Neutral Citation Number: [2007] EWCA Civ 446

Case No: B4/2006/1281

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM FROM SWANSEA DISTRICT REGISTRY
THE HONOURABLE MR JUSTICE FIELD
5MT00758

Royal Courts of Justice
Strand, London, WC2A 2LL

10 December 2015

Before :

THE RIGHT HONOURABLE LORD JUSTICE AULD
THE RIGHT HONOURABLE LORD JUSTICE SCOTT BAKER
and
THE RIGHT HONOURABLE LORD JUSTICE RICHARDS

- -

Between :

STEPHANIE LAWRENCE	**Appellant**
- and -	
PEMBROKESHIRE COUNTY COUNCIL	**Respondent**

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

- -

Mr Robert Weir (instructed by **Hugh James**) for the **Appellant**
Mr Alastair Hammerton (instructed by **Dolmans**) for the **Respondent**

Hearing dates : 28th & 29th November 2006

- -

Judgment

Auld LJ:

Introduction

1. This is an appeal by the claimant, Mrs Stephanie Lawrence, from an order of Field J of 13th June 2006 striking out her claim in negligence against Pembrokeshire County Council ("the Council") and entering judgment for the Council on that claim.

2. The issue on the appeal is whether, in the light of the advent of Article 8 of the European Convention on Human Rights ("the ECHR") to our law on the coming into force in October 2000 of the Human Rights Act 1998 ("the HRA"), a local authority may owe a duty of care to a parent of a child when exercising, through social workers, its duties to protect children from their parents, in this instance by placing them on the Child Protection Register as being at risk. More generally, the issue is whether the common law should now recognise that those, whether public authorities or individuals employed by them, responsible for the protection of children from abuse by their parents or others owe a duty of care to parents when investigating and/or taking steps in protection of their children whom they consider to be at risk of parental abuse.

3. In *JD v East Berkshire Community Health NHS Trust & Ors* [2005] 2 AC 373 (*"East Berkshire")*, the House of Lords, in a number of appeals arising out of facts that pre-dated the coming into force of the HRA, by a majority, upheld the ruling of the Court of Appeal ([2004] QB 558), that the common law, notwithstanding the important interest of both parent and child in their family life reflected in Article 8, should not be developed to recognise such a duty. The common ratio of the Court of Appeal and the House of Lords was that it would be contrary to principle to recognise such a duty, for it would conflict with the more pressing duty to the child to protect him or her from the risk of parental abuse when suspected.

4. When the matter reached the Court of Appeal it consisted of three conjoined appeals from determinations of a judge on a preliminary issue of law in claims by parents of children whom professionals employed by public authorities had removed from the family home because of their suspicions - later discovered to be unfounded – of child abuse within the home. The House of Lords, Lord Bingham dissenting, upheld the Court of Appeal's ruling that lack of care and skill of doctors and social workers, leading to the removal of the children from their homes could not render them or their employers liable in negligence to the parents.

5. In this case Mrs Lawrence's claims against the Council were, under sections 6 and 7(1)(a) of the HRA, for breach of her Article 8 right to respect for her family life with her four children, alternatively in negligence for personal injury. Her claims arose out of conduct of social workers employed by the Council towards her and her children in placing the children's names on the Child Protection Register, conduct that she claimed, not only wrongly interfered with their family life, but also caused her psychiatric injury.

6. In the proceedings before Field J, Mrs Lawrence's pleaded complaints were the same under both heads of claim. Whilst the Council acknowledged that she had an arguable claim under Article 8, it relied on the one year limitation period imposed by section 7(5)(a) of the HRA, which had elapsed before she brought the proceedings.

Whether, pursuant to section 7(5)(b), it may be equitable to extend that period has yet to be decided. As to the claim in negligence, the Council contended, as it does on this appeal, that it was bound to fail because of the rulings in *East Berkshire* that the law does not recognise a duty of care by healthcare or local authorities to parents against whom they suspect, in good faith but wrongly, of child abuse.

7. As the issue for the Court is solely one of principle and the presumed facts for the purpose of determining it have been helpfully summarised by Field J in paragraphs 4 to 17 of his judgment, I need only record that the Lawrence family, including the father of Mrs Lawrence's children, came to the attention of the Council's Child Protection Team in about 1999. As a result of sporadic and inconclusive attention from various members of that team over the next three years, the Council, in April 2002, placed the children on the Child Protection Register as being at risk of physical and/or emotional harm from Mrs Lawrence and/or their father. The Council caused them to remain on the Register for about 14 months before it finally removed them from it in June 2003. In December 2004 the Ombudsman upheld a number of complaints of Mrs Lawrence of maladministration on the part of the Council, and recommended that it should pay £5,000 to her in recognition of the distress and damage to her reputation and of her time and trouble in pursuing her complaints. The Council paid her that sum, and it would fall to be set off against whatever she might be awarded by way of damages in these proceedings.

The judgment of Field J

8. Mrs Lawrence's case before Field J was the same as that for the parent/claimants in *East Berkshire*, save only that the HRA applied to the facts on which she relied. Mainly on the strength of that distinction, she renewed the forensic call for development of the common law to recognise the duty to parents rejected in *East Berkshire.* Field J declined to do so. He held, at paragraphs 43 to 48 of his judgment, that the reasoning of the majority of their Lordships that a duty of care is not owed by investigating professionals to parents suspected of child abuse was not affected by the advent of Article 8 to our law. In summary, he concluded that there remained the need - identified by their Lordships – for the law to avoid the creation of conflicting duties that could prejudice the interests of children. This is how he put it, at paragraphs 45 to 47:

> "... there is no good reason why the law as propounded by the majority in …[*East Berkshire*] should be modified because a claim by a parent honestly but mistakenly thought to be abusing his child may be available under the HRA. … The proposition that if it were held that an investigating profession owed duties to both the child and the suspected parent or parents there would be a real risk of the professional being deflected from deciding what is in the best interest of the child is an entirely straightforward one ….
>
> 46. … if it is against the public interest that professionals investigating child abuse should owe a duty of care to parents suspected of such abuse the common law should not pretend that the public interest is something different merely to keep pace with Convention jurisprudence. Indeed, in my view, the

