



Neutral Citation Number: **[2024] EWHC 2265 (KB)**

Case No: G90MA123

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

The Civil Justice Centre
Manchester

Date: 2 September 2024

Before :

His Honour Judge Bird sitting as a Judge of this Court

Between :

- (1) MARK ANTHONY SAMMUT
(ON HIS OWN BEHALF AND AS
ADMINISTRATOR
OF THE ESTATE OF PAUL SAMMUT
(Deceased))
(2) PATRICIA SAMMUT
(3) CLAIRE SAMMUT
(4) DILLAN SAMMUT

Claimants

- and -

- (1) NEXT STEPS MENTAL HEALTHCARE
LIMITED
(formerly K. BOND HEALTHCARE LIMITED
t/a NEXT STEPS)
(2) GREATER MANCHESTER MENTAL
HEALTH
NHS FOUNDATION TRUST

Defendants

Professor Conor Gearty K.C. and Peter Edwards (instructed by R. James Hutcheon
Solicitors) for the Claimants

Richard Borrett (instructed by Terry Zindi, Keoghs LLP) for the First Defendant
Mark Bradley (Hill Dickinson LLP) for the Second Defendant.

Hearing date: 16 August 2024

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This judgment was handed down remotely at 10.30am on 2 September 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

His Honour Judge Bird:INTRODUCTION

1. Paul Sammut was born on the 18th of February 1983. He suffered from chronic, enduring and treatment resistant schizophrenia. For large parts of his adult life, he was detained under section 3 of the Mental Health Act 1983. On 26th February 2018, following a best interests review, he moved from a secure hospital to facility operated by the first Defendant.
2. Whilst resident at the facility, Paul was treated as a person subject to deprivation of liberty safeguards. In fact, although he was deprived of his liberty, save for a very short period when he first moved in, the deprivation was at no time authorised.
3. Paul died on 20th April 2019. The medical cause of death was found, following an inquest, to be broncopneumonia, large intestinal obstruction and faecal impaction related to the side effects of Clozapine (an atypical anti-psychotic used to deal with the effects of schizophrenia).
4. Paul's estate (acting by his father Mark), his mother Patricia, his sister Claire and his nephew Dillan have commenced proceedings against the first Defendant and Greater Manchester Mental Health NHS Foundation Trust. This is an application by the first Defendant to strike out certain parts of the claim or in the alternative for summary judgment to be entered in its favour in respect of those parts. The second Defendant makes a similar, but more limited application.

SUMMARY JUDGMENT AND STRIKE OUT

5. The test for summary judgment and for strike out is not in dispute. The applications do not require me to set out the tests exhaustively. The submissions have centred on matters of substantive law and not on any subtlety of approach to one application or the other.
6. I remind myself that the test for summary judgment is set out in CPR 24. The court may grant summary judgment if it is satisfied that the Claimant has no real prospect of success and there is no other compelling reason why the claim should be disposed of at trial. Here, "real" means more than fanciful. Evidence is admissible on an application for summary judgment.

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7. In order to decide if the evidence shows a more than fanciful prospect of trial, there must be some evaluation of the evidence. In doing so caution must be exercised and in particular the court should not conduct a mini trial. A hope that "*something may turn up*" (sometimes expressed as "*Micawberism*" – see for example the recent decision of Cockerill J in *King v Stiefel* [2021] EWHC 1045 (Comm)) is not enough to move prospects of success from fanciful to real.
8. I remind myself that the test for strike out is set out at CPR 3.4. Examples of the circumstances in which a claim might be struck out are set out in CPR PD 3A. If the facts pleaded in support of a case, do not disclose any legally recognisable claim, or if the claim is obviously ill-founded it would be appropriate to strike out. When considering an application for strike out I should not consider extrinsic evidence but should take the pleaded case at its highest.
9. Thanks to the sensible approach of all parties, large parts of the first Defendant's application and all of the second Defendant's application have been agreed.

