Clunis (Christopher) (by his next friend Christopher Prince) v Camden and Islington Health Authority

Court of Appeal
Beldam and Potter LJJ and Bracewell J
5 December 1997

A health authority's failure to comply with Mental Health Act 1983 s117(2) does not give rise to a private law action for breach of statutory duty, nor an action for breach of a common law duty of care. The court will not entertain a claim for damages arising out of an illegal act where the plaintiff knew that what s/he was doing was wrong.

Facts

The plaintiff had been in receipt of psychiatric treatment for a number of years. Having been detained at Guy's Hospital under Mental Health Act 1983 (MHA) s3 since some time in August 1992, he was discharged on 24 September 1992. It then became the duty of the area health authority and the local social services authority to provide, in co-operation with relevant voluntary agencies, after-care services for the plaintiff until satisfied that he no longer needed them: MHA 1983 s117. The plaintiff moved to North London, so Guy's Hospital arranged for Dr Sergeant at Friern Hospital, run by the defendant health authority, to become designated as the plaintiff's responsible medical officer and to meet the plaintiff at an appointment fixed for 9 October 1992. The plaintiff failed to attend this appointment, as well as a further appointment arranged with the hospital's consultant psychiatrist on 13 November 1992, a mental health assessment visit on 30 November 1992 and a further outpatient appointment on 10 December 1992. On 13 November 1992, Dr Sergeant ascertained that the plaintiff's general practitioner had removed the plaintiff from his list of patients because of aggressive and threatening behaviour. On 17 December 1992 Haringey Social Services Authority advised Dr Sergeant that the local police had informed it that the plaintiff was 'waving screwdrivers and knives and talking about devils'. However, it was apparent that the police had not taken any action to remove the plaintiff to a place of safety under MHA 1983 s136. Dr Sergeant informed Haringey Social Services Authority that a mental health assessment team should assess the plaintiff as soon as possible but that she first had to check which social services authority was responsible for the plaintiff. Later that day the plaintiff who had armed himself with a knife killed a man in a sudden and unprovoked attack. On 28 June 1993 the plaintiff's plea of guilty to manslaughter on the grounds of diminished responsibility was accepted at the Central Criminal Court. The trial judge ordered the plaintiff to be detained in Rampton Hospital on the ground that he was suffering from a mental illness characterised as a schizo-affective disorder. The judge also ordered that the plaintiff should be subject to a special restriction under MHA 1983 s41. The plaintiff alleged that the defendant health authority had failed to treat him with professional care and skill and that in particular Dr Sergeant had been negligent in failing to arrange a mental health assessment, or, as the plaintiff's key worker, to liaise effectively with the police, the social services authority and other agencies to ensure that the plaintiff, who was plainly in urgent need of treatment and was dangerous, was assessed before he committed manslaughter. Had he been assessed he would have consented to become a patient or been detained. Because he was not

assessed he committed manslaughter and became unlikely to regain his liberty for many years. One of the consultant psychiatrists whose reports had been relied on to establish diminished responsibility stated that the plaintiff had a history of seriously violent behaviour and that any relapses were likely to be marked by paranoia, delusions and a 'strong likelihood' of violent behaviour, so that the management of his illness in the community required close monitoring. The Court of Appeal allowed the defendant's appeal against the refusal of the deputy High Court judge to strike out the plaintiff's claim as disclosing no cause of action.

Held:

1 The plaintiff's action was barred on the ground of public policy embraced by the phrase *ex turpi causa non oritur actio*. That principle applies to claims in tort as well as in contract (indeed to all claims however founded) providing that: (a) the plaintiff's claim arises out of and depends upon proof of his commission of an illegal act: *Tinsley v Milligan* [1994] 1 AC 340 followed; and (b) the plaintiff was implicated in the illegality and in putting forward his case seeks to rely upon the illegal acts: *Gray v Barr* [1971] 2 QB 554 followed. Both limbs were satisfied here. The plaintiff's mental state had not justified a verdict of not guilty by reason of insanity. Consequently, although his responsibility for killing was diminished, he must be taken to have known what he was doing and that it was wrong.

2 The result would be different in the case of a plaintiff who could not be presumed to know that he was committing an illegal act and therefore had no *mens rea*, eg, because he had been duped as to the relevant facts as in *Burrows v Rhodes and Jameson* [1899] 1 QB 816 or if it could be said that the plaintiff in a case similar to this did not know the nature and quality of his/her act or that what s/he was doing was wrong.

