



# CUTTING THROUGH

THE QM BAR SOCIETY NEWSLETTER

QUEEN MARY  
BAR SOCIETY

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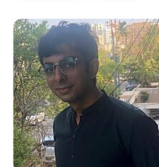
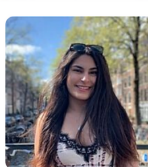
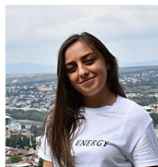
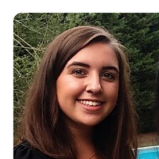
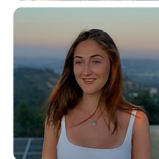
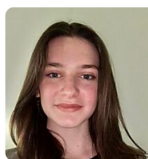
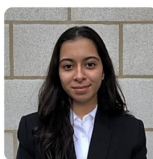
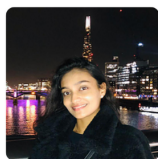
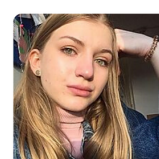
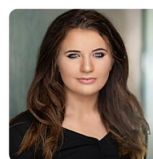
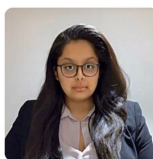
## WELCOME

**By Alexi Norris -QMBS President**

'Welcome to our sixth edition of Cutting Through and our first edition for the new year! This newsletter has been curated and nurtured by the wonderful Asteropi Chatzinikola who has put in a great amount of effort to take this publication to new heights. We hope you enjoy and that you're all keeping well. Stay tuned for more fantastic updates from the Bar Society!'

## THIS YEAR

**W**hat to expect this year from QMBS? **Absolutely everything.**

Bringing you a more diverse and inclusive Bar with every event! **-Tanisha, Vice President**A year of great socials and connections! **-Holly xx, Non Law Representative**Diversity- we have a big and diverse committee who create various events that go outside what's usually done like mock trials and MUN **-Lavanya, Communications Officer**A well-rounded and invaluable experience! **Muhammad, Non Law Representative**Events you wouldn't want to miss! **-Lika, Events Officer**The unexpected! **-Tejal, Head of Competitions**Changing the game **-Mo, Head of Communications**Invaluable learning opportunities! **-Kavya, Events Officer**With our exciting events, we shall make 2020 great again **-Kazi, Events Officer**Insightful events for everyone! **-Claudia, Non Law Representative**

@qmbarsociety  
@queenmarybarsociety  
@QMBarSociety



## TORT IN-DEPTH

To make the most out of the interview, have a look at the case summary, and the decisions in *Gray*, *Clunis*, and *Patel v Mirza*.

[1] 'to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong'; [1843] 6 WLUK 145 at 719. For further reading, see also 'Insanity defence: overview' (Practice note) [here](#) and Law Commission's Discussion Paper 'Insanity and Automatism' (2013) [here](#).

[2] 'The illegality defence operates to prevent the courts from providing the claimant with the rights or remedies to which he or she would otherwise be entitled.' See Law Commission, The Illegality Defence (Consultation Paper No 189, 2009) paras 2.1–2.18 and a summary [here](#).

[3] [2009] UKHL 33, [2009] 1 AC 1339.

[4] [1998] QB 978, [1998] 2 WLR 902.

## NICHOLAS BOWEN QC

CALL: 1984

SILK: 2009



Nicholas Bowen QC, Doughty Street Chambers, has been in practice since 1988 and took silk in 2009. He is one of the most prominent barristers in civil and human rights claims against public authorities, and acted for the claimants in the seminal Supreme Court cases *Robinson v Chief Constable of West Yorkshire* and *Michael v Chief Constable of South Wales Police* which have changed and redefined the landscape of tort law. In May, he completed submissions to the Supreme Court in the landmark negligence case of *Henderson v Dorset Healthcare*, the Court has adjourned to consider the arguments, judgment is expected in due course; court handout [here](#).

