be identified at stages (a) and (b) depending on the nature of the rule that has been broken by the Claimant. All the factors must then be placed in the balance. As Lord Toulson emphasised, judges should not decide where the balance falls in an unprincipled way. Rather, the assessment must be both principled and transparent so that the parties can understand why the court is leaning one way rather than the other.[43]

Patel stage (c) relates to proportionality and should identify factors *specific to the case* rather than the general policy concerns that lie behind the broken rule and the illegality defence itself that come into play at stages (a) and (b). The factors of particular relevance to proportionality are the seriousness of the conduct, its centrality to the transaction, whether it was intentional and whether there was a marked disparity in the parties' respective culpability.[44] But as Lord Hamblen said in *Henderson*, it may not be necessary to consider proportionality at all if the balancing exercise comes down in favour permitting the claim.[45] It is only where the balance points in favour of denying the claim that a court should consider proportionality. This is because as Lord Toulson says, a disproportionate response by a court could also undermine respect for the integrity of the justice system.[46] This makes sense because the whole purpose of *Patel* is to test whether the integrity of the legal system would be harmed.[47]

Stoffel at [32], Lord Lloyd-Jones said that a remedy should only be denied if it would be legally incoherent to award it.

[36] *Henderson* [116].

[37] *per* Lord Kerr in *Patel* [124].

[38] *Patel v Mirza*.

[39] *Hounga v Allen (Anti-Slavery International intervening)* [2014] UKSC 47.

[40] *Hall v Hebert* n 37. In *Stoffel* it was expressed thus: conveyancing solicitors should perform their duties to their clients diligently and without negligence and if they are in breach their clients should be entitled to a remedy. See [32].

[41] *Hardy v MIB* [1964] 2 QB 745.

[42] *Stoffel* [35].

[43] *Patel* [120].

[44] ibid [107] and *Henderson* [124].

[45] *Henderson* [123].

[46] *Patel* [108].

[47] One example of a case where it was found to be unnecessary to consider proportionality was *Stoffel*.

In evaluating the competing policy factors judges should not apply a mechanistic process.[48] However, the reasoning of the judges in *Lewis-Ranwell* would have benefitted from sticking more closely to the *Patel* test. What follows is an attempt to reconstruct the reasoning of the judges by reference to *Patel* whilst at the same identifying any gaps to improve that reasoning.

Applying *Patel* in *Lewis-Ranwell*

Although the judges in the Court of Appeal did not systematically apply *Patel* in *Lewis-Ranwell*, their respective positions appear to be as follows. As Sharp P agrees with Underhill VP, references to the latter can be taken to cover the majority. Underhill argues that that balance falls in favour of permitting the Claimant's claim because the factors in *Patel* stage (b) clearly outweigh those in stage (a). It is therefore unnecessary to consider proportionality at stage (c). Andrews LJ argues that the balance falls in favour of denying the claim because the factors at stage (a) are sufficiently weighty, and further it would not be disproportionate to deny the Claimant's claim at stage (c). The policy factors that Andrews LJ weighed heavily at stage (a) included:

(i) The general deterrent effect of a clear rule that prevents Claimants from claiming compensation for losses flowing from their deliberate act of unlawful killing.
(ii) The impact on NHS funding if a claim were permitted in such circumstances.
(iii) The incoherence of holding a Claimant responsible to his victims for his unlawful acts whilst permitting him to claim losses flowing from those acts from someone else.

Although not expressly classified by Andrews LJ as a policy factor at *Patel* stage (b), the factors at (a) were not in Her Ladyship's view outweighed by the fact that the Claimant may also be a victim suffering from a serious mental illness who had been let down by those responsible for their care.[49]

Underhill VP agreed that general deterrence and the impact on NHS funding were in play in this case. However, since the Claimant was not morally culpable of unlawful killing, the policy factors of inconsistency and public confidence were not engaged at stage (a). Further, there was no inconsistency or incoherence in permitting the Claimant to claim for his own losses despite being liable to his victims. The policy factors at stage (a) did not therefore outweigh the weighty stage (b) public interest in Claimants in insanity cases receiving due compensation. Since the balancing exercise favoured permitting the claim, it was unnecessary to consider proportionality. For Underhill, then, the absence of moral culpability is relevant at both stages (a) and (b) whereas Andrews LJ argued that moral culpability was irrelevant when considered from the perspective of coherence.