3 MHA 1983 s117(2) does not give rise to a private law action for breach of statutory duty. The primary method of enforcement is by way of the Secretary of State for Health's default powers exercised under MHA 1983 s124. Decisions under the section could also be susceptible to judicial review at the instance of a patient. The wording of the section is not, however, apposite to create a private law cause of action in the event of a failure to carry out the duties imposed: *X v Bedfordshire CC and Others* [1995] 2 AC 633 applied.

4 MHA 1983 s117(2) does not give rise to a common law duty of care. It is not just and reasonable to superimpose such a duty of care onto the statutory duty given the wide-ranging responsibilities brought into being and the variety of statutory and voluntary bodies involved. The duties owed by a health authority are distinct in kind from those owed by a doctor to a patient s/he is treating. It would not appear that a police constable could be liable in negligence for failing to remove the plaintiff to a place of safety under MHA 1983 s136; it would be strange if liability could attach to Dr Sergeant: *X v Bedfordshire CC and Others* [1995] 2 AC 633 applied.

Cases referred to in judgment:

Adamson v Jervis [1827] 4 Bin 66; 130 ER 693.
Burrows v Rhodes and Jameson [1899] 1 QB 816.
Colburn v Patmore [1834] 1 CR, M, & R 73.
Everett v Griffiths [1920] 3 KB 163; [1921] 1 AC 361.
Gray v Barr [1971] 2 QB 554; [1971] 2 WLR 1334; 115 SJ 364; [1971] 2 All ER 949; [1971] 2 Lloyd's Rep 1, CA.
Holman v Johnson [1775] 1 Cowp 341.
Meah v McCreamer (No 1) [1985] 1 All ER 367; (1985) 135 NLJ 80.

Meah v McCreamer (No 2) [1986] 1 All ER 943; (1986) 136 NLJ 235.
R v Ealing District Health Authority ex p Fox [1993] 3 All ER 170; [1993] 1 WLR 373; [1993] 4 Med LR 101; (1992) 136 SJLB 220; [1993] COD 478; (1993) 5 Admin LR 596; (1992) *Times*, 24 June.
Scott v Brown, Doering, McNab & Co [1892] 2 QB 724.
Stovin v Wise and Norfolk CC [1996] AC 923; [1996] 3 WLR 388; [1996] 3 All ER 801; [1996] RTR 354; (1996) 146 NLJ Rep 1185; (1996) 93(35) LS Gaz 33; (1996) 140 SJLB 201; (1996) *Times*, 26 July; *Independent*, 31 July, HL.
Tinsley v Milligan [1994] 1 AC 340; [1993] 3 WLR 126; [1993] 2 All ER 65; (1993) 68 P&CR 412; [1993] 2 FLR 963; [1933] NPC 97; [1993] EGCS 118; (1993) *Times*, 28 June; *Independent*, 6 July, HL.
X (Minors) v Bedfordshire CC and Others [1995] 2 AC 633; [1995] 3 WLR 152; [1995] 3 All ER 353; [1995] 2 FLR 276; [1995] 3 FCR 337; (1995) 7 Admin LR 705; [1995] Fam Law 537; (1995) 145 NLJ Rep 993; (1995) *Times*, 30 June; *Independent*, 30 June, HL.

Legislation/guidance referred to in judgment:
Mental Health Act 1983 ss3, 23, 117, 118, 124 and 136.

This case also reported at:
Not elsewhere reported.

Representation
J Grace QC and Mr A Grubb (instructed by Beachcroft Stanleys) appeared on behalf of the applicant.
S Irwin QC and J Glasson (instructed by Thanki Novy Taube) appeared on behalf of the respondent.

Judgment
LORD JUSTICE BELDAM: This is the judgment of the court.

In these proceedings the defendant health authority applies to strike out the claim brought against it by the plaintiff, Christopher Clunis, as disclosing no cause of action. The defendant's application was dismissed by order of Mr R B Mawrey QC sitting as a deputy judge of the High Court on 12th December 1996. The defendant now appeals to this court.