> way forward is to apply Article 8(2) so as to give effect to the public interest identified in …*East Berkshire*. Thus, if the interest of children suspected of being victims of child abuse demands that the investigating professionals should owe no duty of care to parents suspected of being responsible for the abuse, the courts of England and Wales should hold that the removal of a child or the inclusion of its name on the 'at risk register' due to an honest but mistaken view that the abuse is the work of one or both of the parents is necessary in a democratic society. I can see nothing in the Strasbourg jurisprudence that compels a contrary approach.
>
> 47. Even if the Convention and the Strasbourg jurisprudence compel the court to give a remedy where for the reasons given in … [*East Berkshire*] the common law prefers non-justiciability, I think that the claimant should be restricted to a claim under the HRA. Justice does not require that he should also be able to sue in negligence. It is true that under section 7(5) of the HRA there is a limitation period of only one year but it is unlikely that a claimant would not quickly appreciate that his right to respect for family life has been interfered with and the period can be extended if in all the circumstances it is equitable to do so. It is also true that under section 8(3) damages can only be awarded if the court is satisfied that the award is necessary to afford just satisfaction, but pursuant to section 8(4), in deciding whether to award damages the court must take into account the relevant Strasbourg jurisprudence, and, as we have seen, the ECtHR awarded damages in *TP and KM* and *P, C and S* and *Venema*. Moreover, the ECtHR's approach to the award of damages for breach of Article 8 has been more generous than the common law's approach in that the ECtHR has awarded damages for the 'loss of an opportunity' and for distress, whereas in analogous cases the common law requires proof on the balance of probabilities that the child would not have been removed from the parents if the measures not taken had been taken and that claimant has suffered a recognised psychiatric injury."

The *East Berkshire* case in the Court of Appeal

9. The Court of Appeal in the *East Berkshire* case considered the same argument now advanced by Mrs Lawrence, save that it was invited to consider whether the enactment of the HRA, notwithstanding its non-application to the facts of that case, affected the common law principle of no duty of care to parents. It held that, in the light of recent Strasbourg jurisprudence on issues approximating to those governing our common law duty of care in this context, in particular *Z v United Kingdom* (2001) 34 EHRR 97 and *TP and KM v United Kingdom* (2001) 34 EHRR 42, although there had emerged a common law duty of care to children, there were cogent reasons of public policy why it should not extend to parents suspected of abusing them. Lord

Phillips of Worth Matravers MR, giving the judgment of the Court, justified this distinction in paragraphs 82 to 87 of the judgment in the following terms:

> "82… It is true that a claim under the Human Rights Act 1998 will only lie against public authorities and not against the individuals employed by them. But the reality is that claims in negligence are brought primarily to establish liability on the part of the local authorities and individuals are unlikely to be personally at risk. In so far as the risk of legal proceedings will inhibit individuals from boldly taking what they believe to be the right course of action in the delicate situation of a case where child abuse is suspected, we think that this factor will henceforth be present, whether the anticipated litigation is founded on the Human Rights Act 1998 or on the common law duty of care.
>
> 83. In so far as the position of a child is concerned, we have reached the firm conclusion that the decision in *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 cannot survive the Human Rights Act. Where child abuse is suspected the interests of the child are paramount: see section 1 of the Children Act 1989. Given the obligation of the local authority to respect a child's Convention rights, the recognition of a duty of care to the child on the part of those involved should not have a significantly adverse effect on the manner in which they perform their duties. In the context of suspected child abuse, breach of a duty of care in negligence will frequently also amount to a violation of article 3 or article 8. The difference, of course, is that those asserting that wrongful acts or omissions occurred before October 2000 will have no claim under the Human Rights Act 1998. This cannot, however, constitute a valid reason of policy for preserving a limitation of the common law duty of care which is not otherwise justified ….
>
> 84. It follows that it will no longer be legitimate to rule that, as a matter of law, no common law duty of care is owed to a child in relation to the investigation of suspected child abuse and initiation and pursuit of such proceedings. …
>
> 86. The position in relation to the parent is very different. Where the issue is whether a child should be removed from the parents, the best interests of the child may lead to the answer yes or no. The Strasbourg cases demonstrate that failure to remove a child from the parents can as readily give rise to a valid claim by the child as a decision to remove the child. The same is not true of the parents' position. It will always be in the parents' interests that the child should not be removed. Thus the child's interests are in potential conflict with the interests of the parents. In view of this, we consider that there are cogent reasons of public policy for concluding that, where child care decisions are being taken, no common law duty of

> care should be owed to the parents. Our reasoning in reaching this conclusion is supported by that of the Privy Council in *B v Attorney General of New Zealand* [2003] 4 All ER 833.
>
> 87. For the above reasons, where consideration is being given to whether the suspicion of child abuse justifies taking proceedings to remove a child from the parents, while a duty of care can be owed to the child, no common law duty of care is owed to the parents.

The *East Berkshire* case in the House of Lords

10. The House of Lords, Lord Bingham of Cornhill dissenting as I have said, upheld the decision of the Court of Appeal by focusing essentially on the same public policy point of the conflict of interests that the imposition of a duty of care to the parents in such a context would engender. Apart from some peripheral mention, their Lordships did not, however, deal specifically with the point considered by the Court of Appeal, namely the potential contribution of the HRA to the development of the common law in this area.

11. Lord Nicholls of Birkenhead, at paragraphs 85 and 86 of his speech, regarded as crucial the question of conflict of interest:

> "85. … 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.
>
> 86. This is not to suggest doctors or other health professional would be consciously swayed by this consideration. The professionals are surely made of sterner stuff. Doctors often owe duties to more than one person; … But the seriousness of child abuse as a social problem demands that health professionals, acting in good faith in what they believe are the best interests of the child, should not be subject to potentially conflicting duties when deciding whether a child may have been abused, or when deciding whether the doubts should be communicated to others, or when deciding what further investigatory or protective steps should be taken. The duty they owe to the child in making these decisions should not be clouded by imposing a conflicting duty in favour of parents or others suspected of having abused the child."

