THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

CAUSE NO. 190 OF 2013

BETWEEN:

DONETTE THOMPSON
(A minor, suing by her mother and next friend, NORENE THOMPSON)

Plaintiff

AND

(1) THE CAYMAN ISLANDS HEALTH SERVICES AUTHORITY

(2) DR. GILBERTHA ALEXANDER

Defendants

AND

THE ATTORNEY GENERAL OF THE CAYMAN ISLANDS

Intervener

Appearances:	**Mr. Jonathan A.D. Jones Q.C. instructed by Ms. Kim Grandage of Samson & McGrath for the Plaintiff** **Mr. Paul Bowen Q.C. instructed by Michael Wingrave of Dinner Martin for the First Defendant** **Mr. Paul Bowen Q.C. instructed by Mr. Zachary Hoskin of Mourant Ozannes for the Second Defendant** **Mr. Samuel Bulgin Q.C., Attorney General of the Cayman Islands and Ms. Reshma Sharma, Deputy Solicitor General and Ms. Rachael Hoare, Crown Counsel for the Intervener**
Before:	**Hon. Justice Richard Williams**
Heard:	**5-9 September 2016**
Draft Judgment Circulated:	**18 April 2017**
Date of Judgment:	**24 April 2017**

JUDGMENT

Opening Remarks

1. This case has raised a significant number of novel legal issues which have not hitherto been considered by the Grand Court in the Cayman Islands. In fact, this may be the first time that a Court in any jurisdiction has had to consider the lawfulness of a statutory provision removing access to civil proceedings in respect of all claims for clinical negligence. Queen's Counsels have expertly assisted this Court by their comprehensive and prodigious oral submissions at the hearings and their opening written submissions covering a very wide range of complex issues. They have carried out an in depth analysis of a significant amount of case law. With this in mind, this judgment will be more detailed than one might have wished and it contains a fuller analysis of a number of cases than one might ordinarily expect.

The Claim and the Background Pre-Judgment dated 19 February 2016

2. The detailed background to this matter is set out in a comprehensive judgment delivered by this Court on 19 February 2016 ("the Judgment"). I have regard to the content of the Judgment and, although I do not intend to again fully rehearse the same, I feel it helpful to repeat some of the background detail contained therein to put the issues now requiring my determination into context.

3. Donette Thompson ("P"), aged 11, was born on 9 July 2005 at the George Town Hospital ("the Hospital"). The Hospital is maintained and operated by the First Defendant, the Cayman Islands Health Services Authority ("the Authority").

4. The Second Defendant, Dr. Gilbertha Alexander, was the attending Consultant Obstetrician at P's birth and was an employee of the Authority under a contract of employment dated 11 February 2005. It is agreed that at all material times, the Authority was responsible for the general management of the hospital and the nursing and midwifery care therein.

5. On 26 June 2015, the Attorney General's Chambers confirmed in writing to P that he did not intend to intervene in the proceedings at that stage. The Attorney General played no role at the June/July 2015 hearing. The Attorney General now intervenes pursuant to my order dated 26 June 2016.

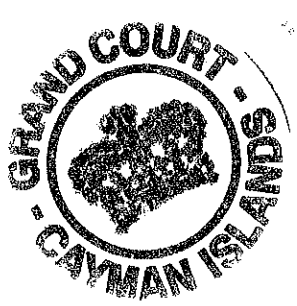
6. Norene Thompson is P's mother and next friend. These proceedings were commenced by her Writ of Summons and Statement of Claim filed on 7 June 2013. P sues in respect of her injuries suffered at her birth[1] which she alleges in her Amended Statement of Claim were caused by the negligence of staff employed by the Authority, including Dr. Alexander who all owed her a "*duty of care to provide reasonably competent medical care.*" P's allegations of negligence[2] against the Authority's clinicians and Dr. Alexander include:

   a. Failing to respond to a pathological CTG;

   b. Failing to appreciate the urgency of the situation by failing to perform an emergency caesarean section within 30 minutes;

   c. Delivering P with undue force;

[1] The nature of the injuries are briefly outlined in paragraph 4 of the Judgment.
[2] See paragraph 85 of P's Skeleton Argument.



d. Failing to communicate properly with the rest of the medical team so all parties were aware of the urgency of the situation; and

e. Failing to perform the Caesarean Section within 30 minutes of the decision at 4:55PM.

7. It is alleged that the Authority is either vicariously liable for the negligent acts and omissions of its servants or agents, including Dr. Alexander, alternatively it is directly liable for those acts of negligence under a non-delegable duty of care. It is claimed that Dr. Alexander is personally liable for failing to provide competent medical care to P.

8. In the alternative, P requested at the earlier hearing that, if the Court were to determine that s.12 of the Health Services Law (2003 Revision) as amended by the Health Services Authority (Amendment) Law 2004 ("s.12") provides the Defendants with immunity, then "*as a last resort*" the Court should make a declaration of incompatibility pursuant to s.23 of Part 1, Bill of Rights, Freedoms and Responsibilities, of the Cayman Islands Constitution Order 2009 ("the BOR"). The BOR came into force on 6 November 2012, three years after the appointed day[3] and s.23 BOR provides:

> *"If in any legal proceedings primary legislation[4] is found to be incompatible with this Part, the court must make a declaration recording that the legislation is incompatible with the relevant*

[3] Sections 4(1) & (2) Constitution Order 2009.
[4] Section 28(b) BOR defines "*primary legislation*" as being a Law enacted by the Legislature of the Cayman Islands.

section or sections of the Bill of Rights and the nature of that incompatibility."

