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IN THE NEWCASTLE UPON TYNE COUNTY COURT

Case No: 9NE08976

Law Courts,
Quayside,
Newcastle upon Tyne

Date: 25 February 2011

Before :

His Honour Judge Walton

Between :

Claire Selwood	**Claimant**
- and -	
Durham County Council	**First Defendant**
	Second Defendant
Tees, Esk and Wear Valley NHS Foundation Trust	
Northumberland, Tyne and Wear NHS Foundation Trust	**Third Defendant**

Michael Kent QC and Mark Armitage (instructed by **Thompsons**) for the **Claimant**
Michael Ditchfield (instructed by **Durham County Council**) for the **First Defendant**
Angus Moon QC and James Berry (instructed by **Beachcroft**) for the **Second and Third Defendants**

Hearing dates: 19th, 20th January 2011

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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His Honour Judge Walton :

1. It is important to bear in mind in the course of what may well appear a rather abstract discussion of legal principles that at the heart of this claim lies a shocking and life-threatening attack upon a social worker, the claimant, by a father whose family she was trying to help. On 20th October 2006, at a case conference called to discuss issues in relation to his daughter, Graham Burton turned up unexpectedly and attacked the claimant. She was stabbed repeatedly with a long bladed knife and is left with extensive scarring, weakness in the right upper limb and a considerable reduction in hand function. She developed post-dramatic stress disorder and a major depressive episode and is left vulnerable to future psychiatric injury. What happened is something she will never forget.

2. She has brought these proceedings on the grounds that the negligence or breach of statutory duty of the defendants caused that attack, in the sense that had precautions been taken it would not have occurred. Alternatively she alleges that the defendants were guilty of a breach of article 2 of the European Convention on Human Rights as incorporated into domestic law by the Human Rights Act 1998. The present application is made on behalf of the second and third defendants to her claim. The first defendant is the local authority by whom she was employed at the time of the incident. The other two defendants are respectively the NHS Trust which had been engaged in providing treatment for Mr Burton via its community mental health and crisis teams; and the similar Trust responsible for the management of Cherry Knowle psychiatric hospital and the employer of Dr Gupta, a psychiatrist treating Mr Burton there. In brief at this stage the claimant alleges that over a period of time Mr Burton uttered statements in the course of contacts with him by the employees of both Trusts which indicated his intent to do her serious harm which were not passed on to herself with the result that precautions to avert that harm were not put in place.

3. By concession made in advance of the hearing in front of myself, the claimant formally withdrew against both these defendants allegations of breach of the Management Regulations 1999. The defendants submit that the other claims against them have no real prospect of success and invite the court to strike them out or give summary judgement in their favour.

4. It is common ground that in approaching an application of this present kind the court must assume that the factual allegations contained in the Particulars of Claim will be made out. It is necessary therefore that I should set out first a summary of the relevant factual background, taken from the pleadings save where otherwise stated.

5. **Background.** During the course of 2006 the claimant was working as a senior social worker in Durham County Council's Children in Need team. She was appointed the social worker with responsibility for Graham Burton's daughter. There were ongoing court proceedings in relation to Mr Burton's children. Concurrently other organisations were involved with the family. The second defendant's Child and

Adolescent Mental Health Services team was concerned in the care of the children ; Mr Burton himself was engaged with the second defendant's Community Mental Health team (CMHT) and its Crisis Resolution team (CRT). The CMHT included employees of the first defendant. The third defendant was responsible for a mental health ward at Cherry Knowle Hospital ("the hospital") at which a consultant psychiatrist, Dr Gupta, was employed and where Mr Burton received treatment.

6. During 2006 the claimant alleges that employees of the various defendants became aware that Mr Burton posed "a significant and immediate risk" of harm to her. The following matters are gathered from the Particulars of Claim and a report after the incident for the North East Strategic NHSHA after an investigation led by a barrister, Sue Taylor. Mr Moon QC observed that allegations derived from the report, which became available only recently, had not been added to the Particulars of Claim by amendment and should strictly be ignored. Mr Kent QC responded that the report provided additional insights into what was already pleaded. It does not seem profitable to spend much time on the argument. I am disposed to accept that those matters of a factual kind to which I was taken in the report will be proved. I agree that I should disregard the commentary by the authors since that does not address the test which is relevant in dealing with this application.

7. Mr Burton was admitted for in patient treatment at the hospital for two periods in 2006: from 1st July to 23 August; and from 13 to 18th October. On 21st July 2006 it was noted there that he had a history of violence and posed a risk of danger and violence to others. The claimant avers and I accept for present purposes that the extent of the risk to others was not explored. On 23rd August 2006 at a review attended by representatives of the two Trusts and Dr Gupta, it was noted that Mr Burton had expressed himself as not pleased with a social worker who he referred to as the "nastiest one". The claimant's case is that these defendants and Dr Gupta knew or ought to have known he was referring to her, but the information was not passed on to her employer, herself, or anyone else. Again for present purposes that has to be assumed to have been the position.