As we saw above, *Patel* stage (a) requires consideration of whether the policy factors behind both the broken rule (the prohibition transgressed) and the illegality defence will be enhanced by denial of the claim. On the deterrence point, there was broad agreement between the majority and the minority in *Lewis-Ranwell*. But for Andrews LJ, this point was a weighty factor

[48] *Stoffel* [28].
[49] Lewis-Ranwell [123].

in support of a clear rule that applies the illegality defence in all cases of deliberate unlawful killing irrespective of the degree of moral culpability.[50] As Her Ladyship put it, "the policy rule preventing such claims from being made should not rest on nice distinctions between having little or no personal responsibility for the killing because of the state of the claimant's mental health at the time."[51] For Andrews LJ, therefore, the purpose of the rule against unlawful killing would be enhanced by denying all claims involving deliberate unlawful killing. However, Underhill LJ simply placed deterrence as one factor into stage (a) of the balance whilst also questioning whether the public interest in condemnation and punishment applied in the context of insanity.[52]

A bigger difference emerges on the question of whether the policy factors underlying the illegality defence would be enhanced by denying the claim. As we have seen above, Andrews LJ argued that a failure to apply the illegality defence in this case would result in a "lack of coherence",[53] therefore impliedly undermining the integrity of the legal system. Underhill LJ disagreed[54] and argued further that since neither the consistency nor the public confidence principles[55] were engaged in this case, it follows that few, if any, policies would be enhanced by denying the claim.[56] In support of his argument, Underhill LJ refers to paragraphs 139 and 142 of Lord Hamblen's speech in *Henderson* where on two occasions Lord Hamblen says of the respondent that she "knew what she was doing and that it was legally and morally wrong" - that is, the respondent in Henderson was morally culpable. According to Underhill LJ this is the crucial distinction between *Lewis-Ranwell* and *Henderson*: "in the absence of that element [moral culpability], and … essentially for that reason, the consistency and public confidence principles are not engaged."[57] Andrews LJ takes issue with Underhill LJ's interpretation of Lord Hamblen's words in relation to culpability[58] but it is unclear whether that disagreement implies that the consistency and public confidence principles are therefore engaged.[59]

In any event, according to Underhill, in the absence of the consistency and public confidence factors, the only policy factor that supports denial of the claim at stage (a) in addition to general deterrence is the impact on NHS resources in allowing a claim of this kind. Apart from the difficulty in quantifying the value of such claims, Underhill was of the view that their number

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[50] ibid [136].
[51] ibid [137].
[52] ibid [115].
[53] ibid [128]. We will explore Andrews LJ's reasoning further below.
[54] ibid [101].
[55] For the purpose of this discussion, principle and policy will be used interchangeably (as the judges did) even though their natures are quite different. A policy considers the likely outcome of a rule on groups whilst a principle considers whether a rule is individually just. As argued by Dworkin, both are standards against which decision-makers can judge their decisions: R Dworkin *Taking Rights Seriously* (Duckworth 1977) in particular Chapter 2.
[56] Lewis-Ranwell [115-6]. We will return to the remaining policies below.
[57] Ibid [116].
[58] Lewis-Ranwell [132-3].
[59] In passing, it is worth noting that Underhill LJ made this comment about moral culpability in the context of considering whether it was "proportionate" to treat the deterrence and NHS funding factors as outweighing the Claimant's right to compensation under stage (b). This is confusing because proportionality only really comes into play at *Patel* stage (c).

must be "tiny" since cases involving insanity are very rare. [60] He did not think that "the impact on NHS resources or the general deterrent effect of a rule against recovery could justify the denial of the claim in these proceedings."[61] The only identified countervailing policy (ie *Patel* stage (b)) against which general deterrence and the protection of NHS resources were balanced was "the policy of the law - reflected in the law of negligence - that people in [the position of the claimant] should be compensated for the loss which they have suffered."[62]