## CASE SUMMARY

**E**cila Henderson, born in 1971, began experiencing mental health problems in 1995 and diagnosed with paranoid schizophrenia at different times. Dorset Healthcare University NHS Foundation Trust was responsible for her care. On 25 August 2010, during a psychotic episode, and due to negligent care by the NHS Trust, Ms Henderson stabbed her mother to death. Based on medical evidence obtained by Dr Bradley and Dr Lord, consultant forensic psychiatrists, Ms Henderson could not be said not to have known the nature of her act, and thus fell short of the *M'Naghten* rule.[1] Therefore, Ms Henderson was convicted of manslaughter by reason of diminished responsibility and was detained under a hospital order pursuant to s.37 of the Mental Health Act 1983. Ms Henderson claimed damages in the tort of negligence against the NHS Trust under six heads, including compensation for the loss of liberty, PTSD, and future loss. The Trust admitted liability but argued that the claim to damages was barred by the doctrine of illegality.[2] Mr Justice Jay in the High Court agreed, and the Court of Appeal unanimously upheld this decision. A seven judge panel of the Supreme Court are now considering whether or not to depart from *Gray v Thames Trains Ltd* [3] and overrule *Clunis v Camden and Islington Health Authority* [4].

**In the morning session of May 11th, Lord Reed said that ‘the basis of the conviction [5] still has to be the existence of responsibility’[6] and Lord Lloyd-Jones reiterated the point that ‘there is responsibility, but it is simply diminished’.[7] Since Ms Henderson knew the nature of her act, falling short of the *M’Naghten* [8] rule, in your view, why this analysis would not provide a satisfactory answer that her tort claim should be defeated by application of the illegality defence?**

### First, some context.

Ecila Henderson has a valid claim in the law of tort, and the NHS admitted a duty of care to provide competent mental health services in the community. Her care plan demanded that if her mental health deteriorated, she should be swiftly assessed and urgently re-called to a psychiatric hospital. They also accepted breach and causation, but for their failure to assess and recall, she would not have killed her mother. So, applying the ordinary rules of tort law, she should recover for all of her foreseeable losses.

Instead of denying a duty of care, they targeted those heads of loss that were either the result of the lawful sentence or were caused by the commission of her crime (*Gray v Thames Trains / Clunis*). They established that unless criminally insane under the universally discredited (Victorian) *M’Naghten* rule, the principle of illegality prevents a court awarding damages in an otherwise valid tort claim. The test was “unitary”, or as the judge at first instance Jay J. (famous for his use of arcane language) preferred to call it, “monist”, and gradations of personal responsibility were irrelevant.

We argued that this approach was incompatible with the law as explained by the Supreme Court in *Patel* and that the Court should depart from *Gray*, overrule *Clunis* and apply the “range of factors” test, with the result that Ecila is compensated. We argued that it was fair and proportionate to apply the normal law of tort and make the tortfeasor pay, as “but for” the NHS’s negligence, she would not have killed her mother. In the alternative, the Court should distinguish *Gray* on the basis that the ratio is limited to those with significant personal responsibility, and this Appellant has none.

Lord Reed and Lord Lloyd-Jones did make early comments that Ecila was criminally responsible, but it was simply diminished. Our argument is that this is no answer. Underlying to the *Gray* and *Patel* approach to illegality is the fundamental point that the law should be coherent and not self-defeating, “the civil and criminal law should march together”. Whilst consistency is important a negligence claim is not barred by a requirement that tort law should replicate laws developed in criminal law. Ecila was on the very edge of the point of entry into *M’Naghten* insanity and was in no meaningful way responsible. She had no control or ability to resist her psychotic urge to kill. In such a case, there is no risk that a damages award might subvert the policies of criminal law. There is no issue of criminal courts punishing conduct with the one hand while civil courts reward it with the other. The criminal finding was not punitive as she was given a rehabilitative treatment order in the hospital, and there can be no serious suggestion that compensating the Appellant will undermine the integrity of the law. We went as far as saying that the need for coherence would best be served by tort law taking account of the criminal law’s recognition of the lack of personal responsibility, and applying the orthodox tort rules to the claim.

[5] Referring to the criminal conviction of manslaughter on the ground of diminished responsibility pursuant to the Homicide Act 1957, s. 2.