12. Lord Rodger of Earlsferry's reasoning, at paragraphs 110 to 114 of his speech is to like effect, in particular paragraph 110:

> "In considering whether it would be fair, just and reasonable to impose such a duty, a court has to have regard … to all the circumstances and, in particular, to the doctors' admitted duty to the children. The duty to the children is simply to exercise reasonable care and skill in diagnosing and treating any condition from which they may be suffering. In carrying out that duty the doctors have regard only to the interests of the children. Suppose, however, that they were also under a duty to the parents not to cause them psychiatric harm by concluding that they might have abused their child. Then, in deciding how to proceed, the doctors would always have to take account of the risk that they might harm the parents in this way. There would be not one but two sets of interests to be considered. Acting on, or persisting in, a suspicion of abuse might well be reasonable when only the child's interests were engaged, but unreasonable if the interests of the parents had also to be taken into account. Of its very nature, therefore, this kind of duty of care to the parents would cut across the duty of care to the children."

13. See also per Lord Brown of Eaton-under-Heywood, at paragraphs 129 and 138, and Lord Steyn, at paragraph 96, agreeing with Lord Rodger and Lord Brown.

14. I should not leave *East Berkshire* in the House of Lords without mention of Lord Bingham's dissenting speech and the reason for it. He would have allowed the appeal against the judge's dismissal of the claims as a matter of law on the preliminary issue before him, as he was later to explain in *Brooks v Commissioner of Police of the Metropolis* [2005] 1WLR 1495, at para 3, because of reluctance to dismiss without exploration of the facts of the case a claim raised in a contentious and developing area of the law where fuller inquiry might enable a claimant to establish a duty of care and its breach. Two key paragraphs in his speech bearing on the issue should be read together to illustrate the nature of his dissent, in particular his reluctance to exclude such a claim "as a general rule". The first, after detailed consideration of many domestic authorities and Strasbourg jurisprudence, including *TP* and *Venema*, is at paragraph 44:

> "It is in my opinion clear from all this authority that far from presuming a conflict between the interests of child and parent the law generally presumes that they are consonant with each other or at any rate, if not consonant, not so dissonant that healthcare professionals should proceed without fully informing and consulting the parents. There are of course occasions when emergency action must be taken without informing the parents, and when information must for a time be withheld. But there is no reason why the occasional need for healthcare professionals to act in this way should replace a general rule that they should have close regard to the interests of the parents as people with, in the ordinary way, the closest concern for the welfare of their children."

The second is his concluding observation, at paragraph 50:

> "… But the question does arise whether the law of tort should evolve, analogically and incrementally, so as to fashion appropriate remedies to contemporary problems or whether it should remain essentially static, making only such changes as are forced upon it, leaving difficult and, in human terms, very important problems to be swept up by the Convention. I prefer evolution."

Mrs Lawrence's case in summary

15. Mr Robert Weir, for Mrs Lawrence, submitted that the advent of Article 8 to our law since the facts that gave rise to the ruling of the House of Lords in *East Berkshire* calls for an evolutionary change in our law of negligence where, as in this context, it overlaps with a parent's right to respect for his or her family life. He maintained that the right of action for breach of Article 8 now provided by section 7(1)(a) of the HRA should not be the only new remedy for parents whose family life has wrongly been interfered with by social workers, since it has brought with it an imperative to develop the common law to like effect. He urged the Court to do that by imposing a duty of care on local authorities to parents when exercising, through social workers, their child protection powers and duties in respect of those parents' children. He advanced two main arguments in support of that submission:

    i) Now that Article 8 is part of our law, the Court should develop the common law by recognising a duty of care to parents by those publicly responsible for the safety and well-being of children when investigating and/or taking steps to avert the risk of parental abuse, having regard to:

        a) the recognition of Strasbourg jurisprudence that duties of care in cases of suspected child abuse may be owed both to children and to parents suspected of abusing them; and/or

        b) the need for compatibility of the common law with the Article 8 right, in particular as to the period of limitation and the available remedies;

    and, in any event

    ii) the need to re-visit the cogency of the reliance in the *East Berkshire* rulings on conflict of interests as a justification for denial of a duty of care to parents, given that such conflict does not necessarily engender a conflict of duty or breach of it on the part of a local authority or its social workers.

16. In short, Mr Weir urged the Court to take a "small incremental step" further than that taken by it and the House of Lords in the *East Berkshire* case, so as to give "full effect to Article 8" in serving the interest of parents in family life as much as that of the child.

17. As a subsidiary argument, Mr Weir also sought to distinguish this case on its facts from *East Berkshire* in that the putative duty is on a local authority rather than a health authority and concerns social workers rather than, as he maintained, doctors or other healthcare professionals as in that case. He maintained that the liability of doctors and healthcare professionals to parents raises different considerations from

those pertaining to the liability of social workers. But despite questions from the Court to explain the difference, he never suggested a reason for the distinction other than one of proximity to the parent in that, when placing a child on an "at risk" register or on taking steps to remove a child from his or her parent, the doctor's or the healthcare professional's role in interfering with family life is indirect, whereas the social worker's involvement in those respects is direct. In the event, one of the cases in *East Berkshire* did concern a social worker as well as a doctor, and none of their Lordships distinguished between them, the ratio of the majority being clearly directed to all such persons engaged in child protection.

The Council's case in summary

18. Mr Alastair Hammerton, for the Council, maintained that the principles of law as set out by this Court and the majority in the House of Lords in *East Berkshire* preclude a duty of care in this context to parents, and that the applicability of the HRA to the facts of this case does not undermine those principles or the public policy considerations underlying them. He submitted that:

    i) in applying the *Caparo v Dickman* tests of what is "fair, just and reasonable" and of "proximity", a balance has to be struck between the detriment to the public interest likely to be caused by holding a certain class of defendants liable and the likely harm to a claimant if such liability is precluded; see *Barrett v Enfield Borough Council* [2001] 2 AC 550;

    ii) in this context, the strong imperative for the law to protect children from abuse, including abuse by their parents, is a weighty public policy reason against the development of a duty of care by those publicly responsible for their well-being to parents whom, rightly or wrongly, they suspect or fear may abuse their children;

    iii) the reasoning of the Court of Appeal and of the majority of the House of Lords in *East Berkshire* to that effect - reasoning which, he submitted, is unaffected by the advent of Human Rights to our law – namely, that the very existence of a conflict of interests is, in this context, a bar to the imposition of such a duty, regardless of whether in any individual case, it would or might inhibit local authorities and their social workers from properly fulfilling their duty to protect children whom they suspected of being at risk from their parents; and

    iv) the minimal prejudice to a parent in excluding a common law claim, given the availability under the HRA of an alternative or comparable remedy - wider in one respect in that the compensation recoverable in the court's discretion is not limited, as it is at common law, to damages for personal injury, and narrower in the shorter time limit of one year for the bringing of the proceedings, but subject to the wide power in section 7(5)(b) to extend where it is equitable to do so.