The Facts

The plaintiff is a patient by reason of mental disorder. He was born on 18th May 1963 in Jamaica and in 1986 was treated as an in-patient at the Bellevue Hospital there. He appears to have come to the United Kingdom between 1986–1987, and from 1987 to 1992 he had received psychiatric treatment in several hospitals in the London area. In August 1992 he was detained as the result of an order under sec. 3 of the Mental Health Act 1983 at Guys Hospital, London SE1. On 24th September 1992 the responsible medical officer then in charge of his treatment decided he was fit to be discharged. Although no criteria are laid down under sec. 23 of the Act for the making of an order for discharge, it is reasonable to suppose that it was no longer considered necessary to detain him in the interests either of his own health or safety or with a view to the protection of other persons. It was, however, the district health authority's duty under sec. 117 of the Act to arrange in conjunction with the local social services authority to provide in co-operation with relevant voluntary agencies after-care services for the plaintiff until those authorities were satisfied that he no longer needed them. See sec. 117(2).

The plaintiff had expressed a desire to move to North London and into the area covered by the defendant health authority. Accordingly a doctor at Guy's Hospital contacted the defendant authority and arranged for the plaintiff to be seen at Friern Hospital on 9th October 1992. As a result of contact between the doctor at Guy's Hospital and the defendant authority, Dr Sergeant, a psychiatrist employed by the defendant, was designated as the responsible medical officer as required by the Secretary of State's code of practice made under sec. 118 of the Act. The plaintiff failed to attend the appointment at Friern Hospital on 9th October. An appointment was then made for him to see Dr Taylor, the consultant psychiatrist at the hospital on 13th November, but again he failed to attend. Dr Sergeant telephoned the plaintiff's general practitioner, Dr Patel, who said that the plaintiff had been removed from his list of patients because of aggressive and threatening behaviour. As a result, Dr Sergeant telephoned Guy's Hospital and then contacted Haringey Social Services asking them to arrange a mental health assessment visit. It was arranged that this assessment should take place at the plaintiff's address on 30th November at 3pm. On that day the plaintiff apparently left his address without being recognised by anyone in the assessment team; so the assessment did not take place.

Following a call from Haringey Social Services on 1st December, Dr Sergeant arranged an appointment to see the plaintiff on 10th December. Dr Sergeant asked the duty social worker to attend the meeting. It is contended on the plaintiff's behalf that, on the information she had, Dr Sergeant's consideration of the plaintiff's needs 'fell below minimum acceptable practice at that time'. It was over two months since the plaintiff had been discharged from Guy's Hospital and he had still to receive psychiatric care from the defendant authority. On 10th December the plaintiff again failed to attend his outpatient appointment and on 17th December Haringey Social Services advised Dr Sergeant that local police had called them to say that the plaintiff was 'waving screwdrivers and knives and talking about devils', but the constable had apparently not taken any action to remove him to a place of safety under sec. 136 of the Act.

Dr Sergeant advised Haringey Social Services that the mental health assessment team should assess the plaintiff as soon as possible but that she first had to check which social services authority was responsible for the plaintiff. Later that day at about 3.45pm the plaintiff, who had armed himself with a knife, in a sudden and unprovoked attack killed Mr Jonathan Zito at Finsbury Park tube station in London. The plaintiff was charged with Mr Zito's murder and on 28th June 1993 at the Central Criminal Court the plaintiff proffered a plea of guilty to manslaughter on grounds of diminished responsibility. The plea was accepted. The trial judge, Mr Justice Blofeld, ordered the plaintiff to be admitted to, and detained in, Rampton Hospital on the grounds that he was suffering from a mental illness characterised as a schizo-affective disorder. The court also ordered that he should be subject to the special restriction set out in sec. 41 of the Act.

The Plaintiff's Claim

In his statement of claim the plaintiff contends that he has suffered injury, loss and damage because the defendant health authority were negligent and responsible for breach of a duty of care at common law to treat him with reasonable professional care and skill. In particular it is alleged that Dr Sergeant was:

> *. . . responsible for monitoring the implementation of the plaintiff's care plan and liaising and co-ordinating where necessary between the individuals and agencies involved in it.*

She was negligent in that she failed to arrange a mental health assessment of the plaintiff before 30th November 1992, failed to identify him on 30th November, failed to ensure that an urgent mental health assessment was carried out before 17th December 1992 and in effect failed in her responsibility as a key worker to liaise effectively with police, the social services authority and other agencies to ensure that the plaintiff was assessed before he committed manslaughter on 17th December. It is said that from information she possessed Dr Sergeant ought to have realised that the plaintiff was in urgent need of treatment and was dangerous. It is further contended on the plaintiff's behalf that if he had been assessed before 17th December he would either have been detained or consented to become a patient and would not have committed manslaughter. In consequence of the defendant's breach of duty he will now be detained for longer than he otherwise would have been and is unlikely to regain his liberty for many years because of the considerable public interest and publicity which attended his conviction.