8. On 24 August 2006 Burton was assessed by the second defendant's CRT and it was noted that he had been aggressive to others in order to protect his family. A risk assessment was completed. At an appointment with the CRT on 31 August 2006 he was noted to demonstrate increased anger, panic and the risk of violent outbursts. He made a statement that there was someone involved in the court case "who I dislike and wish to harm but I am trying to avoid her". The claimant avers that the second defendant's employees should have known he was referring to her.

9. In the Sue Taylor report, it is suggested at p.32 that the member of the CRT who spoke to Graham Burton on 31st August made a telephone call to his care coordinator, a community psychiatric nurse, giving information that Burton had said he wished to harm someone "with the expectation that she would take responsibility for sharing information with people involved with the court case."

10. Thereafter the Particulars of Claim allege that at an appointment on 17th September 2006 Mr Burton disclosed to members of the CMHT and CRT having violent thoughts and fantasies regarding particular individuals involved in his and his family's care. The information was passed on to Dr Gupta. The Sue Taylor report also refers to the fact that a social worker called the first defendant's organisation, Social

Care Direct, which was apparently the first point of contact with the Children's Social Care, the team within which the claimant worked, to share the same information "with the expectation that it would be passed to staff involved with Graham Burton's family."

11. At an outpatient appointment on 28th September 2006 Mr Burton indicated that he had ongoing problems with social workers with regard to his grandson and was aggrieved with decisions.

12. He was admitted to the hospital as an informal patient on 13th October 2006. He indicated that he had paranoid delusions featuring specific individuals. It was noted that he had been aggressive to strangers in the past. Again the information was not transmitted to anyone else concerned with the family.

13. The Sue Taylor report contains a reference to a fax seen by the claimant three days later on 16th October. It was addressed to Mr Burton's care coordinator. The claimant read it and saw that it contained information about his having expressed thoughts about harming another person. She discussed the fax with the care coordinator. The claimant speculated that it referred to herself. She offered to attend a review that was to be carried out at the hospital on 18th October in order presumably to pass on any relevant information in her possession.

14. That same day at the hospital Burton was observed to be distressed, complaining that he was hearing a screaming voice in his head and referring to "seeing faces".

15. On 17th October 2006 he was reviewed by employees, servants or agents of the second defendant and it was noted that the trigger for his depressive episodes related to issues surrounding his daughter's baby. The following day there was a further review attended by Dr Gupta and other employees of the third defendant. This was the review the claimant had offered to attend, but when asked by Dr Gupta whether she could do so Mr Burton refused permission stating that he would "kill her on the spot" if he saw her. Again this threat was not passed on to the claimant or to the first defendant. It is said that Graham Burton had however given Dr Gupta permission to speak to the claimant in relation to his prognosis and treatment.

16. The Taylor report records that a staff nurse said that she shared with the care coordinator the fact that Burton had said he would kill the social worker and that the coordinator, while stating she had not been given this information "recognised the importance of passing it on if she had received it".

17. At the review on 18th October 2006, notwithstanding the threats of violence, Dr Gupta agreed to Mr Burton having a week's home leave. The claimant was unaware he was out of the hospital. Two days later he attended the case conference and the attack took place. He was subsequently charged with and pleaded guilty to the crime of attempted murder and was sentenced to a minimum term of imprisonment of 11 years and 9 months.

18. Mr Kent highlighted a number of averments which should be taken as crucial to the claimant's case. First he drew attention to the allegation that that the second defendants' CMHT "was an integrated health and social care team, managed by health staff but incorporating employees of the first defendant". The second and third

defendants were simply different manifestations of the National Health Service. The claimant averred, and it should be taken for present purposes to be the case that "all services of the first, second and third defendants systematically failed to facilitate comprehensive communication and multi-agency care planning in relation to Graham Burton and his family, in line with professional responsibilities". They failed to act together to identify and mutually communicate the risk he presented of violence to others in general and the claimant specifically.

19. He underlined the indications to the various teams and medical attendants that Burton intended and was capable of harm to the claimant as the social worker involved with his daughter. There was no proper assessment of his risk to others, including the claimant; and no action taken or warning provided in relation to that risk. The third defendant, by Dr Gupta, likewise did not pass on any warning or take other action when agreeing to home leave. If, as he conceded, Dr Gupta could not prevent Burton from leaving the psychiatric ward, he could at least have made an effort to dissuade him and failing that taken steps to pass on a warning to the claimant.

20. So far as causation is concerned the claimant has said, in response to a request for further information, that had she been made aware of Mr Burton's threats she would not have allowed herself to be in close proximity to him and would have either (i) cancelled the case conference on 20th October 2006; or (ii) ensured that it took place at a secure establishment in which attendance could be monitored or restricted; or (iii) ensured that she was not alone; or (iv) ensured that other members of her team were assigned to the case.

21. **The defendants' case.** Mr Moon submitted that even if the claimant's factual allegations were taken as true the claim could not succeed. In so doing he referred to a number of authorities. The following is a summary of the argument.

22. He started by emphasising that the claimant was never a patient of the second or third defendants. The claim was based upon a duty of care said to be owed to a third party to the relevant doctor/patient relationship. The claimant was alleging that these defendants were responsible for the criminal actions of their patient. On authority such a claim was bound to fail.