19. In short, Mr Hammerton submitted that the very existence of a conflict of interests is a good reason to deny a duty of care, and that, where there are conflicting interests but one is paramount, the common law ordinarily imposes only a duty to the person whose interests are paramount - in this context, the child.

Discussion and conclusions

Preliminaries

20. I should start this discussion, as Mr Hammerton did his submissions, with two general, but important points.

21. First, it was for Mrs Lawrence to satisfy the Court that the Council owed her a common law duty, not for the Council to justify the absence of such a duty, or, on a case by case basis, that it was not owed; see per Lord Hoffmann in *Stovin v Wise* [1996] AC 923, at 994D, and the reasoning of Lord Rodger, in particular, in *East Berkshire*.

22. Secondly, there is logically, and from a public policy point of view, no difference for this purpose between doctors and social workers - and the majority of the House of Lords in *East Berkshire* made no such distinction. It is immaterial that social workers, not doctors, place children on the Child Protection Register or take them into care, since child protection work requires social service departments to work closely with the police, doctors, community health workers, the education service and others. In this instance, the decision to place the children on the Register was taken at a Child Protection Conference in which representatives of various agencies participated.

23. Actions taken by social workers may not always have the direct quality, in the sense of face to face contact with the parent and/or the child in the family context; it may involve enquiries or decisions made in municipal offices or in committee rooms by a number of persons, some with no personal contact with the family. But more importantly, given the factual matrix in which the issue for the Court arises, I can see no sensible or separate role for "proximity" as a feature or variation of the *Caparo v Dickman* question of what is fair, just and reasonable, when added to the requirement of reasonable foreseeability in the circumstances. It does not seem to me to matter as a matter of common law whether the conduct said to have caused harm to the parent was direct, in the sense of face to face, or otherwise.

1. The effect of the advent of Article 8 to our law

24. Article 8 provides:

> "(1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

25. As I have indicated, the Court in *East Berkshire* had express regard to Article 8, notwithstanding its non-application to the facts of that case, when considering the

balance of interests between children and their parents in cases of this sort. Lord Phillips stated, at paragraph 55 of the Court's judgment:

> "The facts that have given rise to the cases with which we are concerned pre-date October 2000, when the Human Rights Act 1998 came into force. It follows that no claim can be brought under the Act. It is nonetheless necessary to consider whether the introduction of the Act has affected the common law principles of the law of negligence. As that law develops, all who have outstanding claims are in a position to profit from the development and in this area of the law, where children are victims, claims may be brought many years after the events to which they relate."

26. Lord Phillips then reviewed a number of Strasbourg authorities, including *Z v United Kingdom*, *TP & KM v United Kingdom* and *E v United Kingdom* (2002) 36 EHRR 519, all concerning claims under Articles 3 and/or 8 in respect of the response or lack of response of local authorities to suspected child abuse within the family. In relation to the issue of justification under Article 8(2), Lord Phillips noted at paragraphs 66 and 71, its similarity to that of whether there has been a breach of a duty of care. At paragraph 79 he noted:

> "Section 2(1) of the Human Rights Act requires the court to have regard to the jurisprudence of the Strasbourg court where relevant to proceedings under the Act. Thus, any English court, when dealing with a claim under the Act in relation to suspected child abuse, must take into account the decisions to which we have just referred …"

And he asked at the beginning of paragraph 82:

> "Can there, in these circumstances, be any justification for preserving a rule that no duty of care is owed in negligence because it is not fair, just and reasonable to impose such a duty?"

His answer to that question in the remainder of that paragraph, and (as I have shown, in paragraph 9 of this judgment) in paragraphs 82 to 87, was a resounding "No".

27. The majority in the House of Lords in *East Berkshire* did not spend much time on the implications of Article 8 and Strasbourg jurisprudence for the common law in this context. However, the issue was argued before them, and it is implicit in their reasoning that, in cases of child abuse within the family, it had contributed to the development of a duty in common law to the child, but not to the parent. Thus, Lord Nicholls said at the start of paragraph 85 of his speech, the remainder of which I have already set in paragraph 11 above:

> "In my view, the Court of Appeal reached the right conclusion on the issue arising in the present cases. Ultimately the factor which persuades me that, at common law, interference with family life does not justify according a suspected parent a

> higher level of protection than other suspected perpetrators is the factor conveniently labelled 'conflict of interest'. …"

28. Lord Rodger, after a comprehensive review of English, Scottish and other common law authorities, concluded, at paragraph 115 of his speech, that they constituted:

> "powerful support for the Court of Appeal's conclusion … that there are cogent reasons of public policy for holding that no common law duty of care should be owed to the parents."

However, and somewhat surprisingly in the light of that conclusion, he added at paragraph 118:

> "... since the relevant events occurred before the Human Rights Act 1998 came into force, the appellants could not seek damages for any possible breach of their rights under article 8(1). Especially in view of the decisions in *Wainwright v Home Office* [2004] 2 AC 406, 423, para 34, and *R (Greenfield) v Secretary of State for the Home Department* [2005] 1 WLR 673, I should wish to reserve my opinion as to whether, in such a case, it would be appropriate to modify the common law of negligence rather than to found any action on the provisions, including section 8, of the Human Rights Act 1998: *Fairlie v Perth and Kinross Healthcare NHS Trust* 2004 SLT 1200, 1209L, para 36, per Lord Kingarth."

