

May 2008

# NEWS @ 9

## 9 GOUGH SQUARE

### IN THIS ISSUE

- 2 **Costs successes**  
*Crane v Canons Leisure Centre [2007] EWCA Civ 1352*  
*Wolley v Haden Building Services*
- 2 **Complaints under the Criminal Justice Act 2003**
- 3 **Corr v IBC: 9 Gough Square in Key House of Lords win**
- 4&5 **Liability of Local Authority's to Compensate for Failure to Protect**
- 6&7 **Clinical Negligence and the Human Rights Act:**  
*Do the cases of Van Colle and Savage create a parallel system of remedies?*

### Diary dates:

*PI seminar, London, 20th June 2008*

*Clinical Negligence seminar, London, 6th November.*

*Manual Handling Seminars 26th June, London 10th September, London*



## Grahame Aldous QC Appointed Head of Chambers

Grahame Aldous, who took silk on 28th March this year has been appointed Head of Chambers. Grahame joined Chambers in 1988 and is Co-ordinator of Chambers' Clinical Negligence Group. He is a Recorder, member of the Professional Negligence Bar Association's Executive Committee and the Personal Injury Bar Association's Legal Practice Committee, and a Chairman of the LSC Funding Review Panel's Clinical Negligence Committee. He is also a Vice-Chair of the Bar Council's Equality and Diversity Committee.

Grahame is recommended by Chambers & Partners directory in the fields of Clinical and Professional Negligence, and by Legal 500 in the field of Personal Injury. He has a particular expertise in Solicitors' Negligence claims arising out of Clinical Negligence and Personal Injury cases, and his expertise in Personal Injury Cases includes in particular Marine Accidents and claims involving International Conflicts of Laws.

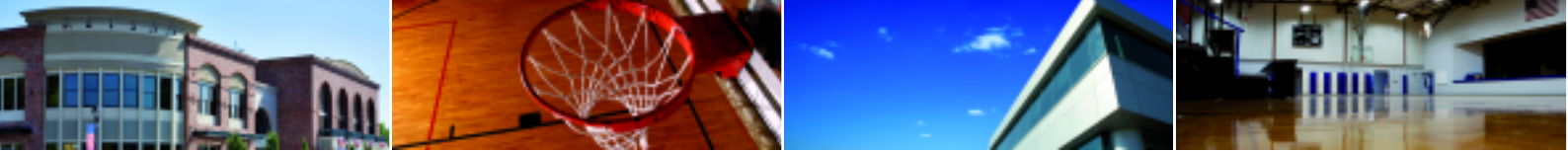
Grahame has appeared in a number of notable recent cases. He has successfully defended the Maltese Health Authority against a claim in the UK arising out of diagnosis of a metabolic disorder, PKU, as a cause of Cerebral Palsy. He obtained damages for stress at work a health visitor had a breakdown during a crisis year for her employer's service, and obtained a £1.2 million award for an assault on an already brain-damaged girl in a care home. Grahame succeeds John Foy QC who has been Head of Chambers for 8 years. John will continue his practice at 9 Gough Square.



Grahame Aldous

### Corr v IBC Full report on page 3.

The House of Lords has upheld a Claimants' victory in the Court of Appeal, led by John Foy QC, in accepting the Claimant's argument that her husband's suicide arising from severe depression caused by an accident at work was not a different kind of harm from personal injury and hence was compensatable in damages. The case raised fundamental issues on the scope of the duty of care, foreseeability and kind of harm in personal injury litigation; the defences of novus actus and volenti; the operation of the Fatal Accidents Act; and whether there should be contributory negligence where someone takes their own life.



# Costs Successes

John Foy QC has achieved success in two recent costs cases. They concern the recovery by solicitors of a success fee in respect of work done on their behalf by costs consultants in costs only proceedings and also whether the 2000 Regulations had been complied with.

## Crane v Canons Leisure Centre [2007] EWCA Civ 1352

Solicitors acting for a Claimant under a CCFA in a personal injury claim, could recover a success fee in respect of work done on their behalf by costs consultants in costs only proceedings.

In the Court of Appeal on 19th December 2007, the Appellant solicitors (A) appealed against a decision that costs incurred by costs consultants (C) were to be treated as disbursements and therefore not subject to a success fee. A represented a client in a personal injury claim under a collective conditional fee agreement, where a 45% uplift on base costs was fixed, (base costs being charges for work done by or on behalf of A). The PI claim was settled, and costs only proceedings commenced. A instructed C to conduct detailed assessment proceedings on A's behalf. The master held that C's costs were disbursements under the CCFA rather than profit costs and thus A was not entitled to claim a success fee in respect of those costs.

A argued that the work done by C was work that they had been retained to do themselves, and while they chose to delegate it to C, they had retained control and supervision over the work done by C on their behalf. It was really solicitors work rather than being in the nature of a disbursement.

Defendants argued that C's fees were expenses incurred on behalf of client not base costs as it was not work done by A or by another solicitor on A's behalf.