9. The Authority filed its Defence on 11 July 2013. Dr. Alexander filed her Defence on 30 July 2013.

10. On 20 October 2014 P's attorneys wrote to the Attorney General stating that if the Court were to find that s.12 provided such immunity, then the Court would be asked to make a declaration of incompatibility. They informed the Attorney General of their view that a "*blanket immunity*" from claims for clinical negligence would amount to a breach of the rights contained in sections 2, 3, 8 and 17 of the BOR.

11. On 26 November 2014, at a directions hearing before Hall J., the Court and the parties defined the terms of the preliminary issues to be determined as follows:

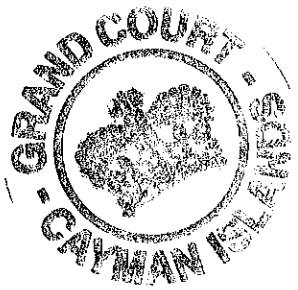
    a) Whether s.12 provides a defence to claims for damages for personal injuries caused by the negligence of the Defendants, unless it is shown that the acts or omissions of the Defendants were in bad faith; alternatively

    b) Whether s.12 must be read and given effect under s.25 of the BOR in a manner that is compatible, so far as it is possible to do so, with P's rights under the BOR and if so, how; alternatively,

    c) Whether a declaration of incompatibility should be made under s.23 of the BOR.

12. P, pursuant to Hall J.'s directions order, filed her Amended Statement of Claim on 9 February 2015. At paragraph 15.2 P plead that in the alternative:

> *"In so far as the Court determines that section 12 applies to the Plaintiff's claim to damages herein (which is denied), the Plaintiff will seek a declaration that the section is incompatible with Part 1, Bill of Rights, Freedoms and Responsibilities, of the Cayman Islands Constitution Order 2009 and in particular:*
>
> *a. Section 2: Life*
>
> *b. Section 3: Torture and inhumane treatment*
>
> *c. Section 7 : Fair trial*
>
> *d. Section 9: Private and family life*
>
> *e. Section 17: Protection of children*
>
> *pursuant to section 23 of the said Order."*



13. On 3 July 2015, leave was given to the Defendants to amend their Defence in the form shown to the Court and to file the same by 14 July 2015. The Authority filed its Amended Defence on 11 July 2015. Dr. Alexander filed her Amended Defence on 10 July 2015.

14. In its Amended Defence the Authority denies that it, its servants or agents were negligent and it withdrew its admission that it owed a duty of care to P by reason of s.12. Dr. Alexander similarly denies that she was negligent or that she owed a duty of care to P.

Background - The June/July 2015 Hearing, the Judgment dated 19 February 2016[5]

15. At the hearing I did not accept P's submission that the Court should be applying s.12 of the Health Services Authority Law 2012.[6] I found that the Health Services Law (2003 Revision), as amended by the HSAL 2004, was the applicable version of the HSAL as it was the version of the Law that was in force at the time of P's birth. I was satisfied that the preliminary issue for determination at the hearing concerned the Defendants' pleaded Defence that P's claim was barred by s.12, which provides that:

> *"Neither the Authority, nor any director or employee of the Authority, shall be liable in damages for anything done or omitted in the discharge of their respective functions or duties unless it is shown that the act or omission was in bad faith."*

16. In the Judgment I ruled on the first preliminary issue, namely whether s.12 excluded the Defendants from any liability in negligence in respect to P's injuries. I reached the same conclusion as Panton J. did in ***Charles McCoy v Cayman Islands Health Services Authority & Dr Jha*** Cause no. G2/13[7], namely that the wording of s.12 was clear and unambiguous and, in the absence of bad faith, the section excluded liability in negligence. This clear and unambiguous exclusion from liability in the section restricted the scope to read and give the section effect under s.25 (1) BOR[8] which provides that:

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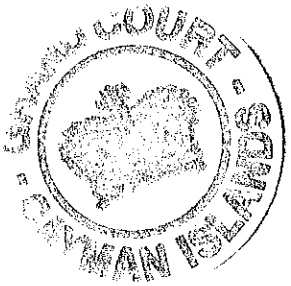
[5] Reported as ***Thompson (by her mother as next friend) v Health Services Authority and Alexander*** [2016 (1) CILR 93].
[6] 2012 is mentioned in the Skeleton Argument prepared for the June/July 2015 hearing, but it appears that P meant to say 2010.
[7] See paragraph 41 of the Judgment.
[8] See paragraphs 120-124 of the Judgment.



"In any case where the compatibility of primary or subordinate legislation with the Bill of Rights is unclear or ambiguous[9]*, such legislation must, so far as it is possible to do so, be read and given effect in a way which is compatible with the rights set out in this Part."*

The reasons for my decision are contained in the detailed Judgment and it is not necessary to set them out again herein.