23. The claimant had to establish a duty of care owed to her by the defendants in negligence. The duty could arise either by way of the tripartite test established by *Caparo Industries plc -v- Dickman* [1990] 2 AC 605 or alternatively by way of an assumption by the defendants of responsibility to protect the claimant from harm. He submitted that neither route was open on the facts here.

24. So far as the *Caparo* test was concerned the claimant had to show the following : (i) foreseeability of harm; (ii) proximity of relationship between herself and the defendant; and (iii) that it was fair, just and reasonable in all the circumstances to impose a duty of care. Foreseeability was conceded but not the other two components of the test. While it was said that "the law should develop novel categories of negligence incrementally and by analogy with established categories" there was no established category with which this case could be regarded as analogous.

25. Mr Moon relied upon *Palmer -v- Tees Health Authority* [1998] Lloyds Law Rep: Med 447 (QBD); [1999] Lloyds Law Rep: Med 351 (CA). That case arose from Shaun

Armstrong's abduction and murder of Rosie Palmer aged 4. Rosie's mother brought proceedings against the health authority which had provided Armstrong with psychiatric treatment. It was alleged that he had been discharged without an adequate assessment and without a proper record of his threatening statements. The action was struck out by Gage J and his decision was upheld by the Court of Appeal.

26. The claim in *Palmer* failed for want of proximity. In order to establish proximity it had to "*be shown that the victim or injured person was one who came into a special or exceptional or distinctive category of risk from the activities*" of the assailant. It was not sufficient to show that the victim was one of a wide category of members of the general public. The identity of Armstrong's potential victims was not known by the defendant. However, albeit obiter, Gage J also held that it would not be fair, just and reasonable to impose a duty of care. He referred to the following factors:- (i) The risk of "defensive medicine" because doctors were in fear of being sued; (ii) the wide category of potential claimants and the burden on NHS Trusts; (iii) health authorities' limited control over voluntary inpatients ; (iv) the difficulty of reconciling a duty of care with a doctor's duty of confidentiality; (v) the availability of an alternative remedy from the Criminal Injuries Compensation Board.

27. On appeal the Court of Appeal dismissed the appeal on the ground that there was no proximity between the claimant and the defendant. The fair, just and reasonable argument was not addressed because of a concession by Mr Moon himself in light of the then recent decision in *Barrett -v- Enfield LBC* [1999] 3 WLR 79, HL.

28. Mr Moon submitted that later House of Lords' authority had significantly reinforced the considerations which led Gage J to find that it would not be fair, just and reasonable to impose a duty upon a public authority such as these defendants in respect of the criminal conduct of a patient in favour of a third party, even in circumstances in which the public authority knew of a specific threat or threats made by the assailant against the claimant.

29. He relied in particular upon *Van Colle -v- Chief Constable of Hertfordshire Police* and *Smith -v- Chief Constable of Sussex Police* [2009] 1 AC 225; *Mitchell -v- Glasgow City Council* [2009] 1 AC 874; *D -v- East Berkshire Community Health NHS Trust* [2005] 2 AC 373; and *Jain -v- Trent Strategic Health Authority* [2009] 1 AC 853. The first of these cases involved the police, and the last three dealt with other public authorities.

30. In the *Smith* decision the claim was struck out on the ground that it would not be fair, just and reasonable to impose a duty of care upon the police. There had been a highly regrettable failure to react to a prolonged campaign by the claimant's former partner threatening the use of extreme criminal violence against him. The police were, or should have been, well aware of the very serious threats that had been made. Following those threats the partner attacked Mr Smith with a claw hammer and caused him to suffer brain damage. The House held, by a majority, that the police owed no duty of care to the victim. In so doing similar matters were taken into account as had been mentioned by Gage J in *Palmer.*

31. In *Mitchell* the claim was not against the police but a housing authority. Mr Mitchell was killed by his neighbour, another secure tenant, James Drummond. The defendant local authority, the landlord, had been aware of threats by Drummond to kill Mr

Mitchell over a long period of time. Mr Mitchell's estate claimed at common law and under the Human Rights Act 1998 contending that the defendant had been under a duty to warn Mr Mitchell that a meeting had recently taken place with Drummond about his conduct so that Mr Mitchell might have taken steps to avoid his neighbour afterwards. The claim was unsuccessful following an appeal to the House of Lords.

32. Again reflecting public policy considerations, Lord Hope decided it would not be fair, just and reasonable to impose a duty of care, see [28]:- *"As in the case of the police it is desirable too that social landlords, social workers and others who seek to address the many behavioural problems that arise in local authority housing estates and elsewhere, often in very difficult circumstances, should be safeguarded from legal proceedings arising from the alleged failure to warn those who might be at risk of a criminal attack in response to their activities. Such proceedings, whether meritorious or otherwise, would involve them in a great deal of time, trouble and expense which would be more usefully devoted to their primary functions in their respective capacities.... There are other considerations too. Defensive measures against the risk of legal proceedings would be likely to create a practice of giving warnings as a matter of routine. Many of them would be for no good purpose, while others would risk causing undue alarm or reveal the taking of steps that would best be kept confidential."*