Evaluating Underhill LJ's analysis

There are some problems with this analysis. The first problem relates to deterrence and the second relates to the "impact on NHS funding" factor. If, as noted by Lord Loyd-Jones in *Stoffel* the risk that a Claimant might be left without a remedy if their solicitor should prove to be negligent in registering the transaction "is most unlikely to feature in their mind,"[63] it is difficult to imagine anyone being deterred by a rule that says unlawful killing never pays even if you are insane. Second, the "impact on NHS funding" factor is only relevant to one of the Defendants in this case. Whilst two other Defendants are public bodies where a similar argument might apply, the first-named Defendant, G4S, is not a public body. Further, even if this is a valid factor to be taken into account, it arguably relates to the public confidence principle since it is a variation of Lord Hoffmann's distributive justice argument raised in the earlier case of *Gray*. That argument was 'glossed' by Lord Hamblen in *Henderson* and incorporated into the public confidence principle. Lord Hamblen did this in order to make the further argument (contrary to Lord Hoffmann's position in *Gray)* that consistency is relevant to both narrow and wide claims.[64] Lord Hamblen said the impact on NHS funding is a reason why public opinion might disapprove of a rule which permits a claimant to claim damages for losses caused by their own unlawful conduct. If the public has a reason to disapprove of the outcome, then public confidence in law would be undermined.[65] Lord Hamblen then took the further step of arguing that inconsistency in law could also give the public a reason to disapprove of the outcome. In narrow claims, the inconsistency is between permitting a claim for losses caused by acts for which a criminal court has found the claimant to be criminally responsible and has imposed a sanction. In wide claims, the inconsistency is only between the criminal court's finding of criminal responsibility for the acts that are said to be the cause of losses in the civil claim.

Despite stating that Lord Hamblen's public confidence principle is central to the appeal, Underhill applied it in a very different way and thereby concluded that it was not engaged. Underhill could have argued that the NHS (or broader public) funding factor is either miniscule in insanity case (as he did[66]) and does not apply at all in relation to G4S. This factor therefore

[60] Lewis-Ranwell [113].
[61] Ibid [116].
[62] Ibid [90].
[63] *Stoffel* [29].
[64] A narrow claim is a claim for damages for losses (eg loss of liberty) caused by the lawful imposition of a criminal sanction such as imprisonment following a criminal conviction. A wide claim involves losses that flow from a criminal act, but which are not caused by the criminal sanction, for example feelings of guilt or a claim for an indemnity.
[65] *Henderson* [72] citing para 58(3) in *Gray*.
[66] Lewis-Ranwell [114]

provides insufficient reason for public disapproval. For that reason, the public confidence principle either does not apply or is not very weighty. Second, since there has not been a finding of criminal responsibility in this case, there is no inconsistency between the civil and criminal law's characterisation of the Claimant responsibility. This is a further reason why the public confidence principle is not engaged. One reason why Underhill LJ does not analyse the public confidence principle in this way may be due the fact that he decouples the consistency principle from the public confidence principles that Lord Hamblen had (rightly or wrongly) related to each other in *Henderson*. And yet, Underhill LJ then reconnects the two principles via the idea of moral culpability. Whereas for Lord Hamblen inconsistency is a reason that risks undermining public confidence; for Underhill VP inconsistency and public confidence are independent factors that require moral culpability as a precondition for their engagement. However, if Lord Hamblen's public confidence principle is correct, then moral culpability is both a reason for public disapproval of an outcome and could also give rise to an inconsistency which in turn feeds into public disapproval. That is, moral culpability would potentially count twice.

Andrews LJ's analysis and evaluation

For Andrews LJ, moral culpability is basically irrelevant.[67] According to Andrews LJ, if a Claimant is in any sense legally responsible for deliberately and unlawfully killing another, then the Defendant should be able to rely on the illegality defence in civil proceedings brought against them for any losses resulting from that unlawful act.[68] Her Ladyship's reasoning in summary is as follows. The killings were unlawful acts. The Claimant would be liable in the tort of battery for those killings because those acts were deliberate.[69] The fact that the Claimant did not know that what he was doing was wrong does not affect his *civil* responsibility for those acts. He would be civilly liable to his victims or their estates:[70] *Morris*[71] and *Dunnage*.[72] If the claimant bears civil responsibility for his actions, then he bears legal responsibility for them. Further, he bears legal responsibility for those actions despite being excused criminal responsibility by reason of insanity. In the absence of criminal responsibility, the Claimant may well be regarded as not morally culpable for his actions despite intending to harm his victims. But, for example, a person who deliberately pushes someone else without intending to harm them would not be regarded as morally culpable either.[73] Such a person would nevertheless be liable in tort. That is because moral culpability is unnecessary for liability in tort. This can be explained because tort law is concerned with compensation, not punishment.[74] The Claimant's claim against the Defendants therefore relies on illegal acts to which civil liability attaches.[75] If the Defendant cannot rely on the illegality defence, then this will lead to incoherence in civil law by

