SHERIFF APPEAL COURT

[2022] SAC (Civ) 27

Sheriff Principal M W Lewis
Appeal Sheriff A MacFadyen
Appeal Sheriff W Holligan

OPINION OF THE COURT

delivered by APPEAL SHERIFF W HOLLIGAN

in appeal by

DD

Pursuer and Appellant

against

NHS FIFE HEALTH BOARD

Defenders and Respondents

Pursuer and Appellant: Khurana KC and Crawford, advocate; Livingstone Brown Limited
Defenders and Respondents: McConnell, advocate; NHS Scotland Central Legal Office

20 September 2022

Introduction

[1] In this action the pursuer seeks damages from the defenders on account of the alleged negligence of a medical practitioner who was, at all material times, in the employment of the defenders. The action proceeded to debate after which, by interlocutor dated 17 August 2021, the sheriff deleted certain averments of the pursuer but allowed a proof before answer on the remaining averments. The pursuer appeals against that interlocutor; the defenders have lodged a cross appeal. For ease of reference, we shall refer to the parties to this appeal as the pursuer and the defenders respectively.

The pleadings

[2] In order to deal with this matter it is necessary to summarise the basis of the pursuer's case with reference to the key averments for the parties.

[3] The pursuer avers that he "had a long-standing diagnosis of Bipolar Affective Disorder" ("BAD") which is an incurable, relapsing/remitting disorder. It had led to periods of hospitalisation. On 20 November 2015, the pursuer was admitted to [the hospital] as a voluntary patient. On 23 November, he was diagnosed by Dr M as being manic. He was reviewed by Dr N and described as "not as manic as previous presentation/admission". He was then reviewed on 7 December, having been prescribed and taken medication. On that date, he was discharged from hospital. On 31 December, the pursuer was readmitted to [the hospital] with agitated and hostile behaviour following an appearance in Dundee Sheriff Court on a charge of a breach of section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 ("the 2010 Act"). He was allowed an unscheduled discharge on 8 January 2016. On 13 January he was outwith [the hospital] and subsequently taken into custody at Perth Police Station. He was assessed by Dr M at Perth Police Station. The assessment comprised speaking to the pursuer through the hatch of a cell door. He was described as having undertaken a "dirty protest" in his cell. Dr M detained the pursuer on a short-term detention certificate ("STDC") dated 14 January, by which point he was admitted to [the hospital]. On 15 January he was reviewed by Dr N who diagnosed a personality disorder. Dr N noted the pursuer as being irritable, loud and angry but he found no evidence of major mental illness. The pursuer avers that he displayed manic behaviour and that Dr N did not carry out a mental state examination. Dr N contacted the police to report the pursuer for racial abuse against him. The pursuer was later charged and convicted of behaving in a

racially aggravated manner towards Dr N. The pursuer avers that he continued to display manic behaviour. He was again reviewed by Dr N on 18 January. By this point, Dr N had received approaches from the pursuer's partner who was concerned about his condition. Dr N did not meet with the pursuer's partner. On 18 January, Dr N revoked the STDC (which had a further 23 days to run) and discharged the pursuer from [the hospital]. In discharging the pursuer, Dr N commented, "there is no major mental illness. Behaviour is due to personality. The patient is responsible for his actions". Put short, the pursuer says that the STDC should not have been revoked and that at that time he was seriously ill and suffering from manic relapse of his BAD. The pursuer left hospital contrary to advice but he did so because, at that point, his judgement was impaired. In particular, the pursuer avers, at article 9(i), that in discharging the pursuer, Dr N acted negligently and caused the pursuer to sustain the loss, injury and damage later condescended upon.