33. Lord Brown referred to *Smith* and stated, at [84]:- *"But realistically, if the police owed no duty of care ... it would be highly surprising if the pursuers owed a duty of care in the circumstances ... Not least, it would be odd indeed if the pursuers were liable in law for not warning the deceased, whereas, had the police been told of all the facts and nevertheless failed to protect the deceased, they (the body principally charged with the protection of the public) would have been under no such liability."*

34. Mr Moon also relied on observations in the earlier decision of *D -v- East Berkshire Community Health NHS Trust* where the House of Lords considered the question whether doctors owed a duty of care to parents in respect of unfounded allegations of child abuse. The claims of the parents were struck out. It was not satisfactory to impose a duty of care in favour of both the alleged perpetrator and the alleged victim. At [85] Lord Nicholls stated:- *"A doctor is obliged to act in the best interests of his patient. In these cases the child is his patient. The doctor is charged with the protection of the child, not with the protection of the parent. The best interests of a child and his parent normally march hand-in-hand. But when considering whether something does not feel "quite right", a doctor must be able to act single mindedly in the interests of the child. He ought not to have at the back of his mind an awareness that if his doubts about intentional injury or sexual abuse prove unfounded he may be exposed to claims by a distressed parent."*

35. In *Jain* the line of authority including *D -v- East Berkshire* was said by Lord Scott at [28] to demonstrate:- *"..that where action is taken by a state authority under statutory powers designed for the benefit or protection of a particular class of persons, a tortious duty of care will not be held to be owed by the state authority to others whose interests may be adversely affected by the exercise of the statutory power. The reason is that the imposition of such a duty would or might inhibit the exercise of the statutory powers and potentially be adverse to the interests of the class of persons the powers were designed to benefit or protect, thereby putting at risk the achievement of their statutory purpose."*

36. While reference was made by both sides to *Tarasoff -v- Regents of University of California* 17 Cal. 3d 425 (1976) it did not seem to me of particular assistance given that there a number of House of Lords authorities in this jurisdiction which both sides agree are relevant and apposite. Nor am I going to enter into the submissions made by both counsel with reference to the summary of the law by Rachel Mulheron in her book "Medical Negligence: Non-Patient and Third Party Claims." It was not agreed by Mr Kent that the passages relied on by Mr Moon were an accurate summary of the law and again it seems to me sufficient for present purposes to consider the House of Lords decisions themselves.

37. In light of the authorities Mr Moon submitted that it was not fair, just and reasonable to impose a duty of care in the present case for the following reasons. First, the second and third defendant were obliged to act in the best interests of their patient Graham Burton. The interests of the claimant in being warned about any danger posed by him was in potential conflict with the interests of the patient.

38. Second, insofar as the claimant contended that Mr Burton should have been given different treatment and/or kept in hospital because of the risks he posed to the claimant, the potential conflict of interest was particularly acute. There was a detailed statutory framework under the Mental Health Act 1983 for the admission and treatment of psychiatric patients. The proposed duty of care would potentially undermine that statutory regime. There was a risk that psychiatric patients, who would otherwise not be the subject of compulsory treatment, would be given less freedom because doctors may perceive they may be a risk to social workers or other professionals. This would amount to defensive medicine of the sort which concerned Gage J. in *Palmer*.

39. Third, whatever the true factual position, there was an issue about whether and to what extent Graham Burton was content for information about him to be shared with the claimant. Psychiatric treatment had to be given in an appropriately discreet manner. In the area of psychiatric treatment, making disclosures in breach of patient confidentiality even to social workers may risk harming the doctor/patient relationship.

40. Fourth, Burton was not under the "control" of the defendant at the time of the assault because he was an informal patient on home leave.

41. Fifth, to hold that a duty of care existed would considerably widen the category of potential claims to include social workers involved in cases and probably other professionals. Such a duty of care would be bound to lead to an increase in claims against health authorities and would require them to investigate and deal with such claims. There would be a significant diversion of manpower and attention from health authorities' primary function of caring for patients.

42. Sixth, the claimant was not left without remedy. She may claim for compensation from the Criminal Injuries Compensation Authority if she has not already done so. She has an outstanding claim against her employer.

43. Seventh, it was important that the law relating to public authorities be consistent and predictable. He submitted it was unlikely that the police and other public authorities would owe a duty of care to the claimant. The case advanced on behalf of the NHS

Trusts was even stronger than if the defendants had been the police authority, "the body principally charged with the protection of the public".

44. Eighth, if a duty of care were imposed in the circumstances of this case, there would be liability on the part of health authorities across the country for a very large number of criminal acts. Not infrequently, criminal offenders and people disposed to violence have been the beneficiaries of treatment for their mental health. In *Smith* Lord Brown and Lord Phillips asked why liability should logically be limited to threats to life or physical safety? Why not also threats to property?