The Court of Appeal concluded that there was a distinction between charges by the solicitors themselves for work that they did or were directly responsible for, and expenses that they incurred for the client, some of which were for other peoples work that A was not directly responsible for and for which they simply passed on to the client at cost. C's work was definitely solicitor's work and was properly defined as base costs. Further the same success fee of 45% was to be carried through to costs proceedings. The Defendants had argued that either the original CCFA should have provided for a different success fee to relate to the costs proceedings as the risk was different in that part of the action or, alternatively, that the court should fix a different success fee at 5%.

## Wolley v Haden Building Services

Further in *Wolley v Haden Building Services* (15th February 2008), before Master Rogers, the issue was whether Regulation 4(20)(C) of the 2000 Regulations had been complied with. The claim related to a mesothelioma case, and allowed for a 100% success fee under a CFA. The articulate and intelligent claimant told her solicitor that she did not have Legal Expenses insurance although she did have a household contents insurance. The solicitors did not examine any policies. The Claim was settled and in the subsequent costs dispute, the defendants alleged that the Solicitor had failed to comply with the duties imposed by Regulation 4(2) (c) and thus the CFA was not enforceable. *Sarwar v Allam* and *Myatt & Garrett v Halton BC* were considered. The Master agreed with John Foy QC's submissions and held (i) that there had been no breach of Reg 4(2) (c) (solicitor had made the proper enquiries and it was not necessary in the circumstances of this Claimant to examine himself the household contents policy), (ii) that Sarwar only applied to small RTA cases, and (iii) that the Court of Appeal guidance in *Myatt* did not apply to cases of this magnitude.

## Complaints under the Criminal Justice Act 2003

Acting for the Crown in the Court of Appeal, Simon Carr and Shahram Sharghy were successful in having appeals against convictions for numerous and various sexual offences dismissed.

Appeals against convictions for numerous and various sexual offences were dismissed where the judge had correctly admitted evidence of the making of complaints under the Criminal Justice Act 2003 s.120(2) and evidence as to bad character, and had not misled the jury in his directions.

**Facts:** The appellant brothers (P and T) appealed against their convictions for numerous and various sexual offences. P was convicted of 14 counts of indecent assault and four counts of indecency with a child. T was convicted of four counts of indecent assault and one count of rape. The alleged offences were committed within a family against five complainants over a period of 10 years beginning more than 30 years before the instant proceedings. The complainants had made the allegations of abuse many years after the abuse had ended. Both P and T denied that the alleged incidents had occurred and claimed that the allegations were deliberate lies and the result of collusion between the complainants. Leave to admit evidence of the complaints was granted at the outset of the trial pursuant to the Criminal Justice Act 2003 s.120(2). Evidence from another alleged incident, not subject of a count in the indictment, was also admitted as evidence of P's bad character.

P submitted that (1) evidence of the complaints should not have been admitted under s.120(2) of the Act at the beginning of the trial as it could not at that stage be known whether it would be suggested that the



Simon Carr



Shahram Sharghy

complainants' evidence had been fabricated; (2) complaints so long after the event should not have been admitted as they did not satisfy the requirement under s.120(7)(d) and (3) the evidence of bad character should not have been admitted as the relevant complainant could not be cross-examined and the incident had little importance in the context of the case as a whole.

**HELD:** (1) The judge was entitled to admit evidence of the making of complaints by virtue of s.120(2) and fairness did not require their exclusion, *R v O (Ian)* (2006) EWCA Crim 556, (2006) 2 Cr App R 27 applied. No injustice had been done by the procedure followed. While the correctness of the ruling had to be assessed, subsequent events did not reveal any procedural unfairness. Nothing emerged that might have led to a different ruling and the conduct of the defence case was not prejudiced. (2) As to s.120(7) of the Act, the extended families to which each of the complainants belonged, and the complications arising from that, was a factor to be taken into consideration. Belonging, as the complainants did, to an outwardly respectable and close-knit family, there were considerable pressures on each of them, including self-imposed pressures, to keep events to themselves. (3) The decision to admit the bad character evidence could not be held to be erroneous. The incident formed part of the pattern alleged.



# Corr v IBC: 9 Gough Square Key House of Lords win

**The 9 Gough Square team of Counsel for the Claimant in this House of Lords win funded by Unite Union (TGWU section) were John Foy QC, Andrew Ritchie and Robert McAllister.**

## House of Lords

Lord Bingham, Lord Scott, Lord Walker, Lord Mance, Lord Neuberger.

**Employers liability – near death accident – physical and psychiatric injuries – subsequent severe depression – subsequent suicide - kind of harm – foreseeability**

## Facts

Mr Corr was a happily married man with two children who worked for IBC as an engineer. In 1996 he suffered a near death accident at work in which his right ear was severed when a machine he was mending was turned on due to the Defendant's negligence and a metal van panel with a sharp edge was thrust towards him nearly cutting his head in two. He managed in the agony of the moment to move his head aside.