Reference to the authorities cited by Lord Rodger suggests a general caution as to whether Article 8 might leave gaps that the common law should fill, but, given his express reliance on the conflict of interest point as denying any such duty to suspected parents, it does not appear to have been one of them.

29. Lords Steyn and Brown did not refer to Article 8, but expressed agreement with the opinions of Lord Nicholls and Rodger and thus also with the judgment of the Court of Appeal.

1(a) correlation of Article 8 duties to the child with those to the parent

30. Mr Weir's primary submission, as I have indicated, was that, in the light of the advent of Article 8 to our law, the Court should now develop the common law by recognising a duty of care to parents by those publicly responsible for the safety and well-being of children when investigating and/or taking steps to avert the risk of parental abuse. He relied, in particular, on the effect given to Article 8 by the Strasbourg Court in *TP* and *Venema*. In *TP* a mother's and child's Article 8 claims succeeded where the mother's boyfriend had wrongly been suspected of abusing her child, and in *Venema,* a parents' Article 8 claim succeeded where the mother had been wrongly suspected of abusing her child. He suggested that the *TP* case established as a general proposition that a local authority owed a duty under Article 8 to both parent and child where a parent is wrongly suspected of abusing the child and that the rulings of the Court of Appeal and the majority in the House of Lords in the *East Berkshire* case against any such duty were too narrowly based, namely on the supposed prejudice to the child's safety that such a duty would engender as a result of the potential conflict it would introduce between the suspected parent's interest and that of the child. He added that, although the Court of Appeal clearly took into account Article 8 in reaching its decision, it did not regard it as "determinative", and that the House of Lords approached the matter as

an ordinary question of common law untrammelled by Article 8 or Strasbourg jurisprudence.

31. Mr Weir submitted that this Court *must now* take into account the impact of Article 8 so as to give less weight than did the Court of Appeal or the majority of the House of Lords in *East Berkshire* to the possible inhibiting effect of a conflict of interests on the discharge by doctors and/or social workers on taking timely and robust action in protection of a child whom they consider is at risk of abuse by his or her parents. If, as the Court of Appeal in *East Berkshire* acknowledged, such a conflict of interest, where it exists, does not preclude the engagement of an Article 8 claim by a parent, why, he asked, should it preclude claim by him or her at common law? Effectively, his argument was that the pass has been sold by section 7 of the HRA in giving the parent a remedy for interference with his or her family life. Such new right, he submitted, "in one fell blow" removed all the force of the conflict of interest point and requires "consignment to history" of the *East Berkshire* decision.

32. In my view, that argument overlooks an important difference between the Article 8 right to respect for family life and a putative right of a claimant at common law to a duty of care. Article 8 is not concerned with the establishment of any such duty, but of a threshold of interference by a public authority with family life. It is not based on a breach of duty of care by such authority, which, once surmounted, is for the authority to justify. It is the justification, not the infringement, with which the Strasbourg Court was primarily concerned in *TP* and *Venema.* In its treatment of the latter in *TP*, at paragraphs 60 – 83, and in *Venema*, at paragraphs 88 – 99, the Court, in its respective assessments of the facts, indicated a plain acceptance in principle that interference with family life in this context may be regarded as being in pursuance of a legitimate aim, proportionate and necessary in a democratic society, though, in each case, in one important aspect, it held on the facts that the interference was not justified. In *TP* the Court - in reasoning that it replicated in *Venema* - clearly contemplated that, subject to certain due process constraints and restrictions on access and the like, the interests of safety and welfare of children could and often should prevail over that of their and/or their parents' interest in their family life when the latter were suspected of abusing them. Thus, in *TP,* the Court said, at paragraphs 70 and 71:

> "70. In determining whether the impugned measures were 'necessary in a democratic society', the Court will consider whether, in the light of the case as a whole, the reasons adduced to justify them were relevant and sufficient for the purposes of paragraph 2 of Article 8 of the Convention. Undoubtedly, consideration of what lies in the best interest of the child is of crucial importance in every case of this kind. Moreover, it must be borne in mind that the national authorities have the benefit of direct contact with all the persons concerned. It follows from these considerations that the Court's task is not to substitute itself for the domestic authorities in the exercise of their responsibilities regarding custody and access issues, but rather to review, in the light of the Convention, the decisions taken by those authorities in the exercise of their power of appreciation.

> 71 The margin of appreciation to be accorded to the competent national authorities will vary in accordance with the nature of the issues and the importance of the interests at stake. Thus, the Court recognises that the authorities enjoy a wide margin of appreciation, in particular when assessing the necessity of taking a child into care. However, a stricter scrutiny is called for in respect of any further limitations, such as restrictions placed by those authorities on parental rights of access, and of any legal safeguards designed to secure an effective protection of the right of parents and children to respect for their family life. Such further limitations entail the danger that the family relations between the parents and a young child would be effectively curtailed."

33. If a domestic court or the Strasbourg Court is called upon to consider the position as it was at the stage when suspicions against parents remained unresolved, each would clearly have to consider within its own legal system whether the strong interest in protecting children against the risk of parental abuse should prevail over the interests of all the family in preserving family life. In both systems there is necessarily a similar balancing of conflicting interests so as to require the cession of one to the other, as the Court of Appeal recognised in *East Berkshire*, albeit that under the Convention, the onus is on the public authority concerned to justify its interference - the nearest it gets to the notion of breach, but not a breach of duty as known to the common law.

1(b) need for compatibility of the common law with Article 8?

34. Mr Weir's second submission on the impact of Article 8, which overlapped heavily with his first, was that it is necessary to develop the common law in the manner that he suggested, because a parent now has a remedy under section 7 of the HRA for interference with his or her family life by doctors and social workers pursuing what turn out later to be unfounded suspicions of child abuse. He characterised section 7 of the HRA as a "substantial gap-filler", but not a "complete gap filler" for this purpose, and suggested the gap could be and should be filled by modifying the common law so as to accommodate the Article 8 right, thereby turning section 7(1)(a) of the HRA into a "residual" remedy in this context insofar as it involved a claim for damages. He maintained that Parliament, in enacting the HRA, clearly contemplated a parallel remedy at common law, referring the Court in particular to its requirements on our courts: section 6 – not to act incompatibly with Convention rights; and section 2(1) – to take into account ECHR jurisprudence; and to section 11 – enabling the development of common law so as to reflect Convention principles. In those provisions, he submitted, Parliament made clear its intention to bring ECHR rights home without, at the same time, stunting the development, where appropriate, of our common law in the light of such rights.

