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IN *Lewis-Ranwell v G4S Health Services (UK) Ltd. and others* [2024] EWCA Civ 138, the claimant (C) had been diagnosed with schizophrenia. A few years later, he was detained by the police on suspicion of burglary and was visibly mentally unwell. He was released after being seen by mental health professionals employed by the defendants (DD). Later that day, C was arrested on suspicion of assault and released the next day, again after being seen by DD's mental health professionals. Soon after his second release, C killed three men during a psychotic episode. C was acquitted of murder by reason of insanity, on the basis that he did not realise his conduct was contrary to the criminal law or the "standards of reasonable ordinary people" (see *Keal* [2022] EWCA Crim 341, at [41]). Following this acquittal, C was detained in hospital. C sought damages from DD in negligence, including for loss of liberty, and an indemnity for claims against him by the victims' estates. C argued that, had DD not been careless in their provision of care, he would not have been released from custody and in a position to kill. At first instance, DD failed to strike out the claim on the ground of illegality. The Court of Appeal, by a majority (Underhill L.J. and Dame Victoria Sharp P.), agreed that the illegality defence did not apply. In this note, we argue that the majority was correct.

Lewis-Ranwell is a novel case, not governed by binding authority. As such, the law must be developed by analogy with established authority, with the "trio of considerations" in *Patel v Mirza* [2016] UKSC 42 serving as the framework of inquiry. As approved by Lord Hamblen in *Henderson v Dorset Healthcare University NHS Foundation Trust* [2020] UKSC 43, at [116]–[124], this requires the court to consider: (1) all relevant policies in favour of applying the defence; (2) all relevant policies against applying the defence; (3) if necessary, whether the result would be disproportionate.

C's claim engages both the narrower rule of illegality ("you cannot recover for damage which flows from loss of liberty … or other punishment lawfully imposed upon you in consequence of your own unlawful act") and the wider rule ("you cannot recover compensation for loss which you have suffered in consequence of your own criminal act") (*Gray v Thames Trains* [2009] UKHL 33, at [32] (Lord Hoffmann)). In *Henderson*, Lord Hamblen explained (at [58], [125]–[126]) that both rules are underpinned by the policy aims of: (1) avoiding inconsistency, so as to maintain the integrity of the legal system; and (2) avoiding outcomes that the public is likely to disapprove of, thereby undermining public confidence in the law. As these policy considerations are the most pertinent in *Lewis-Ranwell*, we will focus on them here.

As regards inconsistency, the majority concentrated on inconsistency between tort and criminal law. On a simple view, the Trial of Lunatics Act 1883, s. 2, as amended, makes clear that an insane defendant is not guilty of criminal wrongdoing. Therefore, in allowing C's claim, tort law would not be condoning what criminal law condemns.

DD argued that what matters is not criminal responsibility, but that C committed an unlawful (or, in DD's terms, "criminal") act. They suggested that, as C had committed the *actus reus* of murder, with the required *mens rea*, an unlawful act was present. The majority was right to reject this argument.

One difficulty posed by insanity is that it can be analysed in a variety of ways. Increasingly, for instance, criminal law theory views defences such as insanity as exemptions from criminal responsibility. The details differ, but the basic point is that criminal responsibility, and concepts relevant to it, such as *actus reus* and *mens rea*, presuppose a number of capacities that an insane person lacks. On such views, it is controversial from a criminal law perspective to even regard the insane defendant's act as "unlawful" in the sense of an *actus reus*. This is one way of explaining the more neutral description that is employed in the relevant statute – namely, whether the defendant "did the act or made the omission charged" (Trial of Lunatics Act 1883, s. 2), and fits with Underhill L.J.'s careful wording about "what would otherwise be criminal conduct" (at [155]).

In response, it can be noted that the courts have used the expression *actus reus* to refer to an insane defendant's conduct (e.g. *Attorney-General's Reference (3 of 1998)* [2000] Q.B. 401) and reacted with scepticism towards more capacity-centred arguments about insanity (see, most recently, *Keal*). Grant, then, that it is possible to take the view that, absent justification (such as self-defence), the act performed by the insane defendant is still "unlawful", in the sense of being an *actus reus*. The additional difficulty faced by DD is that insanity is otherwise a denial of *mens rea*, or an excuse. Both views seem to deny the element of turpitude that is seen as being of moment in relation to the illegality defence. If insanity precludes the formation of *mens rea* (as it conceivably does in some cases), then such turpitude is plausibly absent. If *mens rea* simply means a technical description of the defendant's cognitive mental state, then those falling under the "wrongness" limb of the insanity defence, like C, can have *mens rea* (on these limbs, see *M'Nagthen's* case (1843) 10 Cl & F 200). They can, after all, possess such cognitive mental states (but not appreciate their conduct's wrongfulness). But if such criminal defendants are excused (the only explanation for their acquittal left), then the standard explanation for excuses – that is, that they remove culpability – again seems to negate the sought-after turpitude.