Liability was admitted and Mr Corr underwent prolonged and painful ear surgery. He returned to work but whilst suffering post traumatic stress disorder and depression he suffered nightmares and was avoidant of the machinery at work.

Mr Corr sued for damages for personal injury. During the course of the case he slipped deeper into severe depression and in January 2002, 6 years after the accident, he took an overdose of pills and was admitted to a psychiatric hospital for electro convulsion therapy. This appeared to alleviate the symptoms but he then regressed and in May 2002 he threw himself off a multi storey car park and died.

The Claimant sued under the Law Reform Misc. Prov. Act 1934 for Mr Corr's damages and under the Fatal Accidents Act 1976 for loss of dependency. IBC admitted liability for the estate's claim but denied liability under the 1976 Act asserting that the suicide was Mr Corr's own act performed whilst he was sane under the M'Naughten Rules and that suicide was a different kind of harm from personal injury and hence had to be foreseeable at the time of the tort. IBC also asserted that the suicide was a Novus Actus breaking the chain of causation and that it was an unreasonable act and that it amounted to contributory negligence.

The Claimant asserted that the suicide was a symptom of the severe depression and hence the same kind of harm. As such the normal rules of tort law applied and the Claimant only had to prove the normal employer's duty of care, breach of duty, foreseeability of personal injury and causation. All of these on the evidence had been proven.

First Instance decision: Nigel Baker Q.C. sitting as a deputy high court judge held that suicide was a different kind of harm from depression and physical injury and hence had to be specifically foreseeable by the tortfeasor at the time of the accident. He dismissed the Fatal Accidents Act claim.

The Court of Appeal: Ward, Sedley and Wilson LJ (by a majority with Ward LJ dissenting) allowed the Claimant's appeal holding that suicide was not a different kind of harm from depression and physical injury and hence the normal rules of tort law applied. In the alternative holding that on the facts suicide was foreseeable because 1 in 6 to 1 in 10 sufferers of severe depression committed suicide. Ward LJ held that although suicide was logically foreseeable it was not *reasonably* foreseeable because it was a different kind of harm. The Claimant was awarded £688,000.

House of Lords: By a unanimous decision the House dismissed IBC's appeal. In the lead judgment Lord Bingham held that the normal tort law rules applied, suicide arising from severe depression caused by the accident was not a different kind of harm from personal injury and hence was recoverable if causation was proven. Additionally holding that it was foreseeable on the evidence that some post accident sufferers of severe depression would commit suicide. The defences of Novus Actus and Volenti and unreasonable act and contributory negligence did not help IBC on the evidence because it was IBC who caused the depression so the Defendants own act led the Claimant to suicide.

In a partially dissenting judgment (he agreed on the main issue) Lord Scott held that Mr Corr contributed by his own fault and assessed a 20% blame for the suicide. However Lords Walker, Mance and Neuberger rejected any finding of contributory negligence, whilst accepting that in different cases in future a deceased could be found to have contributed to the suicide by his own negligence or fault. The decision would depend on the evidence on causation.



John Foy



Andrew Ritchie



Robert McAllister



Shahram Sharghy

# Liability of Local Authorities to Compensate for Failure to Protect

In the light of the House of Lords decision in *A v Hoare* allowing courts to exercise a discretion to extend time for abuse claims, Shahram Sharghy highlights the liability of local authorities in tort for breach of duty in relation to safeguarding children from 'significant' harm arising out of the care being provided by their parents.

## Introduction

In *A v. Hoare & Ors* [2008] UKHL 6 the House of Lords overturned its earlier decision in the case of *Stubbings v. Webb* (1993) AC 498 in relation to the applicable limitation period in personal injury cases relating to assault and intentional harm cases and at a stroke opened the door to thousands of potential claims from victims of assault arising out of incidents which occurred many years ago. In particular, this is likely to result in a significant increase in the number of claims brought by claimants alleging that they were victims of abuse as children. Finding a lottery winner such as Mr Hoare will be rare and individual defendants such as parents and/or other carers will usually be impecunious and not worth suing, but schools, local authorities and other employers are likely to be vicariously liable for the acts of their employees or agents following the decision in *Lister v. Hesley Hall Limited* [2002] 1 AC 215.

In *Stubbings*, the House of Lords had overruled the Court of Appeal decision in *Letang v. Cooper* (1965) 1 QB 232 and decided that the regime provided for in sections 11, 14 and 33 of the Limitation Act 1980 did not apply to cases of assault on the grounds that they were not actions for 'negligence, nuisance or breach of duty' within the meaning of section 11(1) of the Act. The effect of this was that all cases involving deliberate acts resulting in personal injury fell within the regime provided by section 2 of the Act, namely a fixed six year limitation period which could not be extended. This provided an absolute bar to proceedings more than six years after the date of the assault or, in the case of a child victim, after his/her 24th birthday.