A medical report is exhibited to the statement of claim. It is from Dr Shubsachs, one of the consultant psychiatrists whose reports were relied on to establish diminished responsibility. The report contains the following paragraph:

> *Mr Clunis had a history of seriously violent behaviour before the homicide of Mr Zito, and any relapses of his illness are likely to be marked by paranoid interpretations of events and delusions, and there must be a strong likelihood, if he did relapse, that violent behaviour would result. Thus, even if he had not attacked Mr Zito, the management of his illness in the community would have required close monitoring.*
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> *Therefore, the 'prognosis' for the management of Mr Clunis, if he had not committed his index offence, would have been that he would probably have lived in the community for the majority of the time subject to acute exacerbations of his illness, perhaps requiring short admissions to hospital. From time to time he would probably have defaulted from medication. His mental state would have worsened and again he would have required short admissions to hospital, assuming he would not have disappeared from contact with the psychiatric services.*

The Defendant's Application

For the defendant, Mr Grace QC contends that the plaintiff's claim should be dismissed on two grounds. Firstly that the claim is based substantially, if not entirely, upon his own illegal act which amounted to the crime of manslaughter: *ex turpi causa non oritur actio*. Secondly the cause of action is alleged to arise out of the statutory obligations of the defendant to provide aftercare following the plaintiff's release from Guy's Hospital. The defendant contends that those obligations do not give rise to a common law duty of care.

In answer, Mr Irwin QC for the plaintiff contended that the maxim *ex turpi causa non oritur actio* did not apply to causes of action founded in tort. Even if it did, the court should look at the seriousness of the offence to determine whether it was contrary to public policy that the plaintiff should be allowed to maintain a cause of action. As to duty, the plaintiff was still a patient who was in the care of the defendant authority and its doctors and nurses. His relationship with the defendant was that of doctor and patient which clearly gives rise to a duty of care. Even if that was not the relationship between the plaintiff and the defendant authority, the obligations imposed under the Mental Health Act 1983 created duties owed by the defendant authority to a limited class, i.e. mental health patients, whom Parliament must have intended should have a right to sue for

A breach of that duty. Failing that, the obligations imposed by Parliament on the defendant gave rise to a duty of care owed to him at common law.

Is the Plaintiff's Action barred on Grounds of Public Policy?

Mr Irwin submitted that the rule of policy embraced by the Latin maxim *ex turpi causa non oritur actio* does not apply to causes of action founded in tort and that B the plaintiff's cause of action does not arise from the manslaughter of Mr Zito.

Of this maxim Lord Lindley in *Scott v Brown, Doering, McNab & Co* [1892] 2 QB 724 said:

> *This old and well-known legal maxim is founded in good sense, and expresses a* C *clear and well recognised legal principle, which is not confined to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It* D *matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him.*

The clear and well recognised legal principle to which Lord Lindley referred has E in the ensuing one hundred years become blurred by attempts to rationalise its application to different types of claim and to mitigate its consequences where they have appeared to the court to lead to a manifestly unjust result or where the rights of innocent parties may be affected if it is applied. Comparisons have been made between its application to cases in which contractual rights are pursued, those in which property is claimed and those in which other rights are in issue. F

In *Colburn v Patmore* [1834] 1 CR, M, & R 73 at page 83, Lord Lyndhurst LCB said:

> *I know of no case in which a person who has committed an act, declared by the law to be criminal, has been permitted to recover compensation against a person* G *who has acted jointly with him in the commission of the crime. It is not necessary to give any opinion upon this point; but I may say, that I entertain little doubt that a person who is declared by the law to be guilty of a crime cannot be allowed to recover damages against another who has participated in its commission.*

The argument is even more pertinent if the claim to damages is against some- H one who has not participated in the crime. The rule stated by Lord Mansfield in *Holman v Johnson* [1775] 1 Cowp 341 was a rule of public policy that:

> *A court will not lend its aid to a man who founds his cause of action on an illegal or immoral act.*

I

The question in that case arose on a claim for goods sold and delivered, but Lord Mansfield did not confine his principle to such cases.