17. Part 3 of the Preliminary Issue required determination as to whether s.12 infringed P's rights under ss. 2, 3, 7, 9 and/or 17 of the BOR. P contended that s.12 as interpreted by the Defendants (and now by this Court) is incompatible with the above rights. She contends that the consequences are:

(i) she will be unable to bring a civil claim against the Defendants;
(ii) she will not be able to establish civil liability for injuries;
(iii) she will not be able to seek any remedy, including financial remedy;
(iv) she will be denied the financial means to ensure provision for her long-term health, to assist with the management of disabilities which will prolong her life; and
(v) there will be no investigation into what happened at the time of the birth and the causes of her injuries.

18. In relation to Part 3 I stated at paragraph 133 of the Judgment that:

"The issue as to whether a statute providing immunity against claims in damages, including for clinical negligence, is incompatible with the Bill of Rights is one of great public importance. The separate issue about the retro-active effect of the Bill of Rights, which emerged shortly before the hearing and was

[9] My emphasis by underlining.

elaborated upon during and after the hearing, is also of great public importance."

I went on to say that I felt it to be in the public interest for the Attorney General to be able to attend and make representations. Accordingly, I adjourned P's application for a declaration of incompatibility to afford the Attorney General the opportunity to make representations at a later hearing.

Background - Post-delivery of the Judgment

19. On 10 March 2016 the parties appeared for directions in relation to P's proposed appeal of the Judgment and concerning Part 3 of the Preliminary Issue. I informed the parties that if there was to be an appeal of my decision it could be heard by the Court of Appeal during its August 2016 sitting because, to reduce any delay, I had asked the Registrar to the Court of Appeal to provisionally reserve two to three days[10]. However, P and the Defendants did not wish the appeal to come on before there had been a determination of the remaining parts of the preliminary issue[11]. The Attorney General was formally added as an Intervener with respect to the remaining issue. Directions were given for a five day hearing to commence on 5 September 2016.

[10] At that hearing I was aware that the remaining preliminary issue hearing was listed for 5 September which would be after the Court of Appeal's sitting.

[11] Ms. Sharma on behalf of the Attorney General indicated a preference for the appeal hearing to take place prior to the hearing in relation to the remaining preliminary issue.

20. On 2 June 2016 the Legislative Assembly passed the Health Service Authority (Amendment) Law 2016 ("HSAL 2016") which amended s.12 of the HSAL (2010 Revision) ("HSAL 2010"). The Amended Law provides:

> *"Neither the Authority, nor any director, nor any committee member, shall be liable in damages for anything done or omitted in the discharge of their respective functions or duties unless it is shown that the act or omission was negligent or in bad faith."*

This amendment means that employees of the Authority are not covered at all by the immunity under s.12. The Authority, directors and committee members would not be liable for acts and omissions unless it is shown that the act or omission was negligent or in bad faith.

Issues for Determination at this Hearing

21. When the parties came before me on 27 June 2016 it was agreed that there were more matters requiring determination by the Court. The preliminary issue was expanded and the remaining parts of the preliminary issue are now:

(i) Part 3 - whether a declaration of incompatibility should be made in respect of HSAL under s.23 of the BOR.

(ii) Part 4 - whether the HSAL 2016 applies to P's claim, including the question (but not limited to and in so far as relevant) whether it has retroactive effect; alternatively

(iii) Part 5 - whether the HSAL 2016 must be read and given effect under s.25 of the BOR in a manner that is compatible, so far as it is possible to do so, with the party's rights under the BOR and if so, how.

22. As a consequence of the expanded issues P was given leave to file a Re-Amended Statement of Claim to address Parts 4 and 5. P filed the same on 6 July 2016. The Authority filed its Re-Amended Defence on 18 July 2016 and Dr. Alexander filed her Re-Amended Defence on 19 July 2016.

Each Party's Schedule of Issues for Determination and Positions

(i) The Plaintiff

23. P contends that she should be able to progress her claim, as the HSAL 2016 should be interpreted as amending HSAL 2004 so that s.12 HSAL 2004 no longer exists. P argues that on a strict interpretation of HSAL 2016 it applies to P's claim and therefore the Defendants no longer have the immunity. In the alternative P submits that HSAL 2016 should be construed as being retrospective and thereby it applies to P's claim "*as otherwise greater unfairness would result.*" Further in the alternative, if the Court finds the meaning of HSAL 2016 to be unclear or ambiguous it should be read and given effect under s.25 of the BOR as applying to P's claims in preference to the assertions of the Premier of the Cayman Islands contained in the produced excerpts from Hansard. P contends that HSAL 2016 is incompatible with BOR if it excludes claims for clinical negligence which occurred prior to 20 June 2016.