35. In making that submission, Mr Weir acknowledged and relied on the possibility for a public authority to rely by way of justification under Article 8(2) on conflict of interests on a case by case basis depending on the circumstances. Such a mechanism, he submitted would be equally apt for consideration of breach of a common law duty of care to parents and would be more appropriate to the interests of both parents and

children in their family life together than the present blanket exclusion of all duty of care to the former in such cases.

36. However, there are two difficulties in that approach, to both of which I have already referred.

37. First, it may well be too late for the protection of children from the *risk* of abuse by their parents to have a system of law that leaves the matter to be resolved by a court at the stage and in the form of an Article 8(2) type inquiry, as suggested by Mr Weir. The whole point of the *East Berkshire* solution is to forestall by robust and timely intervention, if at all possible, the greater possible harm when a local authority suspects parental abuse of children in the context of their family life together.

38. Secondly, under Article 8(2) it is for the public body interfering with family life to justify its conduct, which, translated into a common law duty of care, would effectively require the local authority and/or social workers concerned to prove, by reference to their concern for the welfare of the children, that they were not in such breach of duty. These are, as Field J commented, mechanisms not available in the common law duty of negligence, and contra- indicate its development in the manner proposed by Mr Weir. Put more, robustly, they would be a plain distortion of the common law action in negligence.

39. As it is, for the reasons given in *East Berkshire*, the common law, as it stands, is compatible with Article 8(2) in its treatment of parents. As Richards LJ observed in the course of Mr Weir's submissions, neither the Strasbourg jurisprudence nor responsiveness of the common law to the needs of the time requires the Court to secure harmonisation of the two systems.

40. Taking Mr Weir's submissions on the Article 8 point over-all, the only basis that he could suggest for his invitation to the Court to re-visit the issue is that, subject to the outstanding limitation point, it is engaged on the facts of this case, whereas in *East Berkshire*, although the judgments were given after, the facts under consideration occurred before, the HRA came into force. Given the clear attention of the Court of Appeal to the potential implications of Article 8 to issues of the sort being considered by it, and the affirmation of its reasoning by the majority in the House Lords - who, if they had foreseen any difficulties of the sort now suggested by Mr Weir, would surely have said so - I can see no basis upon which this Court can now properly take a different course.

41. Thus, in my view, the advent of Article 8 to our domestic law, bringing with it a discrete right to children and parents of respect for their family life, does not undermine or weaken as a matter of public policy the primacy of the need to protect children from abuse, or the risk of abuse, from, among others, their parents. Nor, when those interests are or may be in conflict, does Article 8 so enhance the status of family life as, in the balancing exercise involved, would require the development of the common law by the introduction of a duty of care to parents suspected of abusing their children, a duty precluded by that public policy. In that respect the cogency of the reasoning of the Court of Appeal and of the majority of the House of Lords in *East Berkshire* remains untouched and is compatible with the reasoning of the Strasbourg Court in *TP* and *Venema*.

42. As to Lord Rodger's reservation of opinion in paragraph 118 of his speech in *East Berkshire* (see paragragph 28 above) about possible future impact of the HRA in this area of the law, it is difficult in the light of his firmly expressed views on the conflict of interest point, to see in what respect it could logically affect the issue in hand. Given that Article 8(2) clearly precludes an Article 8(1) claim where to allow it would conflict with powerful public and/or private interests - which must include the protection of children from parental abuse - there is, in my view, no logical basis to contemplate, even as a possibility, that its advent to our domestic law could take effect so as to remove, by putting to one side the implications of the conflict of interests point, the protection that it affords to children at common law. It is certainly not, in my view, an indicator of a possible need in the future to distort the common law in that respect.

2. ***The cogency of the conflict of interests/inhibition point, regardless of the impact of Article 8***

43. There are clearly potentially conflicting interests at play in suspected parental abuse cases, as identified by the Court of Appeal and the majority in *East Berkshire*, each of high social importance, as Lord Nicholls put it, at paragraph 71 of his speech:

> "… In the ordinary course the interests of parent and child are congruent. This is not so where a parent wilfully harms his child. Then the parent is knowingly acting directly contrary to his parental responsibilities and to the best interests of his child. So the liability of doctors and social workers in these cases calls into consideration two countervailing interests, each of high social importance: the need to safeguard children from abuse by their own parents, and the need to protect parents from unnecessary interference with their family life."

It was the presence of such potential for conflict in suspected parental child abuse cases that led Lord Nicholls and the majority to conclude that, where it arises, the risk of harm and the gravity of that harm to children are such that doctors and social workers should not be hampered in the exercise of that duty by a sense of caution flowing from the imposition of a countervailing duty of care to parents. And, as Mr Hammerton observed in his submissions, whether their suspicions are later borne out is irrelevant to the question whether such a duty of care should exist at the commencement of and during a child protection investigation.

44. Mr Weir's second submission was, however, that, regardless of the impact or otherwise of Article 8 on the issue, to base the denial of a duty of care to parents suspected of abusing their children on a potential conflict of interests with those of their children is not sound, whether as a matter of Strasbourg or domestic law. He acknowledged the potentially countervailing interests, as Lord Nicholls described them in *East Berkshire*. However, he maintained that Lord Nicholls' analysis is only accurate as far as it goes, because since that decision our law recognises that children can also have the same potentially conflicting interests, in respect of both of which they can sue. In the case of parents, he submitted, the position is no different; local authorities should be expected to take into account and to respond professionally to their interests as well as those of their children whether or not they are in conflict. Thus, he submitted, the fact that there are conflicting interests at stake, bringing with

them conflicting pressures on the doctor or social worker is not *in itself* a good reason to deny a duty of care to the parent.