We do not consider that the public policy that the court will not lend its aid to a litigant who relies on his own criminal or immoral act is confined to particular causes of action. Although Mr Irwin asserted that in the present case the plain- J tiff's cause of action did not depend upon proof that he had been guilty of manslaughter, the claim against the defendant authority is founded on the assertion that the manslaughter of Mr Zito was the kind of act which Dr Sergeant ought reasonably to have foreseen and that breaches of duty by the defendant authority caused the plaintiff to kill Mr Zito. Further the foundation of the injury, loss and K damage alleged is that, having been convicted of manslaughter, the plaintiff will

in consequence be detained under the Mental Health Act 1983 for longer than he otherwise would have been. In our view the plaintiff's claim does arise out of and depend upon proof of his commission of a criminal offence. But whether a claim brought is founded in contract or in tort, public policy only requires the court to deny its assistance to a plaintiff seeking to enforce a cause of action if he was implicated in the illegality and in putting forward his case he seeks to rely upon the illegal acts. As Best CJ said in *Adamson v Jervis* [1827] 4 Bin 66; 130 ER 693:

> *From the inclination of the court in this last case, and from the concluding part of Lord Kenyon's judgment in* Merryweather v Nixon*, and from reason, justice and sound policy, the rule that wrongdoers cannot have redress or contribution against each other is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act.*

The restriction of the operation of the policy to cases in which the person seeking redress must be presumed to have known that he was doing an unlawful act was confirmed in the case of *Burrows v Rhodes and Jameson* [1899] 1 QB 816. In that case the court had to decide whether the plaintiff could recover damages for deceit after he had been duped by the defendants into joining in a military expedition led by one of the defendants into the Transvaal ('the Jameson raid') and who, had he known of the purpose for which he was joining the expedition, would have been guilty of an offence under the Foreign Enlistment Act 1870. The defendants had argued that his action should be dismissed as his case was founded on an illegal act. The court rejected the argument because the plaintiff himself was innocent, had not been convicted and did not have the necessary intention to be involved in the commission of the offence. Kennedy J at page 828 said:

> *It has, I think, long been settled law that if an act is manifestly unlawful, or the doer of it knows it to be unlawful, as constituting either a civil wrong or a criminal offence, he cannot maintain an action for contribution or for indemnity against the liability which results to him therefrom . . .*
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> *Where the circumstances constituting the unlawfulness of the act are known to the doer of it, his inability to claim contribution or indemnity appears to me to be clear.*

And at page 829:

> *Certainly there is no right of indemnity where the doer of the act which another has authorised or induced knows it at the time to be a criminal offence. If, in a case in which knowledge is an essential ingredient of the offence, the plaintiff, in his claim for an indemnity, admitted that he was guilty of the offence, his claim would be on the face of it bad. If, in the like case, he was, on the trial of his claim for indemnity, proved to have been convicted of the offence, judgment must be given against him. Nor, in my judgment, can there be any valid claim to indemnity where the doer of the act which constitutes the offence has done it with knowledge of all the circumstances necessary to constitute the act an offence, but in ignorance that the act done under those circumstances constituted an offence. A man is presumed to know the law.*
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> *Thirdly, although it is not necessary to decide the point, I am inclined to think that there could be no valid claim to indemnity for being authorised or induced to do an act where the act which is in fact criminal is done in ignorance of the existence of some circumstance which is necessary to make it a crime, or even is done in a belief that such circumstance does not exist, but where it is known that the act is morally a wrong act. In such a case the doer of the act has, it may be*

A *said, the* mens rea *in the sense attributed to that expression by Bramwell B in the well-known case of* R v Prince . . .