45. Mr Moon recognised that at least a potential alternative route by which a duty of care might arise would be the assumption of responsibility test. For present purposes the question was whether in all the circumstances either of these defendants assumed a responsibility to protect the claimant from harm caused by the criminal acts of Graham Burton. There was no factual basis for saying they did. It was not alleged that Dr Gupta made any promise, express or implied to safeguard the claimant. There was no allegation that Dr Gupta expressed any intention to protect the claimant. None of the "indicia of contract" were present to suggest an assumption of responsibility. Dr Gupta's, and the NHS Trusts' statutory obligations were to protect vulnerable patients not to protect other professionals such as social workers. Just as there was no assumption of responsibility in cases such as *Mitchell*, there was no assumption of responsibility by the second and third defendants in the instant case.

46. So far as the article 2 claim is concerned I should record that Mr Kent agreed to the defendants being able to amend their application to strike out to include that ground as well as the negligence claim. The Particulars of Claim plead breach of article 2 as a particular of negligence rather than as a free standing human rights claim. Mr Moon agreed it should be regarded as such a claim if he could amend the defendants' application and that was done.

47. Mr Moon submitted that there were two reasons why a breach of article 2 could not succeed. In first place there was no duty under article 2 in relation to voluntary in-patients, see *Rabone v Pennine Care NHS Trust* [2010] EWCA Civ 698 at [62]. In the words of Jackson LJ: "*I have come to the conclusion that detention under the Mental Health Act makes a critical difference. It is clear that ECHR Article 2 does not impose upon the state and operational obligation towards all persons who are at "real and immediate risk" of death... In addition to the "real and immediate risk" of death, there must be some additional element before state authorities come under the operational obligation. Examples of the additional element are (a) involvement of the police with a criminal who was liable to kill the individual concerned or (b) the fact that the individual concerned is detained by the state.*

48. *"[63] On the law as it stands, I do not believe that health trusts have the article 2 operational obligation to voluntary patients in hospital, who are suffering from physical or mental illness, even where there is a "real and immediate " risk of death. In my view it is not possible to separate such patients into categories and to say that the operational obligation is owed to some categories of voluntary patients, but not others..."*

49. He went on to say that it was important that legal obligations and liabilities should be clearly defined and understood.

50. Mr Moon's second submission was that there was no immediate risk to the claimant even if the risk was real. The need for a real and immediate risk as the basis for a breach of article 2 was explained by Lord Hope in *Mitchell* at paragraph [31]. He said that the test that the averments must satisfy was a high one. He quoted the European Court in *Osman v United Kingdom* [1998] EHRR 245 [116]: *"It must be established to the court's satisfaction that the authorities knew or ought to have known at the time of the existence of the real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk."* Here so far as the employees of the second defendant were concerned Burton's last words were that he was trying to avoid the claimant. A risk was contingent on his meeting her which was something he was trying to avoid. It was not immediate.

51. In Dr Gupta's case Burton expressed his threat to the claimant on 18th October but was at that stage in hospital. Home leave was agreed on 18th but there was nothing to indicate to Dr Gupta at that stage that the risk to the claimant which materialised on 20th October was immediate.

52. **The submissions on behalf of the claimant.** In reply Mr Kent on behalf of the claimant submitted, again in summary, as follows. First he drew attention to the test on a strike out: the jurisdiction to strike out a pleading as disclosing no reasonable grounds for bringing the claim (i.e. no reasonable cause of action) should be exercised only in plain and obvious cases. It was not appropriate to do so in an area of developing jurisprudence as novel points of law should be based upon actual findings of fact: *Equitable Life Assurance Society v. Ernst & Young (a firm)* [2003] EWCA Civ 1114.

53. Under CPR 24.2(a)(i) the question was whether the second and third defendants could demonstrate that the claimant had no "real prospect" of success on the relevant issue. "Real" is used in this context as the opposite of "fanciful" and the court should not conduct a "mini trial" in order to establish whether a summary disposal is appropriate: *Swain v. Hillman* [2001] 1 All ER 91 CA. The court was not attempting, in deciding whether to grant summary judgment, simply to arrive at a conclusion on a balance of probabilities. The jurisdiction is designed to deal with cases "which are not fit for trial at all" and the power was discretionary, see *Three Rivers District Council v. Bank of England (No. 3)* [2001] UKHL 16, [2001] 2 All ER 513 (per Lord Hope of Craighead at paras 94 and 95).

54. So far as the claim in negligence is concerned Mr Kent distinguished the decisions in *Smith v. Chief Constable of Sussex Police* [2009] 1 AC 225 and *Mitchell v. Glasgow City Council* [2009] 1 AC 874 on their facts.

55. In *Smith* the House of Lords was concerned with what was referred to as the "core principle" laid down in *Hill v. Chief Constable of West Yorkshire* [1999] AC 53 as explained in *Brooks v. Commissioner of Police of the Metropolis* [2005] 1 WLR 1495. That principle was concerned with the need to avoid imposing a duty of care on the police which would or might have "detrimental effects for law enforcement." The considerations which arose were special to that context and could not simply be transposed (or even applied by analogy) to other contexts such as the present.

56. *Mitchell v. Glasgow City Council* (insofar as the House of Lords was considering the allegation of negligence at common law) was concerned with a case in which knowledge of possible threats of serious injury arose out of the relationship of landlord and tenant between, on the one hand, the defendant and the assailant and, on the other hand, the defendant and the victim. The alleged duty of care in negligence was not based upon the special feature that the defendant was a local authority: see Lord Hope at para [27]. If a duty of care as contended for existed, it would equally have existed as between a private landlord and his tenants.