24. P submits that the Court should declare that s.12 is incompatible with ss.2, 3, 7, 9, and 17 of the BOR. With this in mind P submits in her written Schedule of Issues

dated 31 August 2016 that the issues for determination, which are set out at paragraph 21 above, raise a number of supplementary issues which are:

(i) whether a declaration of incompatibility can be made in this case where the events occurred back on 9 July 2005;

(ii) further or in the alternative, (a) whether or not the BOR has retroactive effect so as to be capable of removing the s.12 defence of immunity and (b) whether that is required in order for a declaration of incompatibility to be made;

(iii) whether or not s.12 is incompatible with P's rights under s.2 or s.3 of the BOR in either its substantive or procedural aspects;

(iv) whether or not s.12 is incompatible with P's rights under s.7 and/or s.9 and/or s.17 of the BOR;

(v) if the Court finds that s.12 is incompatible with P's rights under the BOR, does it have the power to make a declaration of incompatibility in light of the amendment made by the HSAL 2016;

(vi) whether, as a matter of statutory interpretation, HSAL 2016 applies to P's claim;

(vii) if HSAL 2016 doesn't apply, whether it must be read and given effect under s.25 of the BOR in a manner that is compatible, so far as it is possible to do so with the parties' rights under the BOR and if so, how; and

(viii) in the alternative, is the inapplicability of HSAL 2016 to P's claim incompatible with the BOR, such that the Court should make a declaration of incompatibility.

25. In the Position Statement dated 30 August 2016 P contends that, due to this Court's interpretation of the immunity given by s.12, the Cayman Islands has breached the autonomous procedural obligation under s.2 and s.3 of the BOR to conduct a proper and open investigation into her life threatening injuries.

26. P contends that the procedural obligations imposed under s.2 and s.3 of the BOR apply to pre-BOR events as there exist relevant acts or omissions after the critical date and there is a genuine connection between P's life threatening injuries[12] and the critical date. It is contended by P that the breach of the procedural duty to have an effective judicial system did not occur at the time of the birth, but at the time that she issued the proceedings in June 2013 or when this Court determined that s.12 conferred an immunity in respect of claims for medical negligence. It is contended that s.2 imposes a continuing duty to have an effective judicial system so the fact that civil proceedings cannot be pursued means that P's rights are being infringed and in these circumstances the issue is not whether there is retroactive application but whether s.5 of the Constitution and/or the case of ***Wilson v First County Trust Ltd*** (No.2) [2004] 1 AC 816 ("***Wilson***") prevents a declaration of incompatibility being made in the circumstances.

27. P contends that ***Wilson*** has limited applicability when interpreting the BOR and the criteria for making a s.23 declaration. P submits that ***Wilson*** must be read having regard to the case Law concerning the temporal nature of Article 2. However, if the Court finds that ***Wilson*** applies, P argues that the matter before me falls into the exceptional category envisaged by Lord Nicholls in ***Wilson.***

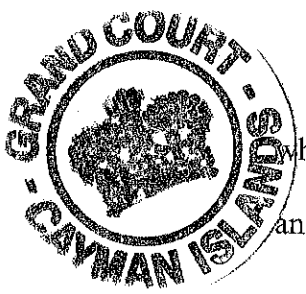
[12] There is no issue between the parties that life threatening injuries may be regarded the same as a death in such circumstances.

28. P contends that there need not be an arguable substantive breach of s.2 of the BOR for there to be a requirement for a civil remedy in damages. However, if wrong, P also argues, in any event, that an arguable breach exists.

29. P submits that in matters such as this, where there has been clinical negligence giving rise to life-threatening and life altering injuries, the requirement under s.3 of the BOR to take positive steps to ensure that no individual is subject to inhuman and degrading treatment applies. For the same procedural obligation reasons argued in relation to s.2 of the BOR, P's position is that s.12 amounts to a breach of s.3 of the BOR.

30. P's position in relation to s.7 of the BOR is that s.12 should be regarded as a procedural, not a substantive, bar and is therefore incompatible with s.7 of the BOR which establishes a right to a fair and public hearing in the determination of an individual's legal rights and obligations. It is contended that s.7 of the BOR imposes ongoing procedural rights which continued after the BOR came into force.

31. P contends that s.12 is incompatible with the obligation arising under the right to family life provision, s.9 of the BOR, namely to enable an individual to exercise his or her civil rights to compensation and to provide victims of medical negligence access to proceedings in which they can obtain such compensation. P submits that s.9 imposes the same procedural obligations on the Cayman Islands



which have been outlined herein in relation to s.2 of the BOR and s.3 of the BOR and that these arose prior to and continued after the BOR came into force.

32. P contends that s.12 is incompatible with a submitted duty imposed under s.17 of the BOR on the Cayman Islands to enact laws to protect the rights of children by causing serious and substantial prejudice to children harmed by acts of clinical negligence. It is contended that the duty under s.17 is a continuing duty which applied from the time that the BOR came into force and applies to past and future legislation.

(ii) The Defendants

33. The Defendants contend that when determining Part 3 of the preliminary issue the Court should consider:

(i) whether the BOR has retroactive effect so as to be capable of removing the s.12 defence of immunity from liability, and if it does, does it have such an effect;

(ii) whether or not s.12 infringes P's rights under s.2 or s.3 of the BOR in either substantive or procedural aspects;

(iii) whether or not s.12 infringes P's rights under s.7 and/or s.9 and/or s.17 of the BOR;

(iv) whether or not HSAL 2016 has retroactive effect and applies to P's claim; and

(v) whether or not a declaration of incompatibility should be made in all the circumstances.