But I am unable to accept the defendants' proposition, where the act, though a criminal offence – malum prohibitum – *is, upon the state of facts which the doer by the fraudulent misrepresentation of the person against whom he claims* B *indemnity has been induced to believe to be the true state of facts, neither criminal nor immoral.*

Later he said at page 833:

As I have already pointed out, it can never, in my judgment, be successfully C *contended that a claim for indemnity can be maintained where the doer of the act knew at the time, or must be presumed to know, of circumstances which make the act either a private wrong or a public crime. Here the gist of the case is that the plaintiff did not know the facts which made his conduct criminal, but, on the contrary, was led by the defendants to believe, and did believe, in the* D *existence of the fact – the sanction of the British Government – which, if it had been given, as he had a right (upon the defendants' representation) to assume it had been given, in the proper way, namely, under the licence of Her Majesty, would have been an answer to any imputation of illegality.*

E These principles seem to us to be relevant to Mr Irwin's next submission that not all criminal or illegal acts will prevent the court from entertaining a plaintiff's claim. Pertinently he said that there are today many summary offences which are not sufficiently serious to warrant the invocation of the maxim; the offence of manslaughter is an offence which varies greatly in its moral blameworthiness, especially if the manslaughter is by reason of diminished responsibility. He urged F the court to say that, where the degree of responsibility was diminished by reason of mental disorder, the court should not apply the maxim. He prayed in aid in this regard a test which this court has adopted in other cases between 1986 and 1994, namely whether the result in a particular case would be acceptable to 'the public conscience'.

G In *Tinsley v Milligan* [1994] 1 AC 340 Lord Goff, Lord Keith and Lord Browne-Wilkinson regarded such a test as unsatisfactory. Lord Goff preferred to accept the reason for the rule stated by Ralph Gibson LJ in the Court of Appeal in that case that, insofar as the maxim is directed at deterrence, the force of the deterrent effect is in the existence of the known rule and its stern application. Lord Goff said H at page 363:

But bearing in mind the passage from the judgment of Ralph Gibson LJ which I have just quoted, I have to say it is by no means self-evident that the public conscience test is preferable to the Act's present strict rules. Certainly I do not feel I *able to say that it would be appropriate for your Lordships' House, in the face of a long line of unbroken authority stretching back over 200 years, now by judicial decision to replace the principles established in those authorities by a wholly different discretionary system.*

J Lord Browne-Wilkinson at page 369 said:

My Lords, I agree with the speech of my noble and learned friend, Lord Goff of Chieveley, that the consequences of being a party to an illegal transaction cannot depend, as the majority of the Court of Appeal held, on such an imponderable factor as the extent to which the public conscience would be affronted by recog- K *nising rights created by legal transactions.*

In the present case the plaintiff has been convicted of a serious criminal offence. In such a case public policy would in our judgment preclude the court from entertaining the plaintiff's claim unless it could be said that he did not know the nature and quality of his act or that what he was doing was wrong. The offence of murder was reduced to one of manslaughter by reason of the plaintiff's mental disorder but his mental state did not justify a verdict of not guilty by reason of insanity. Consequently, though his responsibility for killing Mr Zito is diminished, he must be taken to have known what he was doing and that it was wrong. A plea of diminished responsibility accepts that the accused's mental responsibility is substantially impaired but it does not remove liability for his criminal act. We do not consider that in such a case a court can or should go behind the conviction and, even if it could, we do not see in the medical report attached to the statement of claim any statement which would justify the court taking the view that this plaintiff had no responsibility for the serious crime to which he pleaded guilty.

The plaintiff in this case, though his responsibility is in law reduced, must in Best CJ's words be presumed to have known that he was doing an unlawful act.

The only case cited to us to suggest that the court would entertain a claim to recover damages based on a plaintiff's conviction of a criminal offence knowingly committed is *Meah v McCreamer (No 1)* [1985] 1 All ER 367. In that case the plaintiff who had suffered a head injury in a road accident was held to be entitled to damages which arose from his subsequent conviction of two offences of rape. Subsequently, in *Meah v McCreamer (No 2)* [1986] 1 All ER 943, he was held not to be entitled to claim as damages sums he had been ordered to pay in compensation to the victims of the rapes. At the first hearing the judge, Lord Woolf then Woolf J, recorded that it had not been argued on behalf of the defendant that the plaintiff was not entitled to be compensated for having committed the crimes and was entitled to receive substantial damages in respect of that claim (see page 371(j)). At the second hearing it was argued that it would be contrary to public policy for the plaintiff to be indemnified in respect of the consequences of his crimes (see page 950(h)). Basing himself on the judgment of Lord Denning MR in *Gray v Barr* [1971] 2 QB 554 at page 568, Lord Woolf held that public policy:

> *. . . would be a further ground for holding that the plaintiff is not entitled to be indemnified for his criminal attacks on the two ladies concerned.*

Whilst any decision of Lord Woolf must be given the greatest weight, we do not consider that, in the absence of argument on the issue of public policy, his decision in *Meah v McCreamer (No 1)* (supra) can be regarded as authoritative on this issue.