57. Nor was the issue of proximity the essential issue: Lord Hope accepted that there was proximity in at least some sense (see para [17]). The question was whether it was fair just and reasonable to impose a duty of care and the House of Lords concluded that the contractual and statutory duties owed to the tenant left little room for a delictual duty of care: see Lord Rodger at para [51] where he also observed that tenants were not to be treated as a class of people who could not be expected to look after themselves. The claimed duty of care was founded solely on a need to warn the ultimate victim of the date when the landlord proposed to tell the other tenant (the ultimate assailant) that he might be evicted and what transpired at that meeting. At the meeting he made no specific threats of harm towards the victim (see per Lord Hope at para [6]). This narrow basis for the claim was regarded by Lord Brown as significant (see para [83]). It was not (as here) a claimed duty to disclose or warn about actual threats. The pursuers in *Mitchell* were faced with a consistent line of authority which rejected a duty of care in such circumstances (see per Lord Brown at para [81]).

58. The House of Lords thus focussed upon the question whether it was alleged that there was some "assumption of responsibility" and found that it was not.

59. Mr Kent submitted that the claimant derived assistance from *Palmer v. Tees Health Authority* [1999] Lloyds Law Rep: Med 351 (CA). The Court of Appeal upheld the striking out of the claim as disclosing no cause of action on the sole ground that there was no proximity between the defendants and Rosie Palmer. The argument for the claimant that foreseeability, proximity and fairness, justness and reasonableness could not be put into separate compartments but were merely facets of the same thing (per Lord Oliver in *Caparo Industries plc v. Dickman* [1990] 2 AC 605) was not fully accepted in that the Court of Appeal concluded that nevertheless the issue of proximity that arose in the case before them was one which was capable of being decided separately. Crucially however the court focussed upon the absence of any allegation in that case that the ultimate victim was "identified or identifiable".

60. In paragraph 31 Stuart-Smith LJ said that he would wish to reserve his opinion as to whether a test of "assumption of responsibility to the victim" was required in the case of an identified or identifiable victim. Though Pill LJ said "*I see force in the submission that the question of whether an identity of a victim is known ought not to determine whether the proximity test is passed,*" he noted *that "the point does not arise starkly on the present facts because of the passage of time and distance between Armstrong's release and Rosie's murder*". He went on to note that there were authorities binding on the Court of Appeal "*for the proposition that, in circumstances such as the present, the identity of the victim is an important factor in deciding whether the foreseeability test is passed.*" He continued "*That being so, I agree with Stuart-Smith LJ that, upon the facts of this case, Rosie does not pass the threshold*

requirement of the proximity test necessary to establish a duty of care and that the decision to strike out on that ground was correct". Pill LJ therefore, while accepting that proximity is but one facet of the threefold Caparo test which includes foreseeability, concluded on the facts of that particular case (no victim identified or identifiable and a year's gap between the assailant's release and the murder), that the threshold requirement of proximity was not reached.

61. The difference between *Palmer* and the present case was obvious taking, as the court must under the strike out part of the application, the allegations pleaded in the Particulars of Claim as proved.

62. Mr Kent submitted that even if the court concluded that the existing case law, while not including any clear authority which favours the second and third defendants' approach, revealed a trend which might be applied by analogy in this case, it was not an area where the law was clear and settled. The history of developments since *X (minors) v. Bedfordshire County Council* [1995] AC 633, including *Phelps v. Hillingdon London Borough Council* [1999] 1 WLR 500 HL and *Barrett v. Enfield London Borough Council* [2001] AC 550 (influenced by interventions by the European Court of Human Rights) showed a movement away from absolute statements as to when a duty of care might or might not arise.

63. He pointed out that Lord Brown of Eaton-Under-Heywood, in a lecture in 2009 to the Personal Injuries Bar Association on "Liability for the Crimes of Others" stated that he was "hesitant about the correctness of *Palmer*", which suggested that this is a developing area of the law in which, at the very least, the facts should be established based upon full disclosure and the examination and cross-examination of relevant witnesses before deciding whether a duty of care was disclosed.

64. Mr Kent pointed out that foreseeability was conceded and turned to proximity. He submitted there was a clear argument that the claimant and the defendants came into a relationship which was sufficiently proximate to support a duty of care. The claimant based her case in part on allegations against the second and third defendants of failures to adopt a multi-agency approach and/or to abide by a policy document "Working together in the delivery of services to adults and children." There were also allegations of a failure to act in accordance with a care coordination policy.

65. These allegations, if proved, disclosed the necessary proximity. The claimant was identified or identifiable. There were clear threats to harm her including a threat to kill her. There was communication in both directions between the second defendant and the third defendant. There was also a close link between the first defendant by whom the claimant was employed and the second defendant as the latter's CMHT incorporated employees of the first defendant.