[4] At article 9(ii) the pursuer makes the following averments:

> "As a consequence of the revoking of the order the pursuer suffered the symptoms of prolonged, untreated illness without fixed abode. He suffered stress and anxiety in coping with his illness. He suffered pain and discomfort in living and sleeping in his car and in walking around in the cold inadequately clothed. He suffered stress in confrontations with members of the public, his family and the police. He suffered stress in being arrested and imprisoned and attending court hearings… As a result of the serious mental illness from which he was suffering the pursuer was unable to cope with normal living. On 19 January 2016 his verbally aggressive behaviour caused (his partner) to telephone the police. He appeared at Dundee Sheriff Court on 22 January 2016 from where he was again released on bail. He was arrested again due to his manic behaviour and appeared at Perth Sheriff Court on 27 January 2016 from where yet again he was released on bail. He was arrested on 26 and 29 January at [his partner's] home after he had sworn and shouted at her. On 6 February 2016, he was arrested on suspicion of driving whilst over the prescribed drink drive limit. On or around 8 February 2016, the pursuer was charged with *inter alia* assaulting a police officer in Perth Sheriff Court… On 15 February 2016, he appeared again at Perth Sheriff Court and was subsequently detained on remand in Perth Prison for 30 days. On or around 11 April 2016 he was made subject to a Compulsory Treatment Order… On or around 9 May 2016 he was made subject to a compulsion order. It was only as a result of the said orders that the pursuer was readmitted to [the hospital] and provided with appropriate treatment for his manic state. His

> relapse was longer and greater in severity because of his negligent discharge. The whole of the said experience was extremely upsetting and stressful for the Pursuer. It has had a severe impact on his self-confidence. He had not previously received any criminal convictions but now has convictions for assault and abusive behaviour. No claim is made in respect of loss and damage caused by the pursuer's conviction for drink driving by virtue of the principle *ex turpi causa non oritur action* (sic). The pursuer does claim for loss and damage caused by the remaining convictions…"

[5] The pursuer goes on to aver adverse reports in the media concerning his behaviour which he says damaged his reputation. The relationship with his parents and partner were also damaged. He suffered loss of earnings.

[6] In article 10, the pursuer sets out various duties of care in which the pursuer alleges Dr N failed. They include the failure to undertake a detailed mental state examination of the pursuer; failure to take into account the views of a named person (the pursuer's partner); reporting the pursuer for an alleged criminal act. In relation to the last of these issues Dr N had a duty to consult with an appropriate senior colleague with a view to changing practitioner. But for these failures, the pursuer would have been diagnosed with a relapse of BAD and the STDC would not have been revoked. It is averred that Dr N knew or ought to have known that if the order was revoked the pursuer would leave the hospital and be a danger to himself and to others. As a result of the failures, the pursuer left the hospital with materially impaired judgement. The pursuer avers that, had he not been discharged, he would not have driven a vehicle whilst unwell. He would not have been convicted of criminal offences and would not have carried out embarrassing public acts nor have been remanded in custody.

[7] The defenders' averments are, at times, sparse. They largely make reference to the pursuer's medical records. In answer 9(i), the defenders aver that "the pursuer's treatment was reasonable". Put shortly, the defenders aver that at material times the pursuer retained capacity and was responsible for his actions. The diagnosis of personality disorder was a

reasonable diagnosis. It was appropriate to revoke the STDC because the pursuer no longer met the criteria for detention at that time.

[8] In answer 9(ii) the defenders aver:

> "…Explained and averred that on the pursuer's hypothesis of fact (which is not known and not admitted) he is responsible for the conduct condescended on by him. He cannot recover damages for his criminal conduct *ex turpi causa non oritur actio.* Separately, any stress and anxiety experienced by the pursuer in coping with his illness would have been experienced whether or not he had been detained on 18 January 2016. It was not within the scope of Dr N's duty to prevent the pursuer sleeping in his car or walking around in the cold once he was no longer a patient at [the hospital]".