In *Gray v Barr* (supra) a defendant who had shot and killed the plaintiff's husband in circumstances amounting to manslaughter, though acquitted of the criminal offence, was held to be precluded from claiming indemnity under a policy of insurance. Lord Denning MR at page 568 emphasised that in manslaughter of every kind there must be a guilty mind. He held that if the defendant's conduct was wilful and culpable he was not entitled to recover.

In the present case we consider the defendant has made out its plea that the plaintiff's claim is essentially based on his illegal act of manslaughter; he must be taken to have known what he was doing and that it was wrong, notwithstanding that the degree of his culpability was reduced by reason of mental disorder. The court ought not to allow itself to be made an instrument to enforce obligations alleged to arise out of the plaintiff's own criminal act and we would therefore allow the appeal on this ground.

The Defendant Authority's Duty

The next question for the court is the nature and extent of any obligation or duty owed by the defendant health authority to the plaintiff and whether a breach of such duty can give rise to a claim for damages.

The duty to provide after care which is at the heart of the plaintiff's claim and his submissions arises under sec. 117 of the Mental Health Act 1983. Sec. 117 provides:

> *(1) This section applies to persons who are detained under section 3 above . . . and then cease to be detained and leave hospital.*
>
> *(2) It shall be the duty of the District Health Authority and of the local social services authority to provide, in co-operation with relevant voluntary agencies, after-care services for any person to whom this section applies until such time as the District Health Authority and the local social services authority are satisfied that the person concerned is no longer in need of such services.*
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> *(3) In this section 'the District Health Authority' means the District Health Authority for the district, and 'the local social services authority' means the local social services authority for the area in which the person concerned is resident or to which he is sent on discharge by the hospital in which he was detained.*

The Act also provides by sec. 124 for the Secretary of State to exercise enforcement powers where an authority is in default:

> *(1) Where the Secretary of State is of the opinion, on complaint or otherwise, that a local social services authority have failed to carry out functions conferred or imposed on the authority by or under this Act or have in carrying out the functions failed to comply with any regulations relating to those functions, he may after such inquiry as he thinks fit make an order declaring the authority to be in default.*
>
> *(2) Subsections (3) to (5) of section 85 of the National Health Service Act 1977 (which relates to orders declaring, among others, a local social services authority to be in default under that Act) should apply in relation to an order under this section as they apply in relation to an order under that section.*

Following the analysis of the duties imposed by Parliament on local authorities in *X v Bedfordshire County Council and Others* [1995] 2 AC 633, the first question is whether the statutory provisions in this case create duties which give rise to a private law claim for damages if they are not fulfilled or, more particularly, whether a person who has been detained in hospital and who is discharged can claim damages for non-performance of the 'after care' obligations in sec. 117(2) of the Act.

Under sec. 117(2) the authorities named are required to co-operate with voluntary organisations in setting-up a system which provides after care services for patients who have been discharged from hospital after treatment for mental disorder. The services have to be made available to such persons until 'the person concerned is no longer in need of such services'. Undoubtedly the section is designed to promote the social welfare of a particular class of persons and to ensure that the services required are made available to individual members of the class. However sec. 124 provides the Secretary of State with default powers if he is of the opinion 'on complaint or otherwise' that the functions conferred or imposed under the Act have not been carried out. Thus the primary method of enforcement of the obligations under sec. 117 is by complaint to the Secretary of State. No doubt, too, a decision by the district health authority or the local social

services authority under the section is liable to judicial review at the instance of a patient: see *R v Ealing District Health Authority, ex Parte Fox* [1993] 3 All ER 170. The character of the duties created seem to us closely analogous to those described by Lord Browne-Wilkinson in *X (Minors) v Bedfordshire CC* (supra) at page 747 as requiring:

> *. . . exceptionally clear statutory language to show a parliamentary intention that those responsible for carrying out these difficult functions should be liable in damages if, on subsequent investigation with the benefit of hindsight, it was shown that they had reached an erroneous conclusion and therefore failed to discharge their statutory duties.*

In our view the wording of the section is not apposite to create a private law cause of action for failure to carry out the duties under the statute.