34. The Defendants submit that a declaration of incompatibility should not be made pursuant to s.23 of the BOR for a number of reasons. The first reason is that the BOR cannot remove the Defendants' s.12 immunity defence and thereby create a liability that did not exist in 2005. Section 5(2) of the Constitution is referred to in support of a submission that there was no intention for the BOR to have retroactive effect. It is contended that, as a consequence, it is not strictly necessary for the Court to determine whether there would have been a breach of the BOR if the circumstances alleged had occurred before it came into force on 6 November 2012. However, the parties requested me to conduct that exercise no matter how I ruled in the retroactivity point.

35. The second reason why the Defendants contend that a declaration of incompatibility should not be made is that s.12 does not infringe P's rights under s.2 and/or s.3 of the BOR in either its substantive or procedural aspects. The third reason given is that s.12 does not infringe P's rights under s.7, or s.9 or s.17 of the BOR.

36. The Defendants accept that the presumption against retrospective operation can be affected by the principle of public good construction. However, the Defendants rightly contend that this should only apply to rebut the presumption in the most extreme circumstances and the exercise to be carried out is deducing what Parliament intended with the legislation and not a balancing exercise.

37. The Defendants contend that HSAL 2016, with reference again made to s.5(2) of the Constitution, does not apply to P's claim as it does not have retroactive effect. The HSAL 2016 does not state that it has retrospective effect and the presumption against retrospectivity "*precludes*" the Court from interpreting the amended Law in a manner that would alter the accrued right of the Defendants held at the time of P's birth. The Defendants claim that the language in HSAL 2016 is clear and this restricts the scope to read and give effect to it under s.25(1) of the BOR. It is further submitted that, if there is an ambiguity or lack of clarity, applying the ***Pepper v Hart*** Principles, the Premier of the Cayman Islands made it clear at the second reading of the Bill on 29 April 2016 that the legislation was not retroactive.

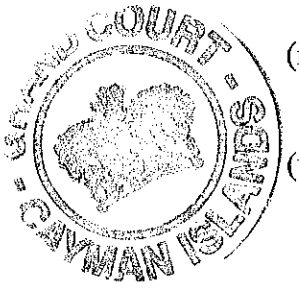
(iii) The Attorney General

38. The Attorney General takes no position on the facts surrounding P's birth relied upon by the parties in the substantive claim and he suggests that the remaining issues for consideration when determining Part 3, Part 4 and Part 5 of the Preliminary issue are:

(i) whether or not s.12 is incompatible with P's rights under s.2 or s.3 of the BOR in either its substantive or procedural aspects;

(ii) whether or not s.12 is incompatible with the P's rights under s.7 and/or s.9 and/or s.17 of the BOR;

(iii) whether, if the Court finds that s.12 is incompatible with P's rights under the BOR, it has the power to make a declaration of incompatibility in light of the amendment made by the HSAL 2016;



(iv) whether, as a matter of statutory interpretation, the HSAL 2016 applies to P's claim;

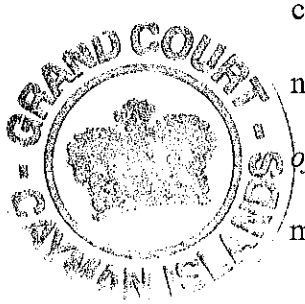
(v) if HSAL 2016 does not apply, whether the compatibility of HSAL 2016 with the BOR is unclear or ambiguous such that s.25 of the BOR requires the Court to interpret HSAL 2016 in such a way as to apply to P's claim; or in the alternative

(vi) whether the inapplicability of HSAL 2016 to P's claim is incompatible with the BOR, such that the Court should make a declaration of incompatibility.

39. The Attorney General contends that the BOR does not have retroactive effect in relation to substantive, as opposed to detachable procedural obligations. The Attorney General shares the Defendants' contention that s.12 does not infringe P's rights under s.7, or s.9 or s.17 of the BOR. The Attorney General contends that no declaration of incompatibility can be made by the Court in relation to the rights set out in ss. 7, 9 and 17 as they lack procedural elements. He adds that, in relation to s.7 even if the BOR could be relied upon retrospectively, no issue of incompatibility would arise because s.12 is a substantive, rather than a procedural bar.

40. The Attorney General takes a different position to the Defendants in relation to the procedural duties under s.2 and/or s.3 of the BOR. The Attorney General accepts that ss. 2 and 3 of the BOR may impose a procedural duty upon the Cayman Islands to investigate serious injuries and that arguably in this case the investigatory processes put in place may be incompatible with that.

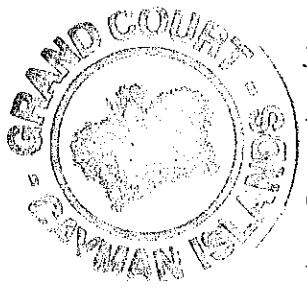
41. Despite his position in relation to s.2 and/or s.3 of the BOR the Attorney General submits that a declaration of incompatibility should not be made as it serves no constitutional purpose. He says that it is "*strongly arguable*" that the Court does not have jurisdiction to now make a s.23 declaration of incompatibility, as "*the offending legislative state of affairs*" has ceased to exist due to the amendments made to s.12 by HSAL 2016.