In the *Hoare* case, the defendant had been convicted in 1989 of the attempted rape of the claimant, Mrs A. He was sentenced to life imprisonment. In 2004, whilst in prison, he won £7m on the lottery. As a result of this event, the claimant started proceedings in December 2004 but the action was struck out because it was statute barred under section 2 of the Act pursuant to the *Stubbings* decision. The *Hoare* case was heard together with the cases of *X & Y v. London Borough of Wandsworth*, *C v. Middlesbrough* and *H v. Suffolk County Council* which all involved claimants who had been sexually abused as children while in the care of the local authorities. Faced with the ruling in *Stubbings* these claimants had to plead their cases in a way that got around the limitation difficulties, in many cases this resulted in bizarre allegations being advanced to achieve this goal.

The House of Lords (to their credit) decided that this was not a satisfactory way in which cases of this nature should be pleaded and/or dealt with and decided to reaffirm the decision in *Letang*, so that there is now a single limitation regime for personal injury cases pursuant to sections 11, 14 and 33 of the Act whether those injuries were caused by an intentional or non-intentional act. Therefore although the primary limitation period for assault cases has been reduced to three years, victims will now be able to extend that period in appropriate cases with a direction in their favour under section 33 of the Act.

## The Issue

Criticism is increasingly being levelled against local authorities for their failure to protect children in their area who are deemed to be 'at risk' of significant harm due to the care they receive from their parent(s). This criticism is usually widespread and include judges and guardian's in care proceedings brought under s.31 or s.38 of the Children Act 1989 or earlier (similar) legislation, namely the Children and Young Persons Act 1969 or the Child Care Act 1980. Insofar as the latter two Acts are concerned, the children who were part of care proceedings are now adults and complain about suffering harm during their minority as a result of the failure of the local authority to act sooner than they in fact may have done.

## The Legal Framework – Duty of Care

The starting point is the decision of the House of Lords in the case of *X (Minors) v. Bedfordshire County Council* [1995] 2 A.C. 633 where it was held that a local authority did not owe a duty of care to five children who were not removed sufficiently promptly from their homes in circumstances where it was foreseeable that they were suffering and would continue to suffer significant harm as a result of the care they were receiving from their parents. This case was taken to the European Court of Human Rights (*sub nom Z*) and *Others v. United Kingdom* [2001] 2 F.L.R. 612 where it was held that there had been a breach of the children's Article 3 and Article 13 rights in that they were subjected to inhuman and degrading treatment and the English Courts had not provided them with an adequate remedy.

This decision proved to be a catalyst for claims to be brought not only by children affected by decisions or omissions made by local authorities but also by parents who alleged that they had suffered harm as a result of false allegations being made against them by professionals. The case of *JD and Others v. East Berkshire Community Health and Others* [2005] 2 A.C. 373 involved a number of conjoined appeals. In each case the parents of young children had brought actions for negligence against health care authorities and in one case a local authority claiming damages for psychiatric harm caused as a result of unfounded allegations made by professionals that the parents had abused their children. The main issue in the case was whether or not a duty of care was owed in tort to parents. At first instance and in the Court of Appeal it was held that no such duty existed on the grounds that it would not be fair, just and reasonable to place a burden on professionals whereby their duty to protect children would come into conflict with their duty to protect themselves against later criticism. By a majority, the House of Lords dismissed the parents' appeals holding that given the serious nature of child abuse cases, healthcare and other professionals should not be subjected to conflicting duties when deciding whether a child may have been abused and what further steps should be taken to protect that child whilst further enquiries are made into the allegations.

The House of Lords were clear that whilst investigations should be conducted in 'good faith', it was not appropriate to impose the duty of care sought by the parents. This decision is hardly surprising given that where child abuse is suspected, the interests of the child are said to be paramount.



The situation is different, however, when one considers a claim by a victim of the child abuse, because as seen above, a duty of care is owed to a child by health and care professionals to ensure that he/she is suitably and sufficiently protected. In addition, acts and omissions which give rise to a breach of duty post October 2000 will also give rise to a breach of Article 3 and Article 8. The position prior to that date is less certain given that the UK was bound to adhere to the European Convention of Human Rights notwithstanding the fact that the Human Rights Act 1998 was not enacted. There may therefore be scope to argue that Convention rights were violated prior to October 2000.

It follows that insofar as children are concerned, it is no longer legitimate to argue that, as a matter of law, no common law duty is owed to a child in relation to the investigation of suspected child abuse and the initiation of care proceedings. There may well be cases where the factual matrix militates against the imposition of such a duty, such as a situation where the harm suffered by the child can be said to have arisen materially or wholly from the care given by a parent as opposed to any act or omission of health and/or care professionals. The position in relation to parents is, however, very different because of the serious conflict of interest which an imposition of a duty of care would give rise to, which may ultimately lead to a failure by health and/or care professionals to act promptly thereby leading to greater harm being suffered by a child. This 'public policy' decision is unlikely to change in the foreseeable future.