45. Mr Weir added that, in any event, not too much weight should be given to the inhibition argument in the case of social workers, since, as officers of local authorities, they are protected from personal liability by section 39 of the Local Government (Miscellaneous Provisions) Act 1976. He referred also in this connection to statutory duties of social workers to children in Part III of the Children Act 1989, which is headed "Local Authority Support For Children and Families", and, in particular section 17(1) which requires local authorities:

> "(a) to safeguard and promote the welfare of children within their area who are in need; and
>
> (b) *so far as is consistent with that duty*, to promote the upbringing of such children by their families …" (my italics)

46. The words that I have italicised in section 17(1)(b) reflect the critical and necessary qualification to any duty to support family life - whether derived from Article 8 or domestic provision - where to purport to do so by keeping the family together might not be in the interests of the child, as in the case of suspected parental abuse of children. It follows that that provision and the ministerial guidance - "Working Together to Safeguard Children (1999)" – to work with parents, to which Mr Weir also drew attention, do not take his argument on the conflict point any further, or support his suggestion that on account of social workers' closer involvement with parents, they should, in this respect, be treated differently from doctors.

47. Looked at over-all and in the context of the parent's as well as the child's entitlement to respect for their family life, any interference with it, Mr Weir argued, requires cogent justification. He submitted that, only where it transpires that the parent had been abusing the child, should the law preclude a duty of care to the parent, whose own interest "in the final account" must or should be that the child's safety and welfare should prevail.

48. Such an argument, which focuses attention on breach of duty to a parent rather than on whether there is such duty, has influential jurisprudential and academic support. It is arguably of a piece with the fact-specific approach of the House of Lords in *Barrett* and *Phelps v London Borough of Hillingdon* [2001] 2 AC 619. It has been pressed by distinguished academics and welcomed by Lord Bingham in his dissenting speech in *East Berkshire*, at paragraph 49, suggesting readier acceptance of either a higher duty of care than *Bolam* or a more robust threshold for breach:

> "… If, as some respected academic authorities suggested, *Barrett v Enfield London Borough Council* [2001] 2 AC 550 shifted the emphasis of the English courts from consideration of a duty to consideration of breach (see Craig and Fairgrieve, '*Barrett, Negligence and Discretionary Powers* [1999] PL 626, Fairgrieve, *State Liability in Tort* (2003), p 84, para 2.1.27), I would for my part regard that shift as welcome, since the concept of duty has proved itself a somewhat blunt instrument for dividing claims which ought reasonably to lead to recovery

> from claims which ought not. But I should make it plain that if breach rather than duty were to be the touchstone of recovery, no breach could be proved without showing a very clear departure from ordinary standards of skill and care. … "

49. More recently, Professor Stephen Bailey has repeated the call for more attention to breach:[1]

> "It is submitted that the core reasoning of the majority is ultimately unsatisfactory in that it seeks to justify a general immunity by reference to a need to prevent unconscious effects on the health professional, irrespective of the nature of the carelessness alleged on the facts of the particular case. … It is remarkable that a duty that is entirely reasonable as to its formal content … should be denied because of the risk that imposing it would cause the professional to act, unprofessionally, other than in accordance with accepted practice … it would have been helpful for the argument concerning the role of breach to have received fuller attention. It is undeniable that private law breach principles can be applied flexibly and sensitively according to the circumstances of the particular case. That should be taken into account when determining whether a duty of care should be owed, although its relevance will vary from case to case …"

50. I have to say that the above remarks of Lord Bingham and the views of the academics on this aspect gave me pause. However and with respect, it seems to me that there is a danger in focusing on breach rather than the existence of duty, in addition to the logical difficulty of first identifying, on a case by case basis, the duty said to have been breached. The danger, as I have indicated in paragraph 37 of this judgment, is that it puts to one side the mischief at which the present exclusion of a general duty of care to parents is based, namely the potential conflict of interests between child and parents creating the imperative, whilst the truth is yet unknown, for social workers to do all that they reasonably can and should to secure the welfare and safety of the child - the imperative so clearly and powerfully identified in *East Berkshire*.

51. As Mr Hammerton noted in his submissions, the common law has generally sought to avoid the imposition of duties potentially in conflict with each other. He drew in this context, not only on the reasoning of this Court and the majority of the House of Lords in *East Berkshire,* but also of other authorities, including that of the Australian High Court in *Sullivan v Moody* (2001) 207 CLR 562, at paragraph 60, to like effect:

> "The circumstance that a defendant owes a duty of care to a third party, or is subject to statutory obligations which constrain the manner in which powers or discretions may be exercised, does not of itself rule out the possibility that a duty of care is

[1] *Public authority liability in negligence: the continued search for coherence,* Legal Studies 26 (2006) 155 at 181; see also: Iain Steele, *Public Law Liability – A Common Solution?* [2005] CLJ 543; Markesinis and Fedtke, *Authority or Reason? – The Economic Consequences of Liability for Breach of Statutory Duty in a Comparative Perspective* (2007) 18 EBLR 5, 35- 36.

> owed to a plaintiff. People may be subject to a number of duties, at least provided they are not irreconcilable. A medical practitioner who examines, and reports upon the condition of, an individual, might owe a duty of care to more than one person. But if a suggested duty of care would give rise to inconsistent obligations that would ordinarily be a reason for denying that the duty exists. Similarly, when public authorities, or their officers, are charged with the responsibility of conducting investigations, or exercising powers, in the public interest, or in the interests of a specified class of persons, the law would not ordinarily subject them to a duty to have regard to the interest of another class of persons where that would impose upon them conflicting claims or obligations."