42. The Attorney General contends that there is nothing in the wording of HSAL 2016 that indicates an intention that it would operate retroactively and therefore the presumption against retroactivity has not been displaced. He agrees with the Defendants that the HSAL 2016, as drafted without a specific reference showing an intention to remove the right, could not be applied retroactively because it would deprive the Defendants of the accrued right to a defence given under s.12 HSAL. He goes on to say that the s.25 BOR interpretive obligation does not apply due to the clear wording of HSAL 2016. He further submits that the inapplicability of HSAL 2016 is not in itself incompatible with the BOR and accordingly there is no basis for making a declaration of incompatibility.

Issue of Retroactivity and the BOR

43. Rights under the European Convention Human Rights ("ECHR") were not extended to the Cayman Islands until 2006 and prior to that, so at the time of the birth, there was no right to bring an individual petition to Strasbourg. The parties agree that from the Strasbourg case law that where the death or serious injury



occurs prior to the entry into force of the ECHR in a given State, the Court has no jurisdiction to consider the substantive aspect. Although P accepts that she is unable to make a claim for a breach of substantive rights for events which occurred prior to 6 November 2012, she argues that there is no need to consider whether the BOR is retrospective, as s.12 constitutes an ongoing and continuing breach of her rights under ss. 2, 3, 7, 9 and 17 of the BOR. P contends that, in the alternative, the procedural duties imposed under ss.2 and 3 apply to events which occurred before 6 November 2012.

44. Section 4(1) of the Constitution Order 2009 provides that the Constitution which was published on 7 July 2009 was to have effect from the appointed date, namely 6 November 2009. Section 4(2) of the Constitution provides that Part 1 of the Constitution was to "*have effect*" from the day three years after the appointed day. Presumably, this was to enable public authorities to be trained about the effects of the Constitution. Therefore, the BOR came into force in the Cayman Islands on 6 November 2012, which was just over seven years after P's birth. In general, the BOR applies to any acts committed after it came into force.

45. The Defendants aptly highlight that the questions for determination are "*what is the effect of the BOR in legal proceedings which take place after the appointed day but which concern events that took place before that date*" and "*to what extent (if any) does the BOR "have effect' in such proceedings?*"

46. Retrospective legislation is defined in Craies on Legislation, 9th Edition, p432 n136 as legislation which:

> *"takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions or considerations already past."*

According to the Oxford Dictionary of Law, retrospective (or retroactive) legislation is:

> *"Legislation that operates on matters taking place before its enactment, e.g. by penalizing conduct that was lawful when it occurred."*

47. The Defendants rely upon the presumption that pieces of legislation, including the BOR, are not intended to have retroactive effect unless they merely change legal procedure and they contend that the principle of non-retroactivity exists in Cayman law, for example in the Interpretation Law (2005 Revision ("IL") and s.5(2) of the Constitution. The presumption is based on concepts of fairness and legal certainty. These concepts require that accrued rights and the legal effect of past acts should not be altered by subsequent legislation. Under its entry for 'retrospective' Stroud's Judicial Dictionary of Words and Phrases, Sixth Edition, 2000, Vol 3, p2315 outlines the principle:

> *"...'nova constitutio futuris formam imponere debet, non proeteritis', that is unless there be clear words to the contrary statutes 'do not apply to a past, but to a future, state or circumstance."*

Bennion section 97 at 291 reiterates the general rule as being that, unless a contrary intention appears, a statute is prospective rather than retrospective.

48. The sections in the IL support a submission that non-retroactivity is implicit. Section 14 of the IL requires the Governor to cause a notification of his or her assent to a Bill to be gazetted. Section 15 of the IL provides that every law, unless expressly provided in it, will come into operation on the day of the publication of the notification of assent.

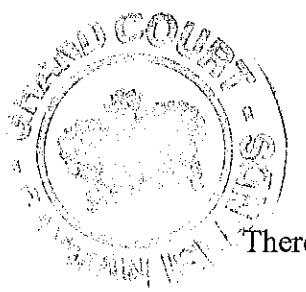
49. Section 24 and s.25 of the IL are even more specific and apply to the circumstances that are before this Court in relation to the amended s.12. Section 24 provides that where a law partly repeals the former law and substitutes a new provision for the repealed law, the repealed law will remain in force until the substituted provisions come into operation.

50. Section 25(2)(b) of the IL provides that:

> *"Where any Law repeals any other enactment, then, unless the contrary intention appears, the repeal shall not – (b) affect the previous operation of any enactment so repealed or anything to be done or suffered under any enactment so repealed."*

No contrary intention appears and this means that the new s.12 cannot affect the operation under s.12 under the 2004 Law which continues to operate.

51. Section 25(2)(c) of the IL provides that:



> *"Where any Law repeals any other enactment, then, unless the contrary intention appears, the repeal shall not – (c) affect any right..... accrued ... under any enactment so repealed."*

Therefore, as the Defendants had a defence under s.12 at the time of the birth, the repeal cannot affect that right.