The most recent decisions relating to claims brought by parents have all been dismissed: *AD & Ors v. Bury Metropolitan Borough Council* [2006] (CA) 2 FLR 247 – local authority did not owe a duty of care to parents in the conduct of care proceedings in respect of their child, and the fact that part of the investigation after the making of an interim care order was conducted by agreement with the parents did not mean that a duty of care had arisen; *L & Ors v. Reading Borough Council & Ors* [2007] (QBD) BLGR 576 – A cause of action alleging a breach of duty owed by a local authority to a parent in investigating a case of suspected child sexual abuse by the parent was not a claim recognised by law. It was not fair just or reasonable to impose a duty of care to the parent in the conduct of the investigation; and *Lawrence v. Pembrokeshire County Council* [2007] (CA) FLR 705 – The reasoning of the majority of the law lords in *JD v East Berkshire Community Health NHS Trust* (2005) UKHL 23, (2005) 2 AC 373 that a duty of care was not owed by investigating professionals to parents suspected of child abuse had not been affected by the advent of the European Convention on Human Rights 1950 Art 8 to domestic law.

## Assessing Liability

This is usually only possible once all the papers from the care and other proceedings have been gathered and assessed. In particular the local authority's threshold criteria, chronology, Guardian's report and any transcript of judgment in those proceedings are likely to shed a great deal of light on the background to the local authority's involvement with the family and whether all reasonable steps to ensure that the welfare of the child was protected and promoted was taken. The objective assessments of the Guardian and other professionals involved in care proceedings are very important in setting the level of reasonable intervention which would have been expected from the local authority. It would be difficult for a local authority to allege in its threshold criteria document that the child was suffering or likely to suffer significant harm due to the care being provided by a parent, to obtain assessments to support these allegations, but then defend civil proceedings by arguing that the child was not suffering or likely to suffer significant harm as a result of the care being provided by his/her parent(s).

To obtain disclosure, it is likely that requests can be made under the Data Protection Act or alternatively an application for pre-action disclosure. However, consideration should be given to the cost of redaction of documents disclosed pre-issue (especially if other children and/or adults were involved in the care proceedings). It may be worth waiting for disclosure to be provided in the usual way, although this will depend on the facts of each individual case.

Given that these claims are akin to professional negligence it is likely that expert evidence is going to be required. This is unlikely to be the Guardian who was involved in the care proceedings and who may be called as a witness in the civil proceedings. However it could well be another Guardian or independent social worker who can provide a Court with an objective assessment of whether or not the standard of social work provided fell below the standard of a reasonably competent social worker and that no reasonable body of social workers would have acted in a like manner. As Lord Bingham explained in *JD v. East Berkshire*, 'the duty to the child is breached if signs of abuse are overlooked which a careful and thorough examination would identify, and the obvious risk then is that abuse which would otherwise be stopped is allowed to continue'.

## Causation

Causation is likely to be an important factor in these claims as in many cases it may be argued that there was no 'perfect' outcome. In many, if not all, of the cases in which local authorities become involved regarding child protection issues an element of harm (whether physical, psychological or developmental) has already been suffered by the child 'significantly' justifying intervention. It is likely to be difficult to quantify the extent to which the child would have suffered from the harm complained of and the extent to which the delay and/or any omission by the local authority to intervene and safeguard the child's welfare has caused or exacerbated the harm suffered by the child. In *AD v. Bury Metropolitan Borough Council*, a mother and her son brought proceedings against the local authority alleging that they had negligently commenced care proceedings on the mistaken premise that he had been caused non-accidental injury. Although the mother's claim was barred, the local authority admitted that it owed the child 'a duty of care to carry out its reasonable plans of child protection in a reasonable manner'. However the child's claim failed because any harm that he had suffered was transitory and did not sound in damages. It was said that as with any personal injury claim compensation was not awarded unless the evidence established physical harm or a recognised psychiatric condition. Mere apprehension, fear and discomfort were not compensatable. Hale LJ said 'it must be arguable that harm to a child's health or development which is recognised as significant for the purpose of section 31 of the Children Act 1989 is also recognised by the law of tort'. Wall LJ however doubted whether reference to 'significant harm' in the Children Act 1989 could apply equally to claims in tort. This issue is in need of further judicial consideration, especially since the standard of proof in care proceedings is the same as in a civil action, and in some care proceedings higher, because it is accepted that the more serious the allegation the more cogent the evidence needs to be in order to establish the allegation of harm.

## Conclusion

Although the standard of social work has improved over the years, this has not stemmed the flow of cases brought by children (and parents) against local authorities in tort for breach of duty in relation to safeguarding children from 'significant' harm arising out of the care being provided by their parents. One recent example is the case of *SF v. London Borough of Merton* [2008] where Stephen Glynn of 9 Gough Square represented a child in his claim against the local authority claiming that they should have taken steps to protect him from the care he was receiving from his mother. The claim was settled for £42,500.