THE CLAIMANT'S PROPOSED CASE

10. The Claimant has exhibited to its detailed skeleton argument, a proposed amended particulars of claim ("PAPoC"). I will consider the applications by reference to that proposed amended pleading.
11. The PAPoC are very long and detailed. They are in part narrative and go beyond what one might ordinarily expect to see in a pleading. They stretch to 58 pages and include very large sections of evidence. They are neither brief nor concise. They therefore fail to comply with paragraph 5.30 of the King's Bench Guide. Paragraph 1.3 of Practice Direction 16 (see paragraph 5.23 of the King's Bench Guide) require that where a statement of case exceeds 25 pages, a situation which the rules consider to be exceptional, a short summary should be filed. No short summary has been provided. Whilst these failings are plain and obvious, and may well lead to complications down the line, no point is yet raised in respect of them.
12. At paragraph 108, they set out a summary of the three types of claim the Claimants bring. The estate brings a claim in respect of damages for clinical negligence and for false imprisonment. Each of the claimants brings a claim pursuant to sections 6 and 7 of the Human Rights Act 1998

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in respect of each defendant relying on breaches of Article 2, Article 3, Article 5, and Article 8. It is therefore plain, and important to note (as I explain further later in this judgment) that the clinical negligence claim is an important part of the claim.

13. The first Defendant's applications relate to the claims under the Human Rights Act. The first Defendant submits that for relevant purposes it was not a public authority and so no remedy under the Human Rights Act ("HRA") can be awarded against it ("the admissibility issue"). In the alternative, if that submission is rejected, it submits that Article 2 is not, on the facts of the present case be engaged ("the engagement issue").

THE ADMISSIBILITY ISSUE

14. The HRA claim is set out at paragraphs 87 to 91 the PAPoC. The Claimants' case on the admissibility issue is set out at paragraph 87 in short form as follows: *"When discharging its duties the first defendant was acting as a public authority, exercising functions of a public nature for the purposes of the Human Rights Act 1998. The claimants will rely in this regard on the judgement of the administrative court in R(A) v Partnerships In Care Limited 2002 1 WLR 2610."*
15. The first Defendants facility is described at paragraph 72 to 75 as a nursing unit, and a nursing care home. It was at all material times a locked door environment with a secure perimeter fence. At paragraph 75 the Claimants plead that the first Defendant *"was contracted by the second defendant to provide care and treatment services to the deceased"*.
16. Paragraph 60(c) pleads the weekly cost of accommodation and care was met jointly by Manchester City Council (who paid £1,035.50), Manchester clinical commissioning group (£1,535.65) and NHS England (£155.05). The obligation to meet these costs arose (see paragraph 61) under section 117 of the Mental Health Act 1983 and section 75 of the Care Act 2014. The Claimants submit (see paragraph 41 of their skeleton) that the funding of Paul's care is *"highly material"* to the admissibility issue.
17. Further details about the circumstances of Paul's placement are pleaded at paragraphs 58 to 62 of the PAPoC. At paragraph 77, on the basis of the pleaded case, the Claimants assert that *"The First Defendant was clearly engaged in functions of a public nature for the purposes of s 6 of the HRA"*.

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18. At paragraph 125 of the PAPoC the Claimants list a number of examples of how the first Defendant limited Paul's freedom. These instances are described at paragraph 15 of the Claimant's skeleton argument as "*special statutory powers exercised by the first Defendant*" over Paul. Read in context, it is clear that paragraph 125 is not a list of powers that were exercised. It is a list of potentially unlawful activities which might have been legitimised if, at the time the things were done, a statutory right to do them was in force.

19. From a broad reading of the PAPoC, the following main facts appear:

- a. The facility operated by the first Defendant was a secure facility, similar to those operated by the state.
- b. The first defendant was contracted to provide services to Paul. The counterparty to the contract was the second Defendant. In effect, there was a subcontracting of the State's function to the 1st Defendant.
- c. Practically speaking, the state paid for the entirety of Paul's care and nursing needs.
- d. Paul was treated in exactly the same way as a person for whom deprivation of liberty safeguards were in place.
- e. If matters had proceeded as they ought to have proceeded, the first Defendant would have been exercising special statutory powers to limit Paul's freedoms.