The decision of the sheriff

[9] The main issues before the sheriff related to the challenge to the relevancy of the defenders' averments by the pursuer on the application of *ex turpi causa non oritur actio* (for reasons of brevity, we will refer to this brocard as *ex turpi*) and the defenders' response thereto; and a challenge by the defenders as to the scope of duty owed by the doctor to the pursuer. The sheriff concluded that the *ex turpi* challenge by the defenders to the pursuer's claim in relation to the criminal matters referred to on record was correct. He proceeded to exclude the relevant passages in the record relating to certain of the pursuer's criminal activity. In so doing, he relied upon a number of House of Lords/Supreme Court cases to which we will later refer. The sheriff concluded that public policy prevented the pursuer from pursuing these claims for damages and he detailed what the various considerations were. He rejected the defenders' challenge to the pursuer's averments concerning the scope of duty and allowed the matter to proceed to a proof before answer on the remaining averments. He rejected the application of the test in *Meadows* v *Khan [2019] 4 WLR 26,* a decision of the Court of Appeal; later [2021] 3 WLR 147 before the Supreme Court, preferring the "but for" test. If Dr N was negligent in revoking the STDC what was

foreseeable as a consequence was a matter for proof. It is agreed by both parties that there is one error in the interlocutor of 17 August 2021. The sheriff repelled the defenders' third plea in law which is a plea to the merits of the matter and not a preliminary plea. That ought not to have been repelled.

The grounds of appeal

[10] The grounds of appeal can be summarised shortly. For the pursuer, the sheriff ought to have allowed a proof before answer on all matters and ought not to have excluded the averments of loss in relation to the *ex turpi* rule. The defenders say that the sheriff was correct in his conclusion on that aspect of the case. However, the sheriff erred in relation to the application of the scope of duty test and in that he ought to have dismissed the action.

[11] Accordingly, there are two issues in this appeal: the *ex turpi* argument; the scope of duty argument. If the defenders are correct on the scope of duty issue the consequence is that the action falls to be dismissed. The *ex turpi* argument is aimed at the pursuer's pleadings but, as the sheriff concluded, sustaining the argument on this part for the defenders leads to deletion of certain averments, not dismissal of the action. It is therefore appropriate to deal with the scope of duty point first.

[12] In the argument before us on scope of duty, the principal authority relied upon by the defenders is the decision of the Supreme Court in *Meadows* v *Khan*. At the point of the debate before the sheriff the judgment of the Supreme Court had not been delivered; reference was made to the decision of the Court of Appeal. The Supreme Court affirmed the decision of the Court of Appeal but proceeded to give extensive guidance on the scope of duty principle. The scope of duty principle came to prominence following the decision of the House of Lords in *Bank Bruxelles Lambert SA* v *Eagle Star Insurance Company* Ltd [1997]

AC 191 (also known as *SAAMCO*) and in particular the speech of Lord Hoffmann. The principle is best illustrated by the facts in *Meadows*. In that case the claimant wished to establish whether she was the carrier of the haemophilia gene. She consulted the defendant general practitioner. As the consequence of negligent advice given by the defendant, the claimant was led to believe that blood tests which she had undergone showed that she was not a carrier of the gene. In fact she was a carrier. Subsequently the claimant gave birth to a son who suffered from haemophilia. Four years later the child was diagnosed as also suffering from autism which was unrelated to the fact that he had haemophilia. The claimant brought a claim of negligence against the defendant for damages for the additional cost of raising her son. Liability for the negligent advice was admitted. Had the claimant known that she was carrying the haemophilia gene she would have undergone foetal testing for haemophilia while pregnant and, if the foetus was affected, would have terminated her pregnancy. The defendant accepted that the claimant could recover the additional costs associated with the child's haemophilia but argued that she could not recover the costs associated with autism as that extended beyond the duty assumed by the practitioner. The claimant was successful before the judge at first instance but failed before the Court of Appeal and the Supreme Court. Put very broadly, the defendant was only liable in damages in respect of losses of a kind which fell within the scope of the duty of care owed by the medical practitioner to the claimant.

[13] Both parties lodged written submissions for the hearing before us which they supplemented by reference to written submissions before the sheriff and oral submissions. We have considered these. We shall limit ourselves to the more salient features of the relative submissions.