52. Section 25(2)(e) of the IL provides that:

> *"Where any Law repeals any other enactment, then, unless the contrary intention appears, the repeal shall not – (e) affect any.... legal proceedings... in respect of any such right....; and any such...legal proceedings.... may be continued ... as if the repealing Law had not been passed."*

I am satisfied that a contrary intention does not appear in express wording in the amended legislation to rebut the presumption against retroactivity, and these legal proceedings are therefore not affected by the Law amended in 2016.

53. The Defendants agree with P that certain procedural rights under the BOR may be relied upon in post 6 November 2012 proceedings even if the events occurred before that date.[13] However, they contend that no rights may be relied upon if they have the effect of creating a new liability or cause of action in respect of pre-

[13] See discussion starting at paragraph 81 herein later which support this contention, namely ***Silih v Slovenia*** *(2009) 49 EHRR 966,*[13] ***Janowiec and others v Russia*** *(2013) 58 EHRR,* ***Re McCaughey & Another (Northern Ireland Human Rights Commission and other intervening)*** *[2011] UKSC20, (2012) 1 AC 725 and* ***Keyu & Others v Secretary of State for Foreign Affairs and Commonwealth Affairs and Anr*** *[2015] UKSC 69.*

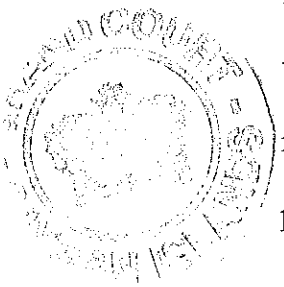
November 2012 events. This submission is based on the Defendants' interpretation of s.5 of the Constitution and the decision in ***Wilson*** and how it has been applied in other cases. It is submitted that the Court cannot make any s.23 declaration of incompatibility even if the legislation would be incompatible after the Constitution came into effect.

54. Section 5 of the Constitution under the heading "*Existing Laws*" provides:

> *"5.-(1) Subject to this section, the existing laws shall have effect on and after the appointed day as if they had been made in pursuance of the Constitution and shall be read and construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution.*
> *(2) The Legislature may by law make such amendments to any existing law as appear to it to be necessary or expedient for bringing that law into conformity with the Constitution or otherwise for giving effect to the Constitution; and any existing law shall have effect accordingly from such day, not being earlier than the appointed day, as may be specified in the law made by the Legislature.*
> *(3) In this section "existing laws" means laws and instruments (other than Acts of Parliament of the United Kingdom and instruments made under them) having effect as part of the law of the Cayman Islands immediately before the appointed day.*

55. As stated at paragraph 44 herein the "*appointed day*" is 6 November 2009 which is when Schedule 2 of the Constitution Order (2009) came into effect. Then, three years later, the BOR came into effect on 6 November 2012.

56. P contends that the wording in s.5(1) of the Constitution means that all existing laws must be treated as though they were made pursuant to the Constitution and with such modifications as may be necessary to bring them into conformity with it. If right this means that, when construing a provision such as s.12 in these proceedings, the section should be brought into conformity with the Constitution.



57. The Attorney General agrees that s.5(1) requires laws in force prior to the appointed day to be compliant with the Constitution and the BOR. However, he points out that it would be wrong to conclude that s.5(1) is applicable for construing laws existing prior to the BOR coming into effect. He highlights that s.25(1) of the BOR provides the guidance on giving effect to legislation in relation to the BOR, namely that the obligation arises in cases where the compatibility of legislation with the BOR is unclear or unambiguous. The Attorney General rightly states that there is nothing in the Constitution or the BOR to suggest that the BOR applies retrospectively to causes of action which arose before it came into effect and, accordingly, the presumption against the retrospective effect of legislation remains.

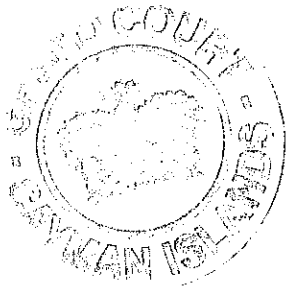
58. The Defendants argue that the proper interpretation of s.5(1) and s.5(2) of the Constitution means that a declaration cannot be made. S. 5(1) gives the power to amend laws in a way which is more "*muscular*" than that found in s.3 the Human Rights Act ("HRA"). The Defendants acknowledge that if s.5(1) was applied in isolation it could require the Court, when it is considering the compatibility of the

existing law after 6 November 2012 and events which occurred prior to 6 November 2012, to read the Law in conformity with the Constitution to the extent permitted by s.25. In such circumstances, if the existing law could not be read in that way, the Court would have to make a s.23 declaration of incompatibility.

59. However, the Defendants do not agree with P that s. 5(1) is "*the end of the matter.*" The Defendants highlight that s.5(2) of the Constitution means that when existing laws have been brought into compliance with the Constitution by the passing of later legislation, the former shall have effect from the date specified by the Legislature which cannot be earlier than the appointed day, in this case 6 November 2012. Therefore, even if a declaration of incompatibility was made in relation to s.12, new legislation removing the immunity which the Defendants enjoyed in 2005 could not be introduced. The Defendants contend that by s.5(2) the Legislature shows a clear intention to limit the retrospective effect of s.5 of the Constitution and therefore the two sections should be read to have a cumulative effect.