THE ARGUMENTS OF THE ADMISSIBILITY ISSUE

20. The Claimants' position is as follows:

- a. Whether or not a body is a "public authority" for the purposes of the Act is a fact specific issue to be determined in each individual case. So that the issue cannot be determined summarily. In the alternative:
- b. As a matter of statutory construction, the first defendant was carrying out "*functions...of a public nature*"
- c. The present position should be taken to fall within section 73 of the Care Act 2014. This point is not pleaded but is a matter of law.
- d. The Deprivation of Liberty Safeguards Form 3 assessment completed by Manchester City Council accepts that placing Paul in the care of the first Defendant is "*imputable*" to the State (pleaded at paragraph 122(d) of the PAPoC)

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- e. The principles set out in *YL v Birmingham City Council and others* [2007] UKHL 27 apply.

21. The first Defendant submits that if the facts pleaded in the PAPoC are made out, it is (as a matter of law), a public authority.
22. I have read and carefully considered each side's written submissions and heard detailed oral submissions. I take all points I have heard into account but set out below only the main issues which are capable on the outcome of the application.

THE HRA

23. By section 6 of the HRA, it is unlawful for a public authority to act in a way which is incompatible with a convention right. Where a public authority has in fact acted in a way which is incompatible with the convention right, by section 7, a victim of the unlawful act may bring proceedings against the authority. If the claim is made out, the court may grant such relief or remedy or make such order within its powers as it considers just and appropriate. Damages may only be awarded if the court is satisfied that such a step is "necessary to afford just satisfaction" (See section 8).
24. The Act contains no exclusive definition of what a public authority is. Instead, section 6(3) makes plain that "*any person certain of whose functions are functions of a public nature*" falls within the definition. But it is not every act carried out by such a person that is capable of giving rise to a claim. By section 6(5), The court must consider if the potentially unlawful act is, by nature, private or public. If the former, the person is not a public authority.
25. As Baroness Hale put it in *YL* at paragraph 37 (in a dissenting judgment, but here simply summarising the position under the HRA):

"Under s 6(1) of the Act, it is unlawful for a public authority to act in a way which is incompatible with a Convention right. "Public authority" is nowhere exhaustively defined, but by s 6(3)(b) it includes "any person certain of whose functions are functions of a public nature". However, in relation to any particular act, s 6(5) provides that "a person is not a public authority by virtue only of sub-s (3)(b) if the nature of the act is private". The broad shape of the section is clear. "Core" public authorities, which are wholly "public" in their nature, have to act compatibly with the Convention in everything they do. Other bodies,

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only certain of whose functions are “of a public nature” have to act compatibly with the Convention, unless the nature of the particular act complained of is private. The law is easy to state but difficult to apply in individual cases such as this.”

PUBLIC AUTHORITY

26. If the first Defendant is a “public authority” for the purposes of the Act it must in my judgment fall to be considered as such by virtue of section 6(3) and not by section 6(1). The distinction was expressed in YL (see for example the passage quoted above) as the difference between a “core” public authority (sect.6(1)) and a “hybrid public authority” (section 6(3)).
27. It is not suggested that the first Defendant is a “core public” authority, and for good reason. It plainly is not. Neither was it suggested (beyond the mere possibility that “*something might turn up*”) that the evidence at trial might indicate that the first Defendant was a core public authority.
28. The main question to be resolved is therefore: were the functions being carried out by the first Defendant which give rise to the claim, functions of a public nature? Before dealing with that point (by reference to YL V Birmingham City Council [2007] UKHL 27), I first deal with the Care Act and the effect of the content of “form 3”.

THE CARE ACT 2014

29. The decision in YL (to which I turn below) meant that residents in private care homes, whose care was paid for by the State, did not have the same rights enjoyed by residents of care homes run by the State. This apparent unfairness led to the enactment of section 145 of the Health and Social Care Act 2008.
30. That section was repealed on the 1st of April 2015 when it was replaced by section 73 of the Care Act 2014. The scheme of these provisions is broadly similar. Each provides that in certain circumstances a private care home will be “*taken for the purposes of section 6(3)(b) of the Human Rights Act 1998 to be exercising a function of a public nature*”. Those circumstances are carefully circumscribed. Section 145 required that the arrangements for care were made under certain defined statutory provisions. Section 73 requires that the care or support is arranged by a specified authority or paid for by it, and that the authority arranges or pays for the care under a specified statutory provision.