Criminal law learning is, accordingly, consistent with the conclusion that the illegality defence should not apply where the claimant has been acquitted on the basis of insanity.

That the illegality defence bars those convicted of manslaughter by reason of diminished responsibility from claiming in negligence (*Clunis v Camden and Islington Health Authority* [1998] Q.B. 978, *Gray*, *Henderson*) does not negate the above conclusion. First, a manslaughter conviction is *still* a conviction, and so the claimant is indeed relying on her straightforwardly criminal action as the basis for her civil claim. Second, someone convicted of manslaughter still has sufficient responsibility for her actions to be convicted, and her conduct can still exhibit turpitude; we simply do not take her to be sufficiently responsible for a murder conviction. Third, on one view, diminished responsibility is simply about avoiding the mandatory life sentence for murder (Murder (Abolition of Death Penalty) Act 1965, s. 1). Ultimately, then, a distinction between insanity and diminished responsibility is coherent.

Andrews L.J., dissenting, concentrated to a greater extent on inconsistency within tort law. Her approach conceives of unlawfulness in terms of C's actions being "illegal and to which civil liability attaches" (at [125]). What undergirds this finding of unlawfulness is that: (1) C had no justification for what he did; and (2) tort law does not credit insanity as a defence (*Morriss v Marsden* [1952] 1 All E.R. 925). In Andrews L.J.'s view, whatever the criminal law says, tort law would be internally incoherent if it allowed the victims' estates to sue C in trespass, and then allowed C to sue DD in negligence for the consequences of that trespass. The absence of turpitude in the senses described above is not determinative; what matters is the deliberateness of the tortious act.

Several responses are apt here. First, o*biter dicta* in cases involving insanity (e.g. *Clunis*, 989 (Beldam L.J.)) and general statements in cases not involving insanity (e.g. *Adamson v Jarvis* (1827) 130 E.R. 693, 696 (Best C.J.)) suggest that the illegality defence does not apply where the claimant was unaware that she was acting unlawfully. Once again, the underlying premise is that, absent such awareness, there is no turpitude. Moreover, as Lord Sumption explained in *Les Laboratoires Servier v Apotex Inc* [2014] UKSC 55, at [28], turpitude in the authorities covers conduct that engages the public interest and so is criminal or "quasi-criminal"; torts that do not involve dishonesty are excluded as they only offend against private interests.

Second, the courts accept that illegality is founded on public policy and is not concerned with achieving justice between the parties (*Holman v Johnson* (1775) 1 Cowp 341, 343 (Lord Mansfield)). The focus is on the position of the claimant vis-à-vis the court, not the relative merits of the parties. In the claim between C and his victims in *Lewis-Ranwell*, the focus is on

interpersonal justice. In the claim between C and DD, there is the negligence aspect, which is about interpersonal justice, and the illegality aspect, which is about public policy. Denying the illegality defence in this case enables the court to allocate responsibility between C and DD through other mechanisms within tort law, such as the rules on causation, contributory negligence and contribution. These doctrines reflect the fact that C's tortious responsibility to his victims does not automatically mean that DD have no responsibility to C for what has happened.

Third, it is questionable whether the deliberate nature of the tortious act is an appropriate threshold for determining the required turpitude. The relevance of intention across different torts and rules varies, and bears little relationship to the use of *mens rea* concepts in criminal law.

Turning to public confidence, there is no doubt a problem in "allowing a claimant to be compensated for the consequences of his own criminal conduct" (*Henderson*, at [58(3)] (Lord Hamblen)), but the same difficulties above arise in describing an insane person's conduct as "unlawful" or "criminal". True, even with that caveat, right-thinking citizens might still object to compensating C. However, given C's serious mental illness and moral blamelessness, and the failings of those responsible for his care which contributed to C's killings, it would not be inappropriate to regard C as a victim, in addition to those he killed. As Spigelman C.J. observed in *Hunter Area Health Service v Presland* [2005] NSWCA 33, at [95]: "how a society treats its citizens who suffer from mental illness ... is often a test of its fairness."

Underhill L.J. seemed concerned about potential public reactions to a "not wholly implausible" case where, for instance, a patient injures their doctor, and then seeks to sue the doctor in negligence for carelessly allowing the attack to occur (at [109]). Again, tort law has tools other than the illegality defence which can produce results that seek to achieve justice between the parties in a way that right-thinking citizens can accept. It would be preferable to use them to respond to individual circumstances, rather than extending the illegality defence to cover a whole class of claimants.

The Supreme Court has given permission for DD to appeal. In due course, it is to be hoped that it endorses the majority's view.

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