[6] The Supreme Court, ‘Ecila Henderson (A Protected Party, By Her Litigation Friend, The Official Solicitor) (Appellant) V Dorset Healthcare University NHS Foundation Trust (Respondent) - The Supreme Court’ (Supremecourt.uk, 2020) <<https://www.supremecourt.uk/watch/uksc-2018-0200/110520-am.html>> accessed 24 June 2020, minutes 41-44.

[7] *ibid* minute 48.

[8] [1843] 6 WLUK 145 at 719.

The denial of the tort claim by means of the illegality doctrine would constitute a punishment meted out in the civil law when the criminal law had declined to punish. It would be incoherent, where the criminal process has decided not to impose punishment, for the civil process to go out on a limb and do what the criminal law has refused to do. There was no section 45A disposal, only sympathy from the sentencing judge for the tragedy that the NHS had failed to avert. Crime and tort are different. Criminal law exists to punish and provide sanctions for behaviour which damages society and, or is against the general interest. In contrast, tort law has very different functions to that of criminal law. It exists to compensate and vindicate. In criminal law, punishment is used to sanction those who are responsible and culpable for their behaviour. Criminal law remedies are flexible enough to recognise that even when the constituent elements of a crime are satisfied, a defendant can still have no, or no significant "personal responsibility", and thus will not be punished. In other words, the criminal courts will punish those who have criminal responsibility and will not punish those who do not. So, it is not incoherent or self-defeating for tort law to vindicate, where the criminal judge has turned his back on the available punitive sanctions and opted for a Hospital Order because the victim of the tort had no, or no significant personal responsibility.

**It is submitted that the absence of a 'hybrid order' of s.45A of the Mental Health Act (1983) is supporting evidence of the lack of responsibility and punishment of Ms Henderson. Could it be, however, that the application of s.37 instead of s.45A is based on a medical judgment that recovery of Ms Henderson's health is not reasonably foreseeable rather than a judgment of culpability?**

## I think you are mixing up concepts here!

Whilst tort and crime have some things in common, they serve different purposes. The sentencing choices open to the criminal judge included a choice between a s.37 Hospital Order and a s.45A hybrid order. The latter is used where there is a need for the judge to indicate that the defendant deserves a "punishment" as well as needing "treatment" for a mental disorder. The main difference between the two is the manner in which the convicted person is released into the community. In the case of a Hospital Order, the doctors decide when it is safe, so it is a medical judgment, in a s.45A case there is judicial oversight via the judicial system. These are trick concepts, but I am afraid your question confuses foreseeability (a tort law idea) with culpability (a component part of the criminal law).

The criminal law has a variety of ways of judging culpability. We relied on the Law Commission's conclusion in its 2013 Discussion Paper 'Criminal Liability: Insanity and Automatism':

Our principal conclusion is that people should not be held criminally responsible for their conduct if they lack the capacity to conform their behaviour to meet the demands imposed by the criminal law regulating that conduct. This lack of capacity might consist in an inability to think rationally, or in an inability to control one's actions. The reason for that lack of capacity might lie in a mental disorder, or in a physical disorder. [A5]

And when it comes to a person like Ecila who lacked the capacity to control her behaviour, the Law Commission thought:

(...) a person is not to be held criminally responsible for an act or omission where, for reasons beyond his or her control, he or she lacked the capacity to control his or her conduct. [A60]



In *Patel* [9], Lord Toulson said:

The other, linked, consideration is that the law should be coherent and not self-defeating, condoning illegality by giving with the left hand what it takes with the right hand.

**How coherence between criminal and tort law would be maintained if Ms Henderson's civil claim was allowed despite the finding that she had some criminal responsibility for her mother's killing? Would you agree with Dyson [10] that a simplistic application of coherence could harm tort law?**

I would, coherence demands that her claim succeeds, not that it be denied. I think that I have already addressed this point in my first answer. The judges may of course disagree!

***"It is not incoherent or self-defeating for tort law to vindicate where the criminal judge has turned his back on the available punitive sanctions"***

**The majority in *Patel* favoured the more flexible approach taken in *Hounga* [11] that it is necessary to consider the public policy on which the defence of illegality relies, but also other aspects of public policy that run counter, to avoid disproportionate and arbitrary outcomes.[12] Would you say that such a counter-policy exists in this case? Could the prevention of medical negligence be one of them?**

Yes, you are quite right about the existence of other countervailing policies, and the one you identify is a core part of our argument, this is the second stage of the *Patel* approach.