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31. It was common ground at the hearing that section 73 does not apply to Paul's case. His care was not arranged by a specified authority and in any event the relevant arrangements or payments would not be made in accordance with a specified statutory provision.
32. Neither section 73 nor its predecessor section 145 is of any assistance to the claimants in this case. Those sections, and for present purposes I need only deal with section 73, offer special rights to a limited category of person. Absent section 73, and (at least at first glance) by operation of the decision in YL, those rights would not be in play. The fact that Paul's care was funded through section 117 of the Mental Health Act does not, in my judgement, assist him. Such funding, excludes private sector care from Section 73 and so prevents those who are cared for from enjoying the special rights it grants.

EXPRESS "IMPUTATION" IN FORM 3

33. Form 3 is a combined assessment form completed by a best interests assessor as part of a deprivation of liberty safeguarding authorisation process. The form relied on by the Claimants was completed by Melanie Walsh, an independent social worker.
34. Miss Walsh explains why in her view the placement is "*imputable to the State*". The point goes to the issue of whether a person is deprived of his liberty for the purposes of Art.5 of the ECHR (see generally Storck v Germany (2005) 43 EHRR 96 discussed at para 37 of Lady Hale's judgment in Cheshire West v P [2014] AC 896).
35. Miss Walsh justifies her belief as follows: first, the care is being funded through section 117 and is therefore funded by the State and secondly, the first Defendant is regulated by the Care Quality Commission, a "state authority".
36. In my judgment, Miss Walsh's view does not assist the Claimants. I come to that conclusion for 2 main reasons: first, even if the "placement" is (as a matter of law) "imputable to the state" it does not follow that the first Defendant was discharging functions of a public nature at the relevant time. Secondly, Miss Walsh is doing no more than expressing an opinion.
37. The importance of "imputation" arises when considering deprivation of liberty. For the purposes of Art.5 (and so for the purposes of the Mental Capacity Act 2005) deprivation of liberty requires 3 elements: (1) an

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objective component of confinement in a particular restricted place for a not negligible length of time; (2) a subjective component of lack of valid consent; and (3) the attribution of responsibility to the state (see para.48 of *Staffordshire CC v K* [2016] EWCA Civ 1317).

38. A deprivation of liberty may be attributed to a State in 1 of 3 ways (see paragraph 52 of *K*): *"First,due to the direct involvement of public authorities in the applicant's detention. Secondly, the state could be found to have violated article 5.1 in that its courts, in the compensation proceedings brought by the applicant, failed to interpret the provisions of civil law relating to her claim in the spirit of article 5. Thirdly, the state could have violated its positive obligations to protect the applicant against interferences with her liberty carried out by private persons."*
39. It may be that State funding and State regulation were (as Miss Walsh suggests) enough to justify her conclusion that public authorities would be "directly involved" in Paul's detention. Whether the first Defendant's functions were "of a public nature" seems to me to be a very different question.
40. The view expressed by Melanie Walsh is no more than a view. It cannot be elevated to a binding statement of the true legal position. In my judgment, it takes matters no further forward and does not assist the Claimants. Whether the view happens to reflect the true legal position depends on an analysis of the relevant law, and in particular the decision in *YL*, to which I now.

THE HOUSE OF LORDS DECISION IN YL

41. The claimant was an 84 year old woman suffering from Alzheimer's disease. She lacked capacity. Birmingham City Council had a statutory duty to provide her with residential accommodation. Pursuant to its statutory powers, the council contracted with an independent provider of health and social care services for the claimant to live in one of its homes. Her fees were paid in the most part by the council, but her family paid a small top up amount. Relations with the care home deteriorated and steps were taken to evict her. Acting through her litigation friend, the claimant commenced proceedings in the Family Division based on breach of her rights under articles 2, 3 and 8 of the ECHR. A preliminary admissibility issue arose: was the care home exercising a public function

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within section 6(3)(b) of the 1998 Act?