Recent changes in how care proceedings are started such as the Public Law Outline and the fees which local authorities must pay for issuing care proceedings (£4,000 per case) mean that more children may be left in their homes to suffer harm (and in some cases significant harm) because local authorities have to produce more documents than previously, before being able to issue care proceedings and more importantly may be financially constrained from doing so in any event due to the high fees charged. This will lead to troubled families and children being 'managed' in the community rather than resorting to care proceedings. The ramifications of such decisions may not be known for some years and even then may afford local authorities a valid defence due to their adherence to the guidance produced by government and the court service.



Linda Nelson

# Clinical Negligence and the Human Rights Act:

## Do the cases of *Van Colle* and *Savage* create a parallel system of remedies?

### Background

In December 2007 the Court of Appeal observed in the case of *Savage v S. Essex Partnership NHS Foundation Trust* that: "There is no English case which clearly identifies the test [for breach of substantive duty under article 2 ECHR] in a medical negligence case." The decision in *Savage* has gone some way to plugging that gap but by no means provides comprehensive guidance. Linda Nelson explores this developing area of law.

Following the death of Mrs Savage whilst detained under s3 Mental Health Act 1983 a claim was brought by her daughter against the NHS trust. There was no claim in negligence: the proceedings only alleged breach of articles 2 and 8 of the European Convention on Human Rights ("ECHR") (the right to life and the right to respect for a family and private life respectively). Swift J dismissed the claim. In October 2007, before it heard the appeal in *Savage*, the Court of Appeal gave judgment in *Van Colle v Chief Constable of the Hertfordshire Police*.

### Van Colle

Mr Van Colle, a prosecution witness in a theft trial, was shot dead by the accused just days before the trial. His parents alleged breach by the police of articles 2 and 8 for its failure to protect him despite having been warned of threats received by Mr Van Colle. Cox J held that the police had acted unlawfully in violation of articles 2 and 8 and awarded damages of £50,000. The police appealed the decision on both liability and quantum. The Court of Appeal upheld the decision on liability but reduced the award of damages.

### No claim in negligence

The claim was not framed in negligence as the Van Colles recognised the difficulty of persuading the court that the police owed them a duty in light of the House of Lords' decisions in *Hill v Chief Constable of West Yorkshire* and *Brooks v Commissioner of Police for the Metropolis*. The Court of Appeal agreed that such a claim would be fraught with difficulty.

### Nature of the Article 2 Duty

Article 2 ECHR provides:

*"Everyone's right to life shall be protected by law. No-one shall be deprived of his life intentionally save in the execution of a sentence of a Court following his conviction of a crime for which this penalty is provided by law."*

The Court of Appeal approved the description by Cox J of article 2 as being one of the most fundamental provisions in the Convention, deprivations of which courts must subject to the most anxious scrutiny. It imposes on member states not only a prohibition on the taking of life, but also a substantive obligation to protect life. The issue to be decided was the nature and extent of that obligation.

Prior to the theft trial a number of incidents (such as threatening telephone calls and arson attacks) occurred which the Van Colles said should have made it clear to the police that the accused posed a serious threat to their son. A police disciplinary panel which considered various allegations against the detective in charge of the theft investigation after the murder found that

during this period he had failed to perform his duties conscientiously and diligently.

The Court of Appeal considered a number of authorities (including *Osman v UK* in which the European Court of Human Rights had held that authorities of a member state, including the police, can be under a positive obligation to take measures to protect a person whose life is at risk) and agreed with the principles distilled by Cox J from those authorities, namely:

- (1) The article 2 obligation to protect life is unqualified (unlike the qualified rights in articles 8-11 which permit a balancing exercise to be performed) and any alleged breach therefore requires most anxious scrutiny.
- (2) Nevertheless, article 2 must not be interpreted so as to impose an impossible or disproportionate burden on the state authorities.
- (3) The positive obligation arises where it is established that the state authorities knew or ought to have known at the time of the existence of a real and immediate risk to life.
- (4) However that threshold is too high where it is the conduct of the authority that has exposed the individual to risk (e.g. by requiring him to perform certain duties on its behalf). In such cases, principles of common sense and common humanity should be applied to determine whether the positive obligation under article 2 is engaged.

### Breach of Duty

The Court of Appeal agreed further:

- (5) There will be a breach of duty where the authorities, who knew or ought to have known of the real and immediate risk to life, failed to take such measures within the scope of its powers which, judged reasonably, might have been expected to avoid that risk. It is not necessary for the claimant to establish that the failure amounted to gross negligence or a wilful disregard of duty. This matter will always depend on the individual facts of the case.

### Causation

The Court of Appeal rejected the submission that the but-for test of causation should apply and held instead that Cox J was correct to find that the test was whether proper and effective management by the authority of its responsibilities might, judged reasonably, have been expected to avoid or at least minimise the risk or the damage suffered. This must be a fact-sensitive approach having regard to all the circumstances of the case. In *Van Colle* the Court of Appeal upheld the decision that causation was established, even on the but-for test.