Submissions for the defenders on scope of duty

[14] The sheriff erred in concluding that *Meadows* was not helpful [paragraph 37]. There are no differences between English and Scottish law in this area. The sheriff erred in failing to apply *Meadows* and instead applied the "but for" test exclusively. In applying the "but for" test alongside considerations of remoteness and foreseeability the sheriff had erred in law. In *Meadows* the Supreme Court held (at paragraph [62]) that the scope of duty principle applies to clinical negligence. That principle has not been applied in Scotland because it is of very recent origin. It does apply. The scope of duty principle imposes a limit on the losses which may be recovered and does so by excluding damages for losses of a kind outwith the scope of the defenders' duty of care. At paragraph [63] the Supreme Court described the duty of care question in respect of medical practitioners as a consideration of the nature of the service provided in order to determine the risks of harm against which the law imposes on the practitioner a duty of exercise reasonable care to avoid.

[15] Applying the scope of duty principle, the losses for which the pursuer seeks damages fall outwith the scope of the defenders' duty. Dr N's duty was to take reasonable care in the provision of the pursuer's medical treatment. In particular, the duty was to decide whether or not the pursuer was to be deprived of his liberty. Dr N concluded that the pursuer no longer met the criteria for detention. Having reached that conclusion he was obliged to revoke the short-term detention certificate. The pursuer, having been informed of the revocation, discharged himself against medical advice. The losses that the pursuer maintains he suffered thereafter all arose from his actions. It was not within the scope of Dr N's duty to protect the pursuer from any of the losses which he maintains that he suffered. In *Meadows*, applying *SAAMCO*, the Supreme Court suggested that one test of the scope of the duty principle is to consider a counterfactual situation. Accordingly, in the

present case, if Dr N's decision to revoke the STDC was correct, the pursuer would still have suffered the same losses.

[16] The pursuer cannot succeed even if he proves that Dr N breached his duty because the losses he avers that he suffered do not fall within the scope of Dr N's duty.

[17] In the course of his oral submissions, counsel for the defenders submitted that the focus in relation to scope of duty is at the point of the losses which were suffered. The approach of the pursuer is in effect to make the defenders an insurer. There is only one duty of care with causative potency and that is the revocation of the certificate.

The pursuer's submissions on scope of duty

[18] When the sheriff referred to *Meadows* he did not have the decision of the Supreme Court before him. The sheriff clearly disagreed with the defenders' argument that the scope of Dr N's duty was limited in the way contended for. The sheriff considered that the potential scope of Dr N's duty was wide and allowed a proof before answer; the matter could be considered after evidence. The defenders have not been deprived of the right to argue, after evidence has been led, that the losses suffered were not within the scope of the duty of the doctor.

[19] The scope of duty argument is concerned with the existence or extent of the duty of care owed. The defenders may have conflated this with a reasonable foreseeability of damage argument. If the negligent act is within the scope of the duty of care that is owed, any reasonably foreseeable losses arising from the consequences of the negligence are recoverable. If the negligent act is outwith the scope of the duty of care no duty of care is owed and no losses are recoverable. The defenders' submission that the scope of duty principle imposes a limit on the losses that may be recovered is incorrect. The principle

states that losses cannot be recovered for acts or omissions outwith the duty of care. In *Meadows*, the court was careful to distinguish between the scope of duty of care and the separate issue of reasonable foreseeability [paragraph 65].