***"what broad policy concerns coalesce or are in opposition to each other when asking if allowing tort law to take its normal course will in reality, not theory, create an inconsistency in the fabric of the law"***

The first thing to identify is the underlying purpose of the prohibition that has been transgressed, and whether that purpose will be enhanced by the denial of the civil claim. The prohibition transgressed here is that the criminal law seeks to prevent killings.

We argued that the real question is whether the prohibition is being actually undermined, and that it was absurd to suggest that a severely ill and psychotic person lacking control would be less likely to kill because of the thought that the killing would take away the benefits of a negligence claim.

When countervailing policies are considered, what the Court needs to focus on is the big picture which is what broad policy concerns coalesce or are in opposition to each other when asking if allowing tort law to take its normal course will in reality, not theory, create an inconsistency in the fabric of the law.

We suggested 4 policies that support allowing the claim: (1) The policy of encouraging NHS bodies to competently care for the mentally ill; (2) fair compensation for those not significantly responsible for their conduct; (3) ensuring public bodies pay proper compensation for the foreseeable losses caused by their negligence; (4) ensuring defendants are only punished by the criminal law and not given further and unnecessary sanctions by tort law.

[9] *Patel v Mirza* [2016] UKSC 42, [2017] AC 467 [99].

[10] Matthew Dyson 'Coherence and Illegal Claims' (2020) Available [here](#).

[11] *Allen v Hounga* [2014] UKSC 47, [2014] 1 WLR 2889 [41] (Lord Wilson); *Henderson v Dorset Healthcare University NHS Foundation Trust* [2018] EWCA Civ 1841, [2018] 3 WLR 1651 [85].

[12] *Patel* (n 9) [120] (Lord Toulson).

It is submitted that Ms Henderson could be wronged because of the inflexibility and rigid adherence to the monist test in *Gray* [13] and *Clunis* [14]. How this inflexibility could be eased to address the rarity of these circumstances without undermining certainty in the application of the law? Would you say that the development of the doctrine of illegality towards this direction could bring a new *Donoghue* [15] moment in the law of tort?

Certainly, a denial of her claim would, in my view, be most unfair and counter-intuitive. These awful tragedies need to be averted by competent medical care and the proper training of staff and resourcing of the NHS. The inflexibility of *Gray* (and *Clunis*) is easily addressed by replacing that thinking and applying the *Patel* approach to tort claims. That will enable the judges to take a proper look at all the circumstances of a case like this and to reach a fair result.

As for *Donoghue v Stevenson* and how significant the judgment in this case will be, we will have to wait and see!

It was a really difficult argument, one of the most challenging cases I have been involved in, but hope springs eternal. Lord Reed comprehensively re-explained and re-organised the tortious liability of public authorities in the recent *Robinson* appeal, fingers crossed!

**"These awful tragedies need to be averted by competent medical care and the proper training of staff and resourcing of the NHS"**

Due to Covid-19, you needed to make your submissions to Supreme Court online and to tackle any technical issues on the spot. What was the most challenging part of this process, and would you suggest that aspiring barristers and solicitors need to develop a more permanent digital skillset?

Don't ask me, I have issues turning on the television set.

**"one of the most challenging cases  
I have been involved in"**

#### - editor's opinion

Ecila is trapped in a liability purgatory between a criminal conviction she had no significant responsibility for and the illegality defence. It is submitted that a violent episode was foreseeable, and the NHS Trust admitted responsibility for Ecila's negligent care. Yet, where does this leave a claimant in her shoes? Even if her tort claim is allowed, a decision that could also facilitate her recovery, it is doubtful that it would change her labelling as 'Bournemouth killer'. The damage is done. Not only for Ecila, but for any person who is diagnosed with paranoid schizophrenia if we fail to protect vulnerability and then we punish it. The fear and stigma surrounding mental health issues could not have a more triumphant moment. In Ecila's case, there is a lot of discussion about consistency in the law. In my view, the law should consistently protect the most vulnerable.