[67] Or possibly relevant at Patel stage (b) when considering the Claimant's victim status.
[68] Lewis-Ranwell [122].
[69] ibid [125].
[70] ibid [128].
[71] *Morriss v Marsden* [1952] 1 All ER 925.
[72] *Dunnage v Randall* [2015] EWCA Civ 673.
[73] Lewis-Ranwell [126].
[74] ibid.
[75] ibid [125].

> … on the one hand making the Claimant liable in tort to pay compensation to his victims or their estates, and on the other, permitting him to avoid the consequences of such liability, by passing responsibility for his actions to someone else.[76]

But not so fast: we have here skipped to the second question in *Patel* stage (a) without noting the altered character of the prohibition. The prohibition transgressed is now the civil tort of battery[77] rather than the criminal rule against unlawful killing. The purpose of that tort is to protect individuals against a wide range of unwanted physical interferences, thereby affirming bodily autonomy, deterring unwanted contact, and to provide symbolic and legal redress for its violation. Will that purpose be enhanced if the illegality defence is applied in the context of a claim in negligence against protective agencies? Denying the battery-doer compensation against a negligent institutional actor does nothing obvious to enhance the protective function of the battery tort. In the context of severe psychiatric illness, denying the claim arguably undermines the broader aims of justice especially where, as here, the claimant lacked moral agency, and the institutional actors owed a duty to intervene in the face of obvious risks and failed to do so. As all the judges agree, the tort of battery is not concerned with moral culpability or self-regulation. Rather it is concerned with the protection of bodily integrity. This protective function is unaffected by whether the battery-doer is permitted to seek redress against others. The incidence of battery is not going to increase if a battery-doer (whether sane or not) knows he can sue those who should have protected him, and only such defendants. 'Unlawful touching never pays' doesn't have the same ring to it as 'unlawful killing never pays'. And "descending to the facts of the present case" to use the language of Lord Lloyd-Jones in *Stoffel*[78], it is arguably more likely that unlawful touching (and indeed unlawful killing) would be prevented if the protective agencies are on notice that they cannot rely on the illegality defence when they fail to take reasonable steps to detain a person displaying obvious signs of mental unwellness who has already attacked others with a weapon. It is also more likely that victims of a battery will *secure* compensation if the illegality defence is *not* applied because the tortfeasor almost definitely will not carry liability insurance against claims in battery. And for serious harms, it is also unlikely that the tortfeasor will have personal resources to satisfy any judgment. Contrary to Andrews LJ's assertion, therefore, there could be some justification in deciding this issue in favour of the Claimant after all.[79]

A finding that the battery-doer is civilly responsible serves the symbolic function of condemning the tortfeasor's acts. Is Andrews LJ therefore nevertheless right to claim that it would be incoherent to permit the Claimant to shift that civil responsibility onto the Defendants in this case? The non-application of the illegality defence does not actually shift responsibility for the tort. Rather it shifts his liability. In tort, liability-shifting is routine. Liability insurance shifts liability from a responsible tortfeasor to the insurer via a contractual indemnity. Vicariously liability places liability on the responsible tortfeasor employer.[80] In contribution claims under the Civil

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[76] ibid [128].
[77] Albeit in the context of deliberate killing.
[78] *Stoffel* [32].
[79] Lewis-Ranwell [131].
[80] And in relationships akin to employment: *The Catholic Child Welfare Society and others v Various Claimants* [2012] UKSC 56.