52. The fact that there is such a conflict in this context does not mean that social workers cannot have regard to both conflicting interests and yet behave professionally. But it does not follow that, in acting professionally they owe a duty of care to each interest, as the House of Lords acknowledged in *Brooks v Commissioner of Police of the Metropolis*, which they handed down on the same day as *East Berkshire*. In that case the House held that, in general, the police, when investigating suspected crimes, had no duty of care to victims or witnesses in respect of their activities. It is notable that Lord Bingham, whilst acknowledging reservations that he had expressed in his dissenting speech in the *East Berkshire* case (see paragraphs 14 and 48 above), felt able on the fully investigated facts of the case, to hold that the duties of care alleged were not:

> "duties which could be imposed on police officers without potentially undermining the officers' performance of their functions, effective performance of which serves an important public interest. That is, in my opinion, a conclusive argument in the Commissioner's favour. …"

Lords Steyn and Rodger made the same point, Lord Steyn, at paragraph 30 of his speech in the following terms:

> "… the core principle of *Hill's* case has remained unchallenged in our domestic jurisprudence and in European jurisprudence for many years. … It is, of course, desirable that police officers should treat victims and witnesses properly and with respect: … But to convert that ethical value into general legal duties of care on the police towards victims and witnesses would be going too far. The prime function of the police is the preservation of the Queen's peace. The police must concentrate on preventing the commission of crime; protecting life and property; and apprehending criminals and preserving evidence: …. A retreat from the principle in *Hill's* case would have detrimental effects for law enforcement. Whilst focusing on investigating crime, and the arrest of suspects, police officers would in practice be required to ensure that in every contact with a potential witness or a potential victim time and resources were deployed to avoid the risk of causing harm or

> offence. Such legal duties would tend to inhibit a robust approach in assessing a person as a possible suspect, witness or victim. By placing general duties of care on the police to victims and witnesses the police's ability to perform their public functions in the interests of the community, fearlessly and with despatch, would be impeded. It would, as was recognised in *Hill's* case, be bound to lead to an unduly defensive approach in combating crime."

53. It is difficult, in cases of suspected abuse of children, where the police may be among the various agencies involved in investigation and prevention of harm to the children concerned, to see why any different rule of law should apply as between them and social workers, or, as I have already said, between doctors and other healthcare workers on the one hand and social workers on the other. They may all, in their different roles, be publicly responsible for taking action in protection of the children. Mr Weir, despite a number of invitations from the Court to justify any valid distinction between them for the purpose, was unable to do so.

54. In the case of parents who are suspected of abusing their children, it is necessary to look at their interest in family life with the children through the eyes of the policeman, doctor or social worker concerned as to the possible need, in the interest of the children, to remove them from the family setting. The relevant interest of the parent for this purpose is that of a parent who may or may not prove at the end of the day to be a child abuser, but who, if a child abuser, would at the time of the decision have a very real interest contrary to that of the child in concealing and continuing the abuse. That is the dilemma for the doctors and social workers when evaluating risk and how they should respond to it in such cases – the dilemma that clearly can give rise to conflicting pressures of which the Court of Appeal and the majority spoke in *East Berkshire.* In *Sullivan v Moody*, the High Court of Australia, with respect, put the point well at paragraph 62 of its judgment:

> "The statutory scheme that formed the background to the activities of the present respondents was, relevantly, a scheme for the protection of children. It required the respondent to treat the interests of the children as paramount. Their professional or statutory responsibilities involved investigating and reporting upon, allegations that the children had suffered, and were under threat of, serious harm. It would be inconsistent with the proper and effective discharge of those responsibilities that they should be subjected to a legal duty, breach of which would sound in damages, to take care to protect persons who were suspected of being the sources of that harm. …"

See also the same approach of the Privy Council, upholding the ruling of the Court of Appeal of New Zealand in *B & Ors v Attorney General of New Zealand* [2003] 4 All ER 833, per Lord Nicholls, giving the opinion of the Board, at para 30, that, given the inconsistency of the claimed duty to the parent, the alleged perpetrator, with that owed to his children, his alleged victims, there could be no such duty owed to the parent.

55. In summary, my view, like that of Field J, is that Mr Weir's proposed "small incremental step" in development of the common law would be a step too far. The public interest in effective and fair investigation and prevention of criminal behaviour has fashioned the common law to protect those suspected of it from malice or bad faith, but not from a well-intentioned but negligent mistake, as Lord Nicholls emphatically explained in *East Berkshire*, at paras 74, 77 and 78. The basis for that distinction is the need to provide protection to those who have a duty to enforce the law in good faith from the imposition of a duty in negligence that could or might tend to inhibit them in the effective fulfilment of that duty. The development proposed would fundamentally distort the law of negligence in this area, putting at risk the protection for children which it provides in its present form. Article 8, with its wholly different legal construct of engaging liability without reference to a duty of care, complements it in facilitating a similar protection through mechanism for justification. The provision of a discrete Convention remedy through the medium of the HRA, does not, on that account, necessitate change of the common law in the manner proposed. This Court and the House of Lords have recently clarified in *East Berkshire* the relevant principles of the common law, including the effect or lack of effect in relation to this issue of the impact of the HRA, concluding that they preclude the existence of such a duty to the parent. That reasoning, with respect, still stands, and is not, as Mr Weir would have it, "consigned to history".

56. Accordingly, I would dismiss the appeal.

Lord Justice Scott Baker:

57. I agree that this appeal should be dismissed. The House of Lords in the *East Berkshire* case examined in depth the conflicting interests of, on the one hand safeguarding a child from parental abuse and, on the other, the protection to be given to a parent from unnecessary interference in his or her family life. Their Lordships concluded by a majority of 4 to 1 that neither public authorities nor individuals employed by them owed a duty of care to parents when investigating or taking steps for the protection of their children whom they honestly believed to be at risk of parental abuse.

58. The *East Berkshire* case was decided very recently and the only new feature about the present case is that the Human Rights Act 1998 applies to the facts upon which Mrs Lawrence relies, whereas the facts of the cases considered by the House of Lords in *East Berkshire* pre-dated the coming into force of that Act. To my mind however that provides no good reason for revisiting a question so comprehensively examined by their Lordships in April 2005. As Lord Nicholls of Birkenhead put it at para 85, ultimately the factor that persuaded him that at common law interference with family life does not justify according a suspected parent a higher level of protection than other suspected perpetrators is the factor commonly labelled "conflict of interest". Nothing in reality has changed. The common law is as set out by the majority of their Lordships in the *East Berkshire* case. Mrs Lawrence was not owed the duty of care on which she seeks to rely.

Lord Justice Richards:

59. I agree that the appeal should be dismissed for the reasons given by my Lords.