42. The facts of YL are therefore strikingly similar to the facts of the present case.
43. The House of Lords concluded (by a majority, Lord Bingham, and Lady Hale dissenting) that the care home was not a public authority for the purposes of the HRA, because its relevant functions were not “public functions”. Lord Scott’s overarching view was that the company was carrying on a private function, it was neither “*a charity nor a philanthropist*”, but rather a company carrying on business for profit. It just so happened the business had an element of social utility. He felt it important that the care home received no public funding (it was simply paid for services provided), had no special statutory powers and was under no relevant obligation to accept residents.
44. Lord Neuberger like Lord Scott felt that the arrangement with the care home was essentially a private, business matter. He agreed with the reasons given by Lord Mance and provided more of his own. He took the following facts into account: (i) care homes were closely regulated and controlled by statute, (ii) the provision of care and accommodation for the elderly and firm was a beneficial public service, (iii) the elderly and infirm were particularly vulnerable members of society, (iv) the care and accommodation in the case was provided pursuant to the local authority’s statutory duty to arrange its provision, (v) the local authority paid for the care and accommodation pursuant to its statutory duty, (vi) the local authority had the power to run its own care homes and so provide the service itself, and (vii) it might be said that section 6(3)(b) should apply to contracting out of a state function. None of these factors, taken individually or collectively was sufficient to justify the conclusion that the care home was performing a function “of a public nature” in providing care and accommodation to the claimant.
45. Lord Neuberger felt that it was of “*particular importance*” that the care home had been given no (or no significant) statutory powers of residents. At paragraph 167 he said this:

“The existence of a relatively wide-ranging and intrusive set of statutory powers in favour of the entity carrying out the function in question is a very powerful factor in favour of the function falling within section 6(3)(b). Indeed, it may well be determinative in many cases, because such powers are very powerfully indicative of a public

institution or service."

46. I am satisfied that YL represents the present state of the law as far as a claim which does not (as is the case here) fall within section 73 of the Care Act 2014. The claimants suggested that I ought to bear in mind when considering the decision, that Parliament had overridden it by statute. It is however important in my judgement, to recall that Parliament's overriding of the decision was not total. For the reasons explained above, the effect of the decision is overridden only for certain arrangements. The facts of the present case fall outside those arrangements and therefore the decision in YL is plainly of central importance.
47. The Claimants relied on (and have pleaded) the first instance decision in *R(A) v Partnership in Care Limited* [2002] EWHC 529 (Admin). That decision pre-dates and was cited in YL. Lady Hale (paragraph 63) notes that when exercising "*their powers of compulsory detention under the Mental Health Act 1983*" a private psychiatric hospital is performing functions of a public nature, citing the case as an example. Lord Mance approved the decision, emphasising (as "*critical*") the compulsory nature of detention.
48. R(A) in my judgment does not assist the Claimants' case. The position in the present case, and central to the estate's case in respect of false imprisonment, is that the first Defendant was not exercising powers of compulsory detention. Thus, the factor described by Lord Neuberger as "very powerful" and of "particular importance", and (in effect) by Lord Mance as "critical" is missing.
49. I bear in mind that the factors set out in YL should not be treated as a checklist. However, applying the principles set out by the House of Lords it is in my view plain that the first Defendant is not a public authority within section 6(3)(b) of the Act because its relevant functions were not "of a public nature". There is nothing in the PAPoC to take the facts of the present case beyond those discussed in YL.
50. In my judgment it is clear that the first Defendant's functions were entirely private and (as in YL) it was simply carrying business (which happened to have -at least in the abstract - some social utility) for a profit.
51. The absence of any special statutory power is an important factor. In order to deal with that absence, the Claimants submitted, in effect, that the court should treat the first Defendant as a body with special statutory

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powers, in particular powers to deprive Paul of his liberty. The submission was based on the fact that the first Defendant appeared to believe that it had those powers and perhaps on the basis that a knowledgeable observer would know that the only lawful way to do what was being done was through the exercise of such a power.