60. The Attorney General does not agree with the Defendants that s.5(2) reinforces the non-retrospectivity of the BOR in relation to proceedings after 6 November 2009 where the alleged breach occurred prior to that date. The Attorney General suggests that s.5(2) is not helpful to the determination of the retrospectivity issues arising in the current proceedings.

61. The Defendants rightly highlight that, despite the differences in language used, the analogous section in England and Wales to s.5 of the Constitution is s.22(4) HRA which provides:



> *"Paragraph (b) of subsection (1) of section 7 applies to proceedings brought by or at the institution of a public authority whenever the act in question took place; but otherwise that subsection shall not apply to an act taking place before the coming into force of that section."*

62. With this in mind, the Defendants correctly submit that the principles applied in England and Wales and in the Strasbourg Courts in relation to s.22(4) of the HRA are relevant to the interpretation of s.5 of the Constitution. The BOR intended to give effect to United Kingdom obligations under the HRA and Convention rights, and therefore the cases that have interpreted that legislation as being non-retroactive (and the earlier cases referred to in those cases) are relevant. The Attorney General agrees with this.

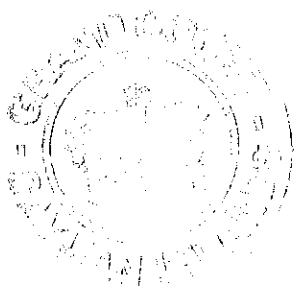
63. In ***re Athlumney Ex Parte Wilson*** (1898) 2 Q.B.547 at 552 Wright J. stated that:

> *"A retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only."*

64. In ***Yew Bon Tew v Kenderaan Bas Mara*** [1983] 1 AC 553 the Privy Council held that, on the expiry of a relevant period of limitation, a potential defendant to an action acquired an "*accrued right*" within the meaning of an identical provision in the Malaysia Interpretation Act 1967 to rely on the time bar as giving him immunity from liability, which was not affected by the source of the repeal of the relevant limitation provision unless a contrary intention appeared. Lord Brightman went on to state the general principal at page 558F:

> "*Apart from the provisions of the interpretation statutes, there is at common law a prima facie rule of construction that a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that result is unavoidable on the language used. A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in regard to events already passed.*"

65. The House of Lords decision in ***Wilson*** considered the retrospective effect of the HRA in relation to incompatibility and the s.3 HRA interpretative obligation. In January 1999, Mrs. Wilson entered into a regulated consumer credit agreement with First County Trust against the security of her car. First County Trust advanced £5,000 in cash to Mrs. Wilson, but documented an advance of £5,250 and an additional fee of £250. Mrs. Wilson defaulted on the loan and First County Trust sought to exercise their right to sell the car, but she claimed that the agreement was unenforceable. The Court of Appeal held that the credit agreement was unenforceable by virtue of s.127(3) of the Consumer Credit Act 1974



("CCA") as it did not contain the prescribed term of the amount of the credit, namely £5,000, resulting in the documented APR also being wrong. Mrs. Wilson was therefore entitled to both the return of her car and to keep the money that had been advanced to her. The Court of Appeal considered whether this had the effect of violating First County Trust's rights under Article 6(1) ECHR and Article 1 of the First Protocol to the ECHR and concluded that s.127(3) CCA 1974 was incompatible with the rights under the HRA, and made a declaration of incompatibility. The decision was appealed by the Secretary of State for Trade and Industry, who argued that a declaration of incompatibility should not have been made in a case where the relevant events took place prior to the coming into force of the HRA, and that s.127(3) was not incompatible with the ECHR. The House of Lords found that a declaration of incompatibility could not be made where the cause of action arose and the parties' rights had been determined by the County Court prior to the entry into force of the HRA. A declaration of incompatibility could only be made where s.3 HRA was available as an interpretative tool. As the events had occurred prior to the Act, the Lords found that this could not be the case, as Parliament could not have intended the application of s.3(1) to alter the parties' existing rights and obligations under the CCA.

66. Lord Nicholls, when he considered the retrospective effect of the HRA in relation to the interpretative obligation in ss.3(1) and 3(2) declarations of incompatibility, stated at paragraphs 17-23:

"17. On its face section 3 is of general application. So far as possible legislation must be read and given effect in a way compatible with the Convention rights. Section 3 is retrospective in the sense that, expressly, it applies to legislation whenever enacted. Thus section 3 may have the effect of changing the interpretation and effect of legislation already in force. An interpretation appropriate before the Act came into force may have to be reconsidered and revised in post-Act proceedings. This effect of section 3(1) is implicit in section 3(2)(a). So much is clear.

18. Considerable difficulties, however, might arise if the new interpretation of legislation, consequent on an application of section 3, were always to apply to pre-Act events. It would mean that parties' rights under existing legislation in respect of a transaction completed before the Act came into force could be changed overnight, to the benefit of one party and the prejudice of the other. This change, moreover, would operate capriciously, with the outcome depending on whether the parties' rights were determined by a court before or after