Liability (Contribution) Act 1978 a tortfeasor can recover from others despite being found civilly responsible for losses. Yet we don't label these routine transfers of liability as incoherent. Of course, it is true that liability insurance against battery is unusual and that in this case the Defendants have not contractually agreed to indemnify the Claimant for any losses for which he may be found liable. But for the purpose of the strike out procedure, it is assumed that the scope of the Defendants' duty extends as far as the indemnity. Underhill LJ could see no reason why it would not be an admissible head of claim.[81] But even if Andrews LJ is right to say that a failure to apply the illegality defence lacks coherence due to the shifting of responsibility/liability, this would only apply to the claim for an indemnity. The Claimant will not be found to be responsible for the other losses that he claims against the Defendants in proceedings brought against him except in the broad sense that those losses also flow from the acts for which he would be found civilly responsible. What we see here, then, is the re-emergence of the distinction between narrow and wide claims raised by Lord Hoffmann in *Gray* but in the context of civil law. Applying Lord Hamblen's reasoning in *Henderson*[82] by analogy to the wider civil claim, what Andrews LJ is effectively saying is that a failure to apply the illegality defence would result in an inconsistency between one civil court's finding of responsibility for acts and that of another civil court. However, like the Appellants, Andrews LJ uses the language of incoherence rather than inconsistency. Underhill LJ did not think that this "taxonomic question" was troublesome, and in a short paragraph explains why he sees nothing necessarily incoherent or inconsistent about law holding the Claimant liable to his victims whilst holding the Defendants liable for the losses that they have caused him.[83]

However, it is in relation to this "taxonomic question" that the disagreement between the majority and the minority is at its most stark. Nowhere does Andrews LJ take issue with Underhill LJ's argument that the inconsistency question should focus on whether criminal and civil courts give consistent answers to the Claimant's responsibility for the consequences of his acts. Instead, Andrews LJ concentrates on the Claimant's *civil* responsibility. It is perhaps for this reason that Andrews LJ deliberately uses the language of coherence rather than consistency. If there had been a finding of criminal responsibility, the illegality defence would have applied on consistency grounds. But where there has been no finding of criminal responsibility - as was the case here - the illegality defence should, according to Andrews LJ, be applied on coherency grounds instead. As we saw earlier, while discussing coherence or "inconsistency with civil law" Underhill LJ says that the question whether the Claimant should be denied recovery because his loss was the result of a criminal act will not necessarily be answered in his favour,[84] although he saw no inconsistency between allowing such a claim and the civil law rule that insanity is no defence to the tort of battery. Andrews LJ, however, perceives "a lack of coherence between on the one hand, making the Claimant liable in tort … to his victims … and, on the other permitting him to avoid the consequences of such liability, by passing responsibility for his actions

[81] Lewis-Ranwell [108]. There may well be an argument in subsequent proceedings following *Meadows v Khan* [2021] UKSC 21 and *Manchester Building Society v Grant Thornton UK LLP* [2021] UKSC 20 whether the scope of the Defendants' duty extends as far as the claim for the indemnity.
[82] *Henderson* [58(6)]
[83] Lewis-Ranwell [101].
[84] ibid.

to someone else."[85]

It is not easy to determine how Andrews LJ justifies the conclusion that incoherence should be judged by reference to the broader concept of legal responsibility, a concept that encompasses civil liability wherein moral culpability loses much if not all of its relevance. Beyond drawing on the analogy with a non-insane tortfeasor who would also be civilly liable under *Morris* or *Dunnage* despite the absence of moral culpability, Andrews LJ relies on Lord Hamblen's opinion in *Henderson* in two ways. First, contrary to Underhill LJ's interpretation,[86] Andrews LJ argues that moral culpability was not central to Lord Hamblen's reasoning in *Henderson*.[87] That is because *Henderson* involved criminal but diminished responsibility for a serious offence (manslaughter) where the degree of responsibility did not matter for a conviction. It was not a case where there was no criminal responsibility because of insanity. What Andrews LJ seems to be saying is that it was the nature of the criminal act itself rather than criminal responsibility for it that ultimately explains the outcome in *Henderson*. It is not clear how this point assists Her Ladyship's argument in support of considering coherence within the broader concept of legal responsibility for acts beyond a general denial that moral culpability was relevant in that case. A better argument might have been that Lord Hamblen's comments were made in the context of considering proportionality which, as we have seen, takes into account case-specific factors rather than more general policy concerns like inconsistency. As often happens in law, the issue of morality may have unnecessarily muddied the waters a little here.