[20] In the present case Dr N clearly owed a duty of care to the pursuer. So much is admitted by the defenders. The pursuer was detained under a short-term detention certificate. Dr N was providing care to the pursuer. He had the power to, and did, revoke the short-term detention certificate. In doing so Dr N caused the pursuer to be discharged into the community. If negligence is proved the reasonably foreseeable losses arising from this act are recoverable as damages. There is no question raised by the defenders of the act of revoking the short-term detection certificate being outwith the defenders' duty of care towards the pursuer. As such, there is no real issue relating to the scope of the defenders duty of care; the sheriff was correct to consider *Meadows* unhelpful. The defenders' analysis of *Meadows* suggests that *Meadows* departs from established principles of factual and legal causation (*Hughes* v *Lord Advocate* [1963] AC 837). The defenders give no reason why the harm should not fall within Dr N's scope of duty. In answering the question posed by the Supreme Court – what is the risk the service which the defenders undertook was intended to address – the answer is "the myriad reasonably foreseeable harm associated with misdiagnosing a severe mental illness and/or revoking a short-term detention of a patient who has severely impaired judgement". Reference was made to *Home Office* v *Dorset Yacht Co Ltd* [1970] 2 WLR 1140.

[21] The losses sustained by the pursuer were reasonably foreseeable. If a person is negligently discharged from psychiatric care while suffering from a manic psychiatric disorder which makes their detention necessary, it is reasonably foreseeable that they will suffer harm and that they will cause harm to others.

Submissions for the pursuer on the *ex turpi* argument

[22] In opening his argument, senior counsel for the pursuer referred in detail to the well known authority of *Jamieson* v *Jamieson* 1952 S.C. (H.L) 44. Only in very clear cases should an action be dismissed after debate. The onus rested on the defenders to persuade the court that matters should be so dealt with. The exclusion of certain evidence by the sheriff prevented the leading of all of the relevant evidence in the case. The crux of the case is the failure to diagnose the pursuer's mania which led to discharge of the pursuer and the revocation of the certificate. Evidence of the crimes committed by the pursuer was relevant to the whole case.

[23] In his written submissions senior counsel made reference to the case of *Patel* v *Mirza* [2017] AC 467. Although it was a contract case, it amounted to a general reformulation by the Supreme Court of the *ex turpi* principle, described also as the illegality principle. In particular, application of the principle involved the court in a balancing exercise. Reference was made to the judgment of Lord Toulson at para [120] and in particular what was described as a trio of considerations.

> "The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system …In assessing whether the public interest would be harmed in that way, it is necessary (a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, (b) to consider any other relevant public policy on which the denial of the claim may have an impact and (c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts."

In analysing the present case the facts and circumstances of the commission of the crimes are relevant. The court requires to consider all relevant public policy issues which may be engaged and they include a policy in favour of the prevention of crime; reparation for

wrongdoing; protection of vulnerable and mentally impaired people; provision of healthcare for serious illness. There is also an issue of proportionality.

[24] In the present case the pursuer has three convictions for seven different offences, dating from 22 January 2016 to 8 February 2016. He pled guilty to all charges in which he was convicted.

[25] In considering the trio of considerations the sheriff erred, firstly in finding that it was appropriate to apply the trio of considerations at debate; and secondly, in a number of respects in the application of those considerations to the case. The sheriff considered that the public policy reasons for maintaining the prohibition are: (1) the need to avoid inconsistency between the civil and criminal law; (2) the maintenance of confidence in the law in that the pursuer should not be compensated for his own criminal acts and that to do so would denude the NHS of valuable resources and; (3) the public interest in deterring and protecting the public from the type of criminal activity engaged by the pursuer. The sheriff did not properly interrogate the circumstances. It is clear from *Patel* that the role of the court was to weigh up and balance the public policy reasons against the specific criminal activity committed by the pursuer. Reference was made to *Grondona* v *Stoffel* & *Co* [2020] UKSC 42 at [paras [20]-[26].

[26] In relation to applying the trio of considerations at debate it was not appropriate to rely upon the pleadings alone. Evidence of the full circumstances would have a direct impact on the application of the trio of considerations.