### Savage

*Savage* provided an opportunity for the courts to consider the same points that were decided in *Van Colle*, but in the context of a clinical negligence claim. Whilst detained on an open psychiatric ward Mrs Savage made a number of attempts to leave. She finally succeeded, jumped in front of a



train and died. Her daughter's claim alleged breach of article 2 for failure to take reasonable measures to prevent the suicide and to assess the risk of absconding. The defendant denied the allegations and applied for a preliminary determination of the appropriate test to establish a breach of article 2.

It was argued on behalf of the claimant that the test, at its highest, should be whether the defendant knew, or ought to have known at the time, of a real and immediate risk to the deceased and if so, whether it failed to take measures that might reasonably have been expected to avoid that risk (i.e. the Osman test). The submission was based on the fact of Mrs Savage's compulsory detention which made her position comparable, it was argued, to that of a prisoner. In *Keenan v UK* a mentally ill prisoner committed suicide. The court said in that case:

*"In the context of prisoners, the Court has had previous occasion to emphasise that persons in custody are in a vulnerable position and that the authorities are under a duty to protect them...The Government has argued that special considerations arise where a person takes his own life, due to the principles of dignity and autonomy which should prohibit any oppressive removal of a person's freedom of choice and action...There are general measures and precautions which will be available to diminish the opportunities for self-harm, without infringing personal autonomy. ..[The test is] whether the authorities knew or ought to have known that [the deceased] posed a real and immediate risk of suicide and, if so, whether they did all that reasonably could have been expected of them to prevent that risk."*

The defendant argued that the minimum test was that set out in *R (Takoushis) v Inner N. London Coroner* (where a schizophrenic patient was left unattended in hospital, jumped into a river and died). In that case Sir Anthony Clarke MR held obiter that although simple negligence in the care and treatment of a patient resulting in death was not sufficient to amount to a breach of the state's obligations under article 2, the position is or may be different in a case in which gross negligence (i.e. the kind of negligence which would be sufficient to sustain a charge of manslaughter) is alleged.

Swift J decided therefore that the appropriate test was either *Takoushis* or *Osman/Keenan* and found that where the article 2 breach was alleged in respect of a detained patient the appropriate test was that expounded in *Takoushis* (gross negligence of a kind sufficient to sustain a charge of manslaughter). It was agreed between the parties that the evidence did not show negligence to that degree and Swift J therefore gave summary judgment for the defendant. However, on 21.12.07 the Court of Appeal allowed the claimant's appeal.

The Court of Appeal acknowledged that European jurisprudence provided strong support for the claimant's submissions and accepted that a detained patient was in a position more closely comparable to that of a prisoner than an ordinary hospital patient. The key factors in this decision were the vulnerability of the patient and the level of control by the state. It held that therefore the *Osman* principles applied in this case and the claimant need not establish gross negligence on the part of the defendant to succeed.

## What is the effect of these cases?

Although there had been speculation prior to the *Savage* Court of Appeal decision that if the appeal was upheld it could lead to revolutionary changes in the field of clinical negligence, the judgment is in fact of limited effect given that it is limited to cases where the patient was detained. There is no reference in the judgment to the appropriate test to be applied to voluntary patients. It is highly unlikely therefore that the judgment will lead to a flood of claims for damages based on ECHR breaches in clinical negligence cases.

Further, the court rejected any suggestion that the distinction between detained and voluntary patients would lead to 'defensive treatment' of detained patients by health professionals. It highlighted that (a) there was no evidence to support that suggestion and (b) the test at common law remains the same for all patients.

Similarly, in *Van Colle* the Court of Appeal addressed the concern that the decision would open the floodgates to baseless claims against the police. Sir Anthony Clarke MR's judgment made the collective observation that the Court was not persuaded that its conclusions would threaten police resources in that way: all that was required was some further thought by a properly trained officer and some protective action.

It was submitted on behalf of the police in the *Van Colle* appeal that if the claim under the Human Rights Act was allowed it would create a parallel system of remedies and tension between the HRA and the common law. There is however no evidence of such a problem occurring: a claim under the HRA will likely remain a fall-back position used where alternative claims are not possible, for example due to the limited categories of potential claimants who fall within the definition of a dependant for the purposes of a Fatal Accidents Act claim, or where recourse through the common law is denied, as in the case of *Gregg v Scott*. (In that case a claim in negligence was made against a GP for failure to refer patient to a hospital. It was claimed that had C been referred earlier a lump under his arm would have been diagnosed as malignant sooner. The expert evidence was that the delay reduced C's chances of surviving for more than 10 years from 45% to 25%. The claim was dismissed, the court holding that C had had a less than 50% chance of survival in any event. C argued that the reduction in his chance of survival was in itself compensatable damage but the Court of Appeal and House of Lords upheld the decision, a divided House of Lords holding that liability for loss of a chance of a more favourable outcome should not be introduced to PI law.)