Second, Andrews LJ quotes a section of Lord Hamblen's discussion of the historic justification for the illegality defence: preventing someone from profiting from their wrong. According to Lord Hamblen, although this

> …is not the rationale for the illegality defence, it is a relevant policy consideration, which is linked to the need for consistency and coherence in the law. For one branch of the law to enable a person to profit from behaviour which another branch of the law treats as criminal *or otherwise unlawful* would tend to produce inconsistency and disharmony in the law and so cause damage to the integrity of the legal system.[88]

Andrew LJ italicised the words 'or otherwise unlawful' without further explanation. However, when read in conjunction with Her Ladyship's recognition of the "well-established distinction between criminal responsibility and civil/tortious responsibility in cases such as the present,"[89] the move she appears to be making is as follows. Although case law suggests that the consistency question asks whether the criminal and civil branches of law are giving consistent answers to the Claimant's responsibility for their acts, this quotation supports a different perspective on consistency *and coherence* (emphasis added): it would be inconsistent or incoherent for one branch of law (the jurisdictional branch that includes the illegality defence) to permit a Claimant to "profit from behaviour" which another branch (tort law) would treat as unlawful. It would be inconsistent because the effect of not applying the illegality defence would "in practical terms

[85] ibid [128].
[86] ibid [116].
[87] ibid [132-3].
[88] *Henderson* [119].
[89] Lewis-Ranwell [135]

enable the Claimant's mental health to enable him *(sic.)* to place the legal responsibility for deliberately taking the lives of three people at someone else's door."[90] That is, if the illegality defence is not applied in these proceedings, tort law would hold him responsible for his acts in one set of proceedings (yet to be brought) but allow him to shift that responsibility for those acts onto the defendants in these proceedings.

There are several problems with this move. First, Lord Hamblen's words are *obiter:* in *Henderson* the behaviour was treated as criminal, not otherwise unlawful. Second, Andrews LJ seems to be ignoring the fact that in *Apotex*, the Supreme Court held that the illegality defence would not apply to torts not involving dishonesty since such wrongs only offend against essentially private interests.[91] Third, there has not been a finding in this case that the Claimant's acts were tortiously unlawful.[92] Fourth, there is no sense in which the Claimant is "profiting" from his unlawful acts. His claims are for compensation and an indemnity. And as Lord Toulson JSC indicates in *Patel,* it is better to drop the language of profiting in favour of focusing on consistency.[93] Fifth, whilst it is true that the non-application of the illegality defence can be interpretated as implying a shift of responsibility, as we have already seen it is more accurate to characterise it as a shift of liability. Finally, intra-civil law coherence in this case would come at the price of an inconsistency with criminal law since civil law would then be characterizing the Claimant's responsibility differently.

The final positions

There is therefore very little to support Andrews LJ's attempt to extend the consistency principle via coherence or otherwise to legal responsibility in general. The remainder of Her Ladyship's argument emphasises the closeness of the connection between the claim and the illegal acts, acts which were deliberate and had serious consequences; that the acts were the immediate and/or effective cause of the Claimant's loss with a potential impact on NHS funding.[94] Earlier we pointed to Andrews LJ's position on deterrence and the view that denial of the claim would not in all the circumstances be disproportionate. What we see here, then are some points relevant to *Patel* stage (a) (NHS funding, deterrence, and possibly inconsistency via the close connection question[95]), no factors relevant to Patel stage (b), and the remainder relevant to *Patel* stage (c). The causation argument is potentially a variant of the 'centrality of the illegal act to the transaction' within stage (c) as well as having echoes of Lord Hoffmann's alternative argument in *Gray* which may go to consistency or be an alternative argument altogether. Moral culpability remains irrelevant.

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[90] ibid.
[91] *Apotex* [28].
[92] Although *Morris* implies that his actions would be unlawful in battery, that decision is a High Court case from the 1950s, and it is possible that a more modern and "proper understanding of the true implications of acute mental illness" to use Sharp P's words, might cause a contemporary court to reach a different conclusion. On the other hand, it should be acknowledged and there was no disagreement about the idea that liability in tort law does not depend on moral culpability, an idea which can be traced back to the seventeenth-century case of *Weaver v Ward* (1616) Hob 134, 80 ER 284.
[93] See n35 above.
[94] Lewis-Ranwell [135-6].
[95] *Henderson* [128].