[27] Separately, the sheriff erred in the application of the trio of considerations. The sheriff was referred to *Henderson* v *Dorset Healthcare* [2021] AC 563, which he found to be "strikingly similar". It was not, and in any event, it was decided upon the basis of evidence. The nature of the crimes was relevant to the trio of consideration and the sheriff erred in

holding that the nature was irrelevant. He also erred in the application of *Henderson* and *Gray* v *Thames Trains* [2009] 1 AC 1339. In particular, in *Henderson* the Supreme Court addressed the arguments which had been made on proportionality which included *inter alia* the seriousness of the crime and intentionality. The sheriff ought to have considered that denial of the pursuer's claim was unlikely to enhance the purpose of the various prohibitions. He ought to have found that the question would, or might, be influenced by the evidence of all of the circumstances.

[28] The pursuer explicitly did not found upon the drink driving conviction and the sheriff ought to have excluded that offence from any assessment of the seriousness or triviality of the offences. The sheriff erred in considering that there were no countervailing principles at all. The countervailing principles included that disabled and mentally impaired people are treated with appropriate allowances; wrongdoers should not profit from their wrongs, as the defenders will in this case; and there should be reparation for wrongdoing.

[29] The denial of this element of the pursuer's claim is unlikely to save time or reduce the scope of evidence.

[30] Senior counsel submitted that all of the Supreme Court cases relied upon by the defenders were decided on facts which were either agreed or established. However, he did accept that in an exceptional case the question of *ex turpi* could be decided at debate. A full hearing of the facts could produce different results. The sheriff considered proportionality at the policy stage. The question of seriousness and intentionality had not been assessed by the sheriff. He had not addressed the questions of proportionality and indeed did not do so because he had not heard evidence. On the question of intentionality see paras [138]-[144] of *Henderson.*

Submissions by the defenders on the *ex turpi* point

[31] The sheriff was correct in the conclusion which he reached. The law is set out in three decisions of the House of Lords/Supreme Court: *Gray* v *Thames Trains*; *Patel* v *Mirza* and *Henderson* v *Dorset Healthcare*. The ratio of *Gray* is applicable and that is that the pursuer cannot recover damages that fall from his criminal convictions. There appears to be no case in which a person convicted of an offence has been successful in pursuing a claim arising out of the conviction. *Patel* can be distinguished. In relation to the pursuer's submission that evidence is required, the sheriff treated the pursuer's averments *pro veritate;* he took the pursuer's averments at their highest. The sheriff accordingly considered the material pleaded by the pursuer. There was no need to hear evidence.

[32] Even if *Patel* is applicable it leads to the same result.

[33] In relation to the allegation of racial aggravated harassment of Dr N, the behaviour that led to the pursuer's conviction took place prior to Dr N's decision to revoke the STDC. It follows that, even if Dr N's decision to revoke the STDC did constitute a breach of duty, it could not possibly have led to the conviction for racially aggravated harassment as the offence had already been committed.

Decision

[34] *Meadows* decides a question of English law. It is not binding upon this court. However, neither party suggested that Scots and English law differ on this issue and as it is a decision of high authority we shall follow it. We do not agree with the sheriff that *Meadows* does not apply and that the "but for" test applies. Its application in this case is another matter.

[35] The judgment of the Supreme Court addresses in detail the question of scope of duty. At para [28] the Supreme Court posed six questions as to the role of scope of the duty principle:

> "(1) Is the harm (loss, injury and damage) which is the subject matter of the claim actionable in negligence? (the actionability question)
>
> (2) What are the risks of harm to the claimant against which the law imposes on the defendant a duty to take care? (the scope of duty question)
>
> (3) Did the defendant breach his or her duty by his or her act or omission? (the breach question)
>
> (4) Is the loss for which the claimant seeks damages the consequence of the defendant's act or omission? (the factual causation question)
>
> (5) Is there a sufficient nexus between a particular element of the harm for which the claimant seeks damages and the subject matter of the defendant's duty of care as analysed at stage 2 above? (the duty nexus question)
>
> (6) Is a particular element of the harm for which the claimant seeks damages irrecoverable because it is too remote, or because there is a different effective cause (including novus actus interveniens) in relation to it or because the claimant has mitigated his or her loss or has failed to avoid loss which he or she could reasonably have been expected to avoid? (the legal responsibility question)"