52. I am unable to accept that submission for the following reasons:

- a. As a matter of fact, the first Defendant did not have any relevant statutory power. The outcome of the inquiry is binary: there is either a power or there is not.
- b. The estate's claim for false imprisonment relies on the absence of a statutory right to detain (summarised at paragraph 7 of the PAPoC). The assertion that I should treat the first as acting under a statutory authority contradicts that position and would create an inappropriate internal tension in the PAPoC.
- c. The argument that the first Defendant (in effect) should not be heard to deny that it was acting under a statutory authority was not directly advanced but is the natural conclusion of the Claimants' position. In my view the argument is untenable for the reasons set out above.

THE OUTCOME

53. Taking the proposed pleaded case (set out in the PAPoC) at its highest, I am satisfied that the argument that the first Defendant was exercising a public function when detaining Paul or when caring for him is bound to fail. I am satisfied that it would be appropriate and in accordance with the overriding objective to strike out that part of the claim against the first Defendant.

54. If I am wrong, I would in any event grant the first Defendant summary judgment. I am easily satisfied that there are no reasonable grounds on which the Claimants might succeed in establishing that the first Defendant was a public authority.

THE ALTERNATIVE POSITION AND THE ENGAGEMENT OF ART.2

55. If I am wrong in respect of strike out and in respect of summary judgment I would have struck out (or granted summary judgment in respect of) the Claimants' Art.2 claim. I will deal with my reasons briefly.

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56. I am satisfied that as a matter of law that Art.2 is not engaged on the facts of the present case.
57. Article 2 (see paragraphs 2 and 10 to 12 of Lord Sales' opinion in R (Maguire) v HM Senior Coroner for Blackpool and Fylde [2023] UKSC 20) comprises:
- a. a substantive systems duty (an obligation to have appropriate legal regimes and administrative systems in place to provide general protection for the lives of citizens and persons),
 - b. a substantive operational duty (an obligation to take operational steps to protect a specific person or persons when on notice that they are subject to a risk to life of a particularly clear and pressing kind) and
 - c. a procedural duty (certain positive obligations of a procedural nature regarding investigation of and the opportunity to call state authorities to account for potential breaches of the substantive obligations to which it gives rise. The precise content of the procedural obligation on a state varies according to the context in which an issue regarding the application of article 2 arises).
58. Lord Sales felt that the Grand Chamber decision in Fernandes v Portugal (2017) 66 EHRR 28 provided "*authoritative clarification*" of the substantive positive obligations (the systems and operational duties) in the field of healthcare (see paragraph 7 of Maguire and the general discussion of the decision at paragraphs 40 to 52).
59. At paragraph 42 Lord Sales noted that if the state has made "*adequate provision for securing high professional standards among health professionals and the protection of lives of patients*" medical negligence would not be sufficient for a finding that Article 2 had been breached. Something more would be required.
60. At paragraph 50 Lord Sales explained that "*very exceptional circumstances*" would be required before the State could become responsible for the acts and omissions of health care providers. He adopted the following passages from Fernandes:
- "191. The first type of exceptional circumstances concerns a specific situation where an individual patient's life is knowingly put in danger by denial of access to lifesaving*

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emergency treatment. It does not extend to circumstances where a patient is considered to have received deficient, incorrect or delayed treatment.

192. The second type of exceptional circumstances arises where a systemic or structural dysfunction in hospital services results in a patient being deprived of access to life-saving emergency treatment and the authorities knew about or ought to have known about that risk and failed to undertake the necessary measures to prevent that risk from materialising, thus putting the patients' lives, including the life of the particular patient concerned, in danger."