Underhill VP considers that Patel stage (b) – the public interest in Claimant victims in insanity cases receiving compensation for the wrongs they have suffered – is not outweighed by considerations relating to NHS funding or deterrence where the Claimant lacks moral culpability. He uses the language of proportionality when undertaking the balancing exercise.[96] That is not quite right. If, as he concludes, the balance favours permitting the claim then it is unnecessary to consider proportionality at Patel stage (b). And since that is His Lordship's conclusion, Underhill LJ does not need to consider the seriousness of the unlawful act, its deliberate nature nor comparative blameworthiness. Perhaps ironically, it is at *Patel* stage (c) that moral culpability may be of greatest relevance rather than at *Patel* stage (a) when considering the public confidence principle or at stage (b) when considering the corrective justice claims of victims of institutional negligence.

Causation

It may be tempting to sidestep the culpability question altogether by analysing the illegality defence entirely in terms of causation (as Andrews LJ was initially tempted to do[97]). This could be done by interpreting Lord Hoffmann's distinguishing of *Vellino*[98] and *Revill*[99] in *Gray* as asking whether the Claimant's illegal act came "last" in the chain of causation. In *Vellino* the career burglar's attempted escape came last and was the proximate cause of his loss. But the police owed no duty to prevent his escape. There was therefore no culpability on their part. Conversely, in *Revill* the burglar's illegal act in attempting burglary came before the occupier shot him. By shooting the burglar, the occupier breached his duty to the burglar. That wrong did come "last" in the chain, but it is also clearly a more culpable act than burglary since he could not rely on self-defence. So, although a causal analysis might point to the Claimant's clear intervention in the world by unlawfully killing others as being inextricably linked to his own losses, there is a marked discrepancy in the parties' culpability. In this case, the Claimant has no culpability whatsoever due to his lack of moral agency. The Claimant's acts were deliberate, intentional and extremely unreasonable and these are matters which would normally break the chain of causation. But could the Defendants reasonably foresee that the Claimant might cause GBH or death if they negligently let him free? Here the Defendants added an obvious risk to the world by doing so. Permitting the claim appears to be correct from the perspective of both causation and culpability.

Concluding questions

Although the Supreme Court has only been asked to resolve one issue, several related questions must be considered by the Supreme Court on 15 July. A few of these include:

1. Is there a relevant "taxonomic" distinction between inconsistency and incoherence in insanity cases involving the illegality defence?
2. Is moral culpability relevant in such cases (and in general), and if so at what stage(s) of

[96] Lewis-Ranwell [116].
[97] Lewis-Ranwell [127].
[98] *Vellino v Chief Constable of Greater Manchester Police* [2002] 1 WLR 218.
[99] *Revill v Newberry* [1996] QB 567.

the *Patel* inquiry? Is it a precondition for engaging the public confidence principle and is it related to consistency but not coherence? Relatedly, does moral culpability justify treating insanity cases differently to diminished responsibility cases involving claims in tort law? If not, are there any other justifications for treating them differently, for example a policy of protection of vulnerable individuals who lack capacity at stage (b).

3. Was Lord Hamblen correct to turn the public confidence principle into a central organising principle at stage (a) of the inquiry? If so, what does that principle mean in the context of a legal doctrine which is unlikely to be understood by the public? As a conditional if-then statement following *Lewis-Ranwell*, it appears to be somewhat indeterminate in this form: the public confidence principle is engaged only if the public has reason to disapprove of the outcome and the public has no reason to disapprove if the Claimant lacks moral culpability.
4. To what extent should courts consider the *Patel* stages in order (and in full)?
5. To what extent might a causal analysis provide a solution to the illegality conundrum in cases involving insanity. And is a causal analysis a part of or distinct from the *Patel* test?

Although it is true that this case will probably not affect many similar cases directly, what it reveals is a continued problem with the illegality defence requiring further guidance from the Supreme Court. It is to be hoped that the court will take the opportunity to clarify and simplify the test.