Read [#timetochange](#) for ways to raise awareness about mental health discrimination. Need help? Visit [Young Minds](#) and [Step Forward](#). Has Covid-19 taken a toll on your wellbeing? Visit [Queen Mary Support](#).

[13] *Gray v Thames Trains Ltd* [2009] UKHL 33, [2009] 1 AC 1339.

[14] *Clunis v Camden and Islington HA* [1998] QB 978, [1998] 2 WLR 902.

[15] *Donoghue v Stevenson* [1932] AC 562 SC (HL); for the importance of *Donoghue* see further Allan Hutchinson *Is Eating People Wrong?* (CUP 2011) 125-140.

## This month, #BLM DOCUMENTARIES

### 13th, Netflix

Racial inequality in the making. Delve into the privatisation of US prisons and the disproportionate criminalisation of African-American people in the Land of the Free. Want more? Visit [The Sentencing Project](#).

### Trial by Media, Netflix

Heard of Bernhard Goetz, the 'Subway Vigilante'? I hadn't- until now. Revisit the 1984 NY Subway shooting yourself and join the debate: self-defence of a frail scientist or hateful racial crime?

### Extreme, Netflix

'Do you believe that if another black man is killed by a police officer things will only get worse?' 'If he is innocent, and the excessive force is too much, then yes' Reggie Yates filmed Race Riots USA in 2015 #mustsee

### Cleanflix, Amazon

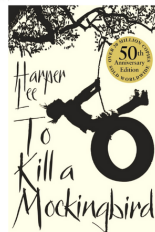
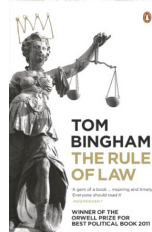
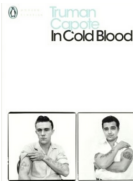
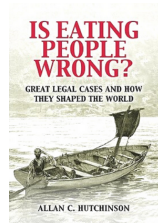
A very informative documentary about re-editing films & removing scenes in Utah to make them 'appropriate'. -What about retrospective [censorship](#) of films in light of #BLM?

Liked 13th? Check-

**When They See Us** based on the true story of Central Park 5 & **The Innocence Files** - with [The Innocence Project](#) opening their files full of wrongful convictions. Both on Netflix. Got **BBC iPlayer**? Click [here](#) for more.

## BOOKISH TYPES

These are for you, classic reads for your summer.



Kansas, November of 1959.

Perry Smith and Richard 'Dick' Hickock take a gun, a knife, and travel from Olathe to Holcomb, a quiet farming community. At the same time, Mr. Clutter, 'touching the brim of his cap' heads for 'home and the day's work, unaware that it would be his last'. **In Cold Blood**, Truman Capote carefully crafts the beginning of his non-fiction novel juxtaposing scenes of everyday chores and blissful family life to two ex-convicts smoking cigarettes and preparing for a brutal crime. It is a gripping story based on Capote's own investigation and study of the Clutter-family murders. The already sensational murder trial of Smith and Hickock becomes even more

interesting when Capote writes what Dr Jones 'would say' if allowed to speak further on the emotional instability of Hickock's character. It is a most clever way to unveil his views on the death penalty and the application of *M'Naghten* rule in Kansas (see chapter 'The Corner'). Capote, after the enchanting *Breakfast at Tiffany's*, gives us a compelling book about amorality, humanity, and the gradations in-between.

Want to finish a book within a week? Hutchinson's **Is Eating People Wrong?** is for you.

You can go through the greatest legal cases of the last two centuries, and you can do so in nine chapters! From famous snails in *Donoghue v Stevenson* to red foxes in *Pierson v Post*, you will enjoy every bit of Hutchinson's legal analysis and witty narrative. Easy to read, and so much fun.

Bingham's **The Rule of Law** is a must-read if you wish to shed a little bit of light on the knotty constitutional concept. In Chapter two, Bingham selects historical milestones giving context to his analysis before he dusts the messy corners of the principle. Of particular interest is Chapter 9 'A Fair Trial' as core elements of the rule of law -equality before the law, judicial independence, constraints on discretion in the exercise of power, etc.- organically come together through commentary on criminal and civil trials. There is a sense of practicality in reading this book, which is always useful, always relevant- and not too heavy!