66. He pointed out that the Childrens Social Care team in which the Claimant worked and the CMHT (of the second defendant) shared an office building. The two shared clerks and a fax machine. They were part of a multi-disciplinary working approach. That explained how the claimant saw a fax intended for the care coordinator (the community psychiatric nurse of the second defendant) to whom she took it and which expressed thoughts about harming another person. It was noteworthy that the true import of Burton's statements made on the 31st August were not included in the fax and the unequivocal threat to kill the claimant was not made until 18th October.

67. So far as the Article 2 claim is concerned Mr Kent submitted that there were similarities between the NHS Trusts and the police which meant that it would be at least properly arguable that the operational duty referred to by Jackson LJ fell equally upon them. On the facts there a real risk to the claimant was conceded and whether it was immediate was a question which could only be assessed when the evidence was heard.

68. **Discussion.** I am going to concentrate on what appears to me the main problem for the claim against these defendants as the law stands. In *Smith* at [63] Lord Hope prefaced his discussion of the liability of the police with these words: "*Normally the law does not attach responsibility to any individual for harm caused to another by the tortious acts of a third party*" and similar statements appear in *Mitchell*. So, Baroness Hale in that case at [76]: "*In essence, there must be some particular reason why X should be held to have assumed the responsibility for protecting Y from harm caused by the criminal acts of Z.*" And in making the same point Lord Rodger, at [56], quoted from the speech of Lord Goff in *Smith v Littlewoods Organisation Ltd* [1987] AC 241 at 272: "*Another statement of principle, which has been much quoted, is the observation of Lord Sumner in Weld-Blundell v Stephens [1920] AC 956 when he said at p 986: "in general ... even though A is in fault, he is not responsible for injury to C which B, a stranger to him, deliberately chooses to do." This dictum may be read as expressing the general idea that the voluntary acts of another, independent of the defender's fault, is regarded as a novus actus interveniens which, to use the old metaphor, "breaks the chain of causation". But it also expresses a general perception that we will not be held responsible in law for the deliberate wrongdoing of others. Of course, if a duty of care is imposed to guard against deliberate wrongdoing by others, it can hardly be said that the harmful effects of such wrongdoing are not caused by such breach of duty. We are therefore thrown back to the duty of care. But one thing is clear, and that is that liability and negligence for harm caused by the deliberate wrongdoing of others cannot be founded simply upon foreseeability that the pursuer will suffer loss or damage by reason of such wrongdoing. There is no such general principle. We have therefore to identify the circumstances in which such liability may be imposed.*"

69. In brief, the absence of liability for another's criminal wrongdoing was well established long before *Caparo*. But the rule was not absolute. It required some special reason if liability was to be imposed. The recent decisions in the House of Lords have emphasised assumption of responsibility as such a reason. In *Mitchell*, in the passage already quoted, Baroness Hale referred to an assumption of responsibility, as did Lord Brown at [83] where he spoke of the defendant assuming "specific responsibility" for the claimant's safety from the perpetrator. If there was no such responsibility undertaken the contention that the defendant was under a positive duty to warn the claimant and that liability for the claimant injury should follow because of the omission to do so, appeared "plainly unsustainable". Lord Hope said at [29]: "*I would also hold, as a general rule, that a duty to warn another person that he is at risk of loss, injury or damage as a result of the criminal act of a third party will only arise where the person who is said to be under that duty has by his words or conduct assumed responsibility for the safety of the person who is at risk.*" For completeness, Lord Hope also said that if there was no assumption of responsibility it would not be fair, just or reasonable to impose a duty of care.

70. Understandably, assumption of responsibility played little part in *Palmer*, which was argued at first instance in terms relevant to the tripartite *Caparo* test. It is difficult to see how it could ever have been suggested that the defendants in *Palmer* had specifically assumed responsibility for Rosie's safety when they simply did not know of her. It was otherwise in *Smith* and *Mitchell* where the issue turned on the duty to protect a specific individual from the activities of another specific individual. To my mind, the present case is closer to those two authorities given the assumption for present purposes that the employees of the NHS Trusts who dealt with Burton knew or ought to have known that his threats were directed against the claimant.

71. Although Mr Kent suggested that the scope of any duty of care was best left for argument at trial it does seem to me relevant to observe that in the extracts above Lord Brown formulates the scope of the duty as an assumption of responsibility for the claimants *safety*. In *Smith* and *Mitchell* that was appropriate in the sense that the information about the risk to the claimant was in the hands of those who on the facts might have been able to do something about it. But the same is not true here. The persons to whom Burton's disclosures were made could not themselves have done anything to ensure the claimant's safety. At most they could have passed the information on to someone else, with a view to it being passed on to the claimant. I cannot see a real prospect on the facts pleaded or otherwise referred to of the claimant establishing an assumption of responsibility by the defendants for her safety.

72. Even if the scope of the duty is expressed more narrowly, in terms of an assumption of responsibility *to pass the information on*, there are difficulties. I cannot see how it could realistically be said that Dr Gupta assumed responsibility to the claimant to pass the information on to her. There was no undertaking by him to transmit any threat to her or to anyone on her behalf, and although not essential, no reliance by her on his providing such information.