61. Lord Sales emphasised that in order to fall within the first exceptional category the medical professional must have gone beyond mere medical negligence and must have been "*fully aware that the patient's life was at risk if treatment was not given*" and that for the second category to apply the dysfunction must be "*genuinely identifiable as systemic*" and so go beyond "*individual instances where something may have been dysfunctional in the sense of going wrong or functioning badly*".
62. As already described, paragraph 108 of the PAPoC Advances a clinical negligence claim against each Defendant. Further detailed particulars of the first Defendant's negligence are pleaded at paragraph 127 in 30 sub-paragraphs. It is plain there is a substantial basis for the medical negligence claim and that it is not pleaded as a mere afterthought. It is a main claim. It is therefore necessary to consider if either of the exceptional circumstances identified above are in play.
63. The Claimants plead their Article 2 claim at paragraphs 129 to 139 of the PAPoC. The Defendants are said to have been under a "*positive operational obligation to protect the Deceased's right to life*". The claim is based on the following pleas:
- a. Paul's death was avoidable and attributable to culpable neglect.
 - b. There was a failure to establish, maintain and apply procedures to protect life and all take preventative measures to protect lives.
 - c. The acts and emissions of the first Defendant placed Paul's life at serious risk and those failures went far beyond the normal course of "medical procedures".
 - d. The first defendant exposed Paul to an increasing risk of death by their actions and failures, far greater than would be expected "in the ordinary course of treatment".

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- e. It failed to provide a “satisfactory and convincing explanation as to the circumstances” of Paul's death by giving evidence to the coroner that he found to be “unhelpful, unreliable and obstructive”. This is pleaded as a breach of the procedural duty.
64. The Claimants' skeleton devotes 12 of its 48 pages to the Article 2 issue. Breach of the operational duty is based squarely (see skeleton paragraph 106) on the extent of failures in Paul's care. In particular, the failure to recognise that he was at risk of death and failing to arrange for him to have access to urgent specialist medical attention (and treatment) which would have saved his life. These matters appear to mirror the pleaded particulars of clinical negligence.
65. The Claimant's case for the engagement of the Art.2 operational duty is explained at paragraph 115 of the skeleton: *“the life-saving treatment”* not given *“was the medication required to counteract the effects of Clozapine. Its denial, the result as the Cs will argue of a systems failure, knowingly or at very least recklessly put his life at risk, a risk that eventually materialised”*. The Claimants continue: *“It cannot be right that D1 can avoid responsibility under this limb of Article 2 because they were so blind to the care-needs of Paul Sammut that they did not even see the obvious risk of failing to treat him as was required. Recklessness cannot be an alibi for failures so gross that they cost a life.”*
66. It is in my judgement clear that the claimants pleaded case in respect of Article 2 is not sufficient to engage Article 2. First, there is no assertion that Paul's life was *“knowingly put in danger by denial of access to treatment”*. There is no sense that the medical practitioners were fully aware that his life was at risk if treatment was not given and, even in the face of such knowledge, denied him that treatment. The “denial” referred to in argument is on its own insufficient to engage Art.2. It is no more than an allegation of (very serious) clinical negligence. It follows that the first type of exceptional circumstance that would justify engagement of Art.2, is absent. Secondly, there is no plea of dysfunction which is *“genuinely identifiable as systemic”*. The pleaded failure to *“establish, maintain and apply procedures”* is a plain reference to something going wrong or functioning badly not as a result of systemic failures, but as a result of clinical negligence. The remaining particulars simply go to emphasise the seriousness of the clinical negligence claim.
67. I am therefore satisfied that, had I not decided the first Defendant was not a public authority, it would have been right to strike out the Article 2

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claim pleaded against the first defendant.

68. I am satisfied, on the proper application of *McGuire*, that it would be inappropriate (and wrong in law) to allow the matter to proceed on the basis, as suggested in the skeleton argument, that “*recklessness*” as to the risk to life as a result of denial of treatment would be sufficient to engage Art.2. It is the need for “*full awareness*” that elevates the matter above the realm of clinical negligence. It is therefore plainly, a necessary element if the first exceptional circumstance is to be made out.

CONCLUSION

69. It follows from the above that the HRA claims against the first Defendant will not proceed. If I am wrong in my approach, then the Art.2 claims cannot proceed.

70. I am confident that the parties will be able to agree what effect this judgment and the agreements reached between the parties have on the PAPoC and will be able to agree an order.

71. I am grateful to all advocates for their oral and written submissions which were clear, helpful and in every respect realistic. Whilst I have concluded that some parts of the case cannot proceed (and that in effect, only the estate has a claim) there are plainly important and very substantial matters that will require resolution at trial if no appropriate agreement can be reached.