"You never really understand a person until you consider things from his point of view, until you climb into his skin and walk around in it" Atticus Finch. That must be the most powerful and well-celebrated quote a fictional character has ever said. Lee's **To Kill a Mockingbird**, set in the fictional Maycomb, Alabama, is an absolute classic for every aspiring barrister. It is a riveting, Pulitzer-winning book with characters that inspire nobility and kindness.

## #food for thought

Is removing old series and films the best approach to tackle racial inequality? Is it sustainable? Share your thoughts on Twitter and tag @QMBarSociety

## PODCASTS

### The Hearing #55

Covid-19: emerging culture and new opportunities for the legal industry. Impact of Covid-19 on our social and working culture - could it become more diverse?

### Talking Law #GriffithsQC

Listen to Sally Penni (barrister, founder, and chair of Women in the Law UK) interviewing Courtenay Griffiths QC (25 Bedford Row) - keynote speaker in our Inclusion Networking Event in February. They talk about racism, war crimes, and the Damilola Taylor murder trial.

### The Economist

#### #Checks and Balance

Statues - take them down or not? Does razing monuments lead to real political change? Share your thoughts @QMBarSociety  
#foodforthought

### Legally Pod

#### #3 The Hidden Side of Law

The Secret Barrister talks about the 'glamour' of the criminal law system, its inadequacies, and the need for reform. Three top skills for aspiring barristers? Empathy, humility, and humanity.

### Law in Action

#### #Justice in Lockdown

Virtual courtrooms, online submissions - is justice done?

#### #Raising the Bar?

Consent, diversity & more. Non-traditional backgrounds, costs of pupillage & privileged applicants.



Sean Penn marvellously portrays Harvey Milk in the movie... **Milk**. In the 70's San Francisco, where homosexuality was compared to prostitution and disobedience, there was not a better (!) time for an openly gay man to run for a public office. And win. An intriguing movie about the historic win and fall of Harvey, who inked the LGBTQ+ movement with his story. #rentPrime

Nyswaner's legal drama-film **Philadelphia** upended misconceptions about AIDS, boldly attacking at the roots. When the AIDS-stricken Andrew Beckett (Tom Hanks) sues his firm for wrongful termination - it is impossible to pause the film. Make your popcorn, brew your tea, and watch the movie. Superb, superb, superb. #rentGoogleplay

The beautiful friendship of **Elisa and Marcela** flowered in the Spanish port city of A Coruña in the late 1890s. Their bond effortlessly becomes stronger and grows into a full-blown love story. Struggled by the era they were born in, Elisa becomes Mario, and the couple tricks the priest at the San Jorge church into marrying them in 1901. Set in black and white, Coixet delicately moulds a cinematic masterpiece where simplicity manifests. #Netflix

## movie lovers

EXPLORE #PROUDMOVIES  
#INCLUSION HEROES &  
#CIVIL RIGHTS

# #PRIDE

You may think that the last day of #pride was 30 June. And you are right. But with the London parade postponed until next summer, and with all the events virtual, a two-week extension for #film celebrations is not too big a mischief.

Follow the very beginnings of gay rights activism after the Stonewall riots in **The Death and Life of Marsha P. Johnson** (P for 'pay it no mind'). Marsha was a founding member of the Gay Liberation Front and co-founder of the activist group Street Transvestite Action Revolutionaries (S.T.A.R.). She was a lionised hero of inclusivity, equality, and civil rights for the LGBTQ+ community, and a unique art figure. From modelling for Andy Warhol to her flamboyant outfits, Marsha will never be forgotten. #Netflix

## DEADLINES

## CALENDAR

### Mini-pupillage

Landmark Chambers - 31 July  
5 Essex Court - 31 July  
1 Hare Court - 31 July  
Maitland Chambers - 31 August

We hope you enjoyed this CT Summer Edition Issue - read, listen, watch, and keep in touch x - next issue 15/8

## QMBS