73. There is no allegation in the Particulars of Claim that anyone connected with either of the NHS Trusts gave such an undertaking. Mr Kent prayed in aid that the Sue Taylor report suggests some efforts were indeed made to pass information on but even so it seems to me that what is recorded falls far short of a demonstrating a real prospect that such persons were assuming responsibility to transmit the information to the claimant, let alone assuming responsibility for her safety.

74. In terms of the approach by way of *Caparo*, foreseeability is conceded and I can see how the claimant can argue for proximity between herself and, for instance, the employees of the second defendant, on the basis that they were involved in a team effort directed at Mr Burton's daughter's care, which might potentially put them at risk from him. But is there a reasonable prospect of establishing it would be fair, just and reasonable to impose a duty? In *Mitchell* their Lordships approached the test on the basis that it marched hand in hand with an assumption of responsibility, see eg Lord Rodger at [63] and Lord Hope at [29]. But Lord Hope in particular also addressed the practical implications of imposing the duty in terms which it seems to me have some relevance to the present facts at [27]: *"But if there was a duty to warn in this case, must it not follow that there is a duty to warn in every case where a social landlord has reason to suspect that his tenant may react to steps to address his antisocial behaviour by attacking the persons or property of anyone he suspects of informing against him? And if social landlords are under such a duty, must social workers and private landlords not be under the same duty to?"* He went on to point

out the various stages at which the duty to warn might arise and the implication that, a particular step could not be taken, until a warning of being given.

75. He referred to the time, trouble and expense that would be involved in meeting such claims consuming resources which would be more usefully devoted to the housing authority's primary functions; and the fact that defensive measures against the risk of legal proceedings would be likely to create a practice of giving warnings as a matter of routine. "*Many of them would be for no good purpose, while others would risk causing undue alarm or reveal the taking of steps that would be best kept confidential.*"

76. Likewise in the present case it is necessary to think through the consequences. If Dr Gupta was under a duty to pass on a warning why not any professional who hears a person with whom he or she has contact utter a threat against another? One's experience in the family jursidiction particularly is that such threats are a matter of common experience for social workers, medical professionals and lawyers involved with troubled families. It would add much complexity to their jobs if every time a family member uttered a threat against another family member there had to be consideration of the weight to be attached to it; an assessment set out on paper (essential for purposes of defending any subsequent claim) of the reasons for not passing it on if that was the decision; subsequent reference back to the decision if further words or conduct relevant to it emerged. Time and resources would be diverted from the decisions necessary for the welfare of any children. Medical professionals in particular would have to consider confidentiality and again record their thinking so that any decision made could be subsequently justified.

77. These considerations suggest to me Lord Hope's points about resources, defensive practices and confidentiality are also applicable in the present context. While Mr Kent stressed the fact-specific features of the present case which meant that it was not appropriate to generalise from it, the same might have been said in *Mitchell*.

78. The other point in relation to to the scope of the duty on Dr Gupta for which the claimant contends is in relation to the giving of home leave. It is said that the third defendant's servants or agents "allowed Graham Burton to leave Cherry Knowle hospital" knowing of the risk he presented to the claimant. However Dr Gupta was unable to stop Burton, an informal patient, from leaving the hospital at any time. He could attempt to dissuade him from leaving but a duty to attempt to persuade a patient to stay does appear to lack some clarity. It must surely come back to an allegation that Burton having left on home leave there was a duty to warn the claimant that he was at liberty.

79. Finally it does seem to me appropriate to bear in mind the position of the police. If there is no duty of care on the police to take action when even very grave threats come to their attention, as in *Smith*, how can it be fair, just and reasonable there should be a duty on social workers, doctors and other medical attendants as alleged here? The police are actually charged with the task of preventing crime. It would seem deeply illogical that if one of these other professionals received information which suggested a threat to an individual they would be under common law duty to pass it on for instance to a police officer, but the latter would not be under any like duty to act.

80. I do not consider that Article 2 can assist the claimant. The second defendant's employees knew only that Burton was trying to avoid the claimant: that does not bear the aspect of knowledge of an immediate risk to her. There is no allegation that Dr Gupta knew or should have known of the case conference two days later ; or of the claimant's likely presence; or of any plan by Burton to attend.

81. These points as it were on the facts are subsidiary to the main one which is that the health authority defendants did not come into a relationship with the claimant which engages article 2. The passages already quoted from the judgment of Jackson LJ in *Rabone* followed an extensive quotation from the speech of Lord Rodger in *Mitchell*. Lord Rodger made it clear that the art. 2 obligation arose where the state had assumed responsibility for an individual "whether by taking him into custody, by imprisoning him, detaining him under mental health legislation, or conscripting him into the armed forces." None of these situations arise on the present facts or could arise by analogy.

82. I take the view that the facts here are known and even if they are assumed in the claimant's favour, for the reasons given there is no realistic prospect her claim against them will succeed. In all these circumstances I would grant the defendants' application and strike out the claims against the second and third defendants.

83. This judgment will have to be handed down at a public hearing. On the basis that by then the parties will have received it in draft, had an opportunity to consider the form of any order and will not attend, it is usual to set the hearing for 30 minutes only. Should that be insufficient I would be grateful if the listing officer could be informed. Any applications for permission to appeal can at least in the first instance be made and dealt with on paper.