[36] The Supreme Court was clear that the scope of duty rule applies to clinical negligence. At para [63] the court gave a number of examples of the application of the scope of duty to medical negligence cases: a surgeon negligently performing an operation; a general medical practitioner negligently prescribing unsuitable medication; the negligent care of a mother in the final stages of pregnancy

[37] A significant aspect of *Meadows* is the link between the duty of care and the losses which the claimant seeks to recover: the law has regard to the actual nature of the damage which the claimant has suffered when it determines the scope of the defendant's duty (para [33]).

[38] The key parts of the reasoning of the Supreme Court are to be found at paras [38] and [63]. At para [38] Lord Hodge and Lord Sales said the following: "what, if any, risks of harm did the defendant owe a duty of care to protect the claimant against?". At para [63]:

> "…it is necessary in every case to consider the nature of the service which the medical practitioner is providing in order to determine what are the risk or risks which the law imposes a duty on the medical practitioner to exercise reasonable care to avoid. That is the scope of duty question".

[39] In the present case the allegedly negligent act was the decision on 18 January 2016 by Dr N to revoke the STDC. Neither party addressed us upon the statutory framework set out in the Mental Health (Care and Treatment)(Scotland) Act 2003 ("the 2003 Act") which sets out in detail the duties and functions of a medical practitioner in relation to the operation of the STDC procedure. The statutory procedure does not lend itself easily to an analysis of a service or to the examples as to scope of duty given by the Supreme Court in *Meadows* referred to above. Both parties to the appeal proceeded upon the basis that the decision to revoke the STDC can properly be the subject of an allegation of negligence. We regard this point as being of fundamental importance to the resolution of the scope of duty issue. Exactly how, in the circumstances of this case and this legislation, what appears to be the exercise of a statutory function may give rise to a finding of negligence was not explored. In its absence we are not inclined to base our decision on that issue. We recognise our conclusion is not satisfactory but it follows from the way in which the case has been pled and the argument presented before us. Referring back to paras [4] and [5] above, the losses which the pursuer seeks to recover can be summarised as being: (a) untreated illness without a fixed abode; (b) sleeping in a car; (c) inadequate clothing; (d) stress and confrontation with members of the public, family and police; (e) embarrassment and damage to reputation; (f) depression; (g) convictions; (h) prolonged relapse; (i) damage to

public reputation; (j) damage to relationships with partner and family; (k) loss of earnings. The alleged behaviour and losses extend between the date of the discharge on 18 January 2016 and the compulsory treatment order on 11 April 2016.

[40] We can see the argument that the pursuer seeks to make the defenders the insurer of the pursuer for all which happened to him post revocation. However, it seems to us that deciding conclusively what is/not recoverable may only be capable of proper resolution after evidence has been led as to the particular medical condition and the particular heads of claim advanced by him. We do not consider it would be appropriate to reach a conclusion solely upon the pursuer's averments. Returning to the *ex turpi* issue, at the outset, two of the convictions can be addressed. The issue concerning the racial harassment of Dr N personally pre dates the revocation of the STDC and therefore cannot be a recoverable loss. The pursuer does not seek to recover for the drink driving matter on account of the *ex turpi* rule. Leaving those aside, on the main point we were referred to a number of decisions of the House of Lords and the Supreme Court. Again, these are decisions on English law but in an area in which it was not suggested that there is any material difference between the law of Scotland and the law of England. The decision of the Supreme Court in *Henderson* v *Dorset University NHS Trust* [2021] AC 563 is the most recent and is the most useful. We say that because the facts of the case are instructive and the decision of the Supreme Court contains a review of the other cases referred to before us and their continuing relevance (*Patel, Grondona* and *Gray*). In *Henderson,* the claimant, who had a history of schizophrenia with paranoia, stabbed her mother to death during a psychotic episode. At the material time she was under the care of a community team managed by the defendant Trust. The claimant pled guilty to manslaughter on the grounds of diminished responsibility and was thereafter detained in a secure hospital pursuant to the relevant Mental Health legislation. The