Further, the requirements of the Human Rights Act 1998 itself, under which ECHR claims are brought, will likely limit the number of claims with reasonable prospects of success. Such claims are brought in reliance on s6(1) HRA 1998 which provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. There may be dispute as to whether the proposed defendant is 'a public authority'. Similarly, proceedings are brought under s7 which provides that a person may bring proceedings against an authority under the HRA only if he is (or would be) a victim of the unlawful act. In *Van Colle* the police did not dispute the entitlement of Mr and Mrs Van Colle to claim damages in a personal capacity, rather than simply as Administrator of their son's estate and this point is therefore left open for future consideration.

There is also the matter of limitation: s7(5) HRA provides that proceedings must be brought before the end of (a) the period of one year beginning with the date on which the act complained of took place or (b) such longer period as the court or tribunal considers equitable having regard to all the circumstances (subject to any rule imposing a stricter time limit).

A key incentive to bring a claim under the HRA may be the potential level of damages. s8(1) HRA provides that that court "may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate" and s8(3) provides that the court must be satisfied that the award "is necessary to afford just satisfaction to the person in whose favour it is made." In *Van Colle* the Court of Appeal held that the Strasbourg (ECtHR) cases are the appropriate guide to quantum and for that reason damages need not be limited to the £11,800 now allowed under the Fatal Accidents Act 1976.

The Court of Appeal's observation in *Savage* that "There is no English case which clearly identifies the test in a medical negligence case" under the HRA remains true. Further, the effect that the HRA duties should have in shaping common law duties is far from settled. In *Smith v Chief Constable of Sussex Police*, [2008] EWCA Civ 39, an action at common law against police for failing to protect a victim of a serious assault who had alerted the police to the risk of assault by a former partner, Pill LJ said "I consider it unacceptable that a court, bound by S. 6 of the [HRA] 1998, should judge a case such as the present by different standards depending on whether or not the claim is specifically brought under the Convention. The decision whether a duty of care exists in a particular situation should in a common law claim require a consideration of Article 2 rights." The House of Lords will hear argument in the cases of *Van Colle* and *Smith* in May 2008, and in *Savage* in October 2008.



# New Book on Manual Handling Claims published by 9 Gough Square

Manual handling injuries account for the majority of accidents at work. **Manual Handling Claims** is designed to assist the practitioner in understanding the application of both common law and statutory duties to this specialised area of work.

Containing concise but comprehensive analysis on the development of the law, an overview of manual handling injuries generally as well as in depth coverage of the Manual Handling Operations Regulations 1992 themselves, it provides all the necessary information for all levels of personal injury practitioner especially given that essential appendices including the MHOR and the HSE Guidance are included.

Written by Andrew Ritchie and edited by Stephen Glynn, both highly experienced members of the Personal Injury Group at 9 Gough Square. **Manual Handling Claims** is part of a series of Chambers' publications on Personal Injury topics.

Copies are available, cost £45 inc p & p, by emailing [jkerr@9goughsquare.co.uk](mailto:jkerr@9goughsquare.co.uk) with your full name, organisation and correspondence address. An invoice will be sent with the publication.

## Manual Handling Seminars

Chambers is holding a series of short evening seminars on Manual Handling Claims to complement the publication of the Book. These will be held at 9 Gough Square, London EC4A 3DG on Thursday 26th June and Wednesday 10th September from 5-7pm. They cost £57 and include a copy of **Manual Handling Claims**. To register your place please email [jkerr@9goughsquare.co.uk](mailto:jkerr@9goughsquare.co.uk) with your full name, organisation and correspondence address. We will confirm the programme and send an invoice.

## Diary Date

### 9 Gough Square's Flagship Seminars

#### 8th Annual PI Seminar

Swissotel The Howard London,  
Friday 20th June 2008

A full day seminar providing 6 hours CPD and providing an update on deafness claims, employers' liability, *Corr v IBC*, costs, drafting schedules and the interpretation of medical records with specialist speakers on ergonomics, pain issues and the effective presentation of cases. Email [jkerr@9goughsquare.co.uk](mailto:jkerr@9goughsquare.co.uk) for a brochure or telephone 020 7832 0500.

#### 9th Annual Clinical Negligence and Legal Update Seminar

– The Law, Society,  
London, Thursday 6th November.

## 9 Gough Square welcomes new criminal practitioner

John Barker has joined 9 Gough Square's Crime Group. He was called in 1982 and his practice involves heavy crime, much of which is leading work, from fraud and drugs to homicide. He has appeared as a leading junior in money laundering, large scale drugs distribution, mortgage fraud, identity theft fraud, kidnap and other serious cases of violence and dishonesty.



John Barker

Another important aspect of John's practice is Professional Regulation and Discipline. He sits as a legal assessor for three regulators: the Royal Pharmaceutical Society of Great Britain, to the General Osteopathic Council and the Association of Accounting Technicians.

Editor – Aileen Downey

Managing Editor – John Kerr, Chief Executive  
Chambers of Grahame Aldous QC, 9 Gough Square, London EC4A 3DG.

T: 020 7832 0501 F: 020 7353 1344 E: [jkerr@9goughsquare.co.uk](mailto:jkerr@9goughsquare.co.uk) DX: LDE 439 Videoconference: 020 7832 0592