Mr Irwin argued that, on discharge from hospital, the patient nevertheless remained a person for whom the district health authority and the local social services authority are responsible in the sense that they have a duty not only to ensure that the services are available but that the patient receives the benefit of them and he went on to submit that a duty of care is thereby imposed on the authority which is merely an extension of the care which he has been receiving as a patient in hospital. In effect, he submitted, the relationship of doctor and patient which existed between the district health authority and the plaintiff while he was in hospital continued after discharge, so that a common law duty of care was owed by the defendant to continue the plaintiff's treatment. Is it in the circumstances just and reasonable to superimpose such a common law duty of care on an authority in relation to the performance of its statutory duties to provide after care? We do not think so. We find it difficult to suppose that Parliament intended to create such an extensive and wide-ranging liability for breaches of responsibility under sec. 117 which would of its nature apply alike to those engaged as professionals as well as those in voluntary services in many disciplines.

After care services are not defined in the Act. They would normally include social work, support in helping the ex-patient with problems of employment, accommodation or family relationships, the provision of domiciliary services and the use of day centre and residential facilities. No doubt an assessment of the patient's needs would in the first instance be made by the hospital which discharged him. It was for that purpose in this case that the defendant authority sought to arrange appointments with the plaintiff. In that respect, its actions through Dr Sergeant were essentially in the sphere of administrative activities in pursuance of a scheme of social welfare in the community. Bearing in mind the ambit of the obligations under sec. 117 of the Act and that they affect a wide spectrum of health and social services, including voluntary services, we do not think that Parliament intended so widespread a liability as that asserted by Mr Irwin. The question of whether a common law duty exists in parallel with the authority's statutory obligations is profoundly influenced by the surrounding statutory framework. See per Lord Browne-Wilkinson *in X v Bedfordshire CC* at page 739C, and per Lord Hoffmann in *Stovin v Wise* [1996] AC 923 at 952F–953A. So, too, in this case, the statutory framework must be a major consideration in deciding whether it is fair and reasonable for the local health authority to be held responsible for errors and omissions of the kind alleged. The duties of care are, it seems to us, different in nature from those owed by a doctor to a patient whom he is treating and for whose lack of care in the course of such treatment the local health authority may be liable.

A Nor do we think that Dr Sergeant should be held liable for a failure to arrange for a mental health assessment more speedily. The suggestion that because local police had reported that the plaintiff was waving screwdrivers and knives about and talking about devils illustrates to our mind the difficulty of holding her responsible in this case. Under sec. 136 of the Mental Health Act a constable B finding a person in a public place who appears to be suffering from a mental disorder and to be in immediate need of care or control may:

> *. . . if he thinks it necessary to do so in the interests of that person or for the protection of other persons, remove that person to a place of safety . . .*

C We doubt if even this language, though specifically requiring the constable to act in the interests of a mentally disordered person, creates a duty to take care which gives rise to a claim for damages at the suit of the disordered person.

Moreover as Lord Browne-Wilkinson pointed out in *X v Bedfordshire CC* (supra), the question whether a doctor owes a duty of care to a patient in certifying that a D patient is fit to be detained under the Mental Health Acts was left undecided in *Everett v Griffiths* [1920] 3 KB 163; [1921] 1 AC 361 and still remains open for decision in an appropriate case. We have no doubt that it would not be right to hold Dr Sergeant or the defendant health authority liable to the plaintiff in damages for failure to arrange the plaintiff's assessment for the purposes of E sec. 117 more speedily than she did.

For these reasons we do not think the plaintiff can establish a cause of action arising from a failure by the defendant health authority or Dr Sergeant to carry out their functions under sec. 117 of the Mental Health Act. Nor do we think that it would be fair or reasonable to hold the defendant responsible for the con- F sequences of the plaintiff's criminal act.

In our view the defendant's application should have succeeded on both grounds and we would allow the appeal.

Order: Appeal allowed, order below set aside.
G Costs below to be the defendants', not to be enforced without leave.
Order nisi against The Legal Aid Board in relation to the costs of the appeal.
Leave to appeal to the House of Lords refused.

H