claimant then brought an action against the defendant in negligence on the defendant's failure to return her to hospital when her condition deteriorated. In short, the defendant admitted breach of duty but pleaded that since the damages claimed were the consequence of the sentence imposed upon her by the criminal court and/or her criminal act of manslaughter they were irrecoverable on illegality or public policy grounds. The trial judge dismissed the claim on the grounds that the case was identical to *Gray.* The claimant appealed, arguing that *Gray* was distinguishable or incompatible with *Patel* which required the court to have regard to the trio of considerations. The claimant failed in her appeal to the Court of Appeal and also to the Supreme Court (a bench of 7 Justices). Put shortly, the Supreme Court held that *Gray* was not incompatible with *Patel* and remained good law. *Gray* was similar on its facts to *Henderson* in that it also involved a claim for negligence following an unlawful killing by the claimant. The claimant in that case had inter alia suffered mental health issues following a train crash. He averred that the train operators were liable in damages when his condition led him to commit the unlawful killing. He failed in his claim. *Gray* was decided by reference to public policy considerations. In the *Henderson* case similar considerations were held to apply: the need to avoid inconsistency between the criminal and the civil law; the need to maintain public confidence in the law, the significance of which was heightened by the gravity of the of the claimant's wrongdoing; the public interest in deterring, protecting the public from, and condemning unlawful killing; there were no countervailing policies that outweighed these considerations and it would not be disproportionate to refuse the claim.

[41] In our opinion the *ex turpi* principle applies in the present case to those parts of the case which relate to the pursuer's claim for damages arising out of his relevant criminal convictions. We do not consider that the sheriff reached the wrong conclusion on this part

of the case. We are not persuaded that the application of this rule should await proof (see paragraph 115 of *Henderson*) nor that it is essential to the conduct of the pursuer's proof that the averments should remain. The pursuer's averments are clear, as are the issues. The pursuer's averments fall to be taken at their highest for the purposes of the hearing. We accept that both *Gray* and *Henderson* involve cases which lie at the most serious end of the spectrum of criminal activity. The issue of triviality was raised but not decided in *Henderson* (paragraphs 53-55 and 112, per Lord Hamblen JSC). The sheriff did not consider the offences to be trivial and we can see why he so concluded. In a careful analysis of both *Gray* and *Patel*, Lord Hamblen JSC held that *Gray* remains of "precedential" value and is not inconsistent with *Patel*. As the defenders maintain, if one applies *Gray* or *Patel*, it leads to the same result. Intentionality was an issue in both *Gray* and *Henderson* but on a close reading of the judgements that seems to relate to specialities of English criminal law relating to the issue of diminished responsibility. It seems to us that the major public policy issues referred to in these authorities and before the sheriff are relevant. That involves inconsistency between judgements of the criminal courts and the civil courts. As has been pointed out in a number of the authorities the criminal in such a case as this becomes a pursuer. Having pled guilty before a criminal court the pursuer now seeks to recover damages from another party for conduct for which he has accepted responsibility before a criminal court. It involves opening up matters which have already been decided. That does result in an undermining of confidence in the law. The sheriff also took into account the effect on resources involving the NHS and we consider he was entitled to do so. The sheriff held there were no countervailing factors to consider in the balance. We would not go that far but, taking the ones relied upon by the pursuer into consideration, we do not consider that they outweigh

the factors relied upon by the defenders. Therefore, we would have reached the same conclusion as the sheriff.

[42] Accordingly, we shall allow the appeal only to the extent of the erroneous repelling of the defenders' third plea in law *Quoad ultra* we shall refuse the appeal and the cross appeal and remit to the sheriff to proceed as accords. We shall also reserve all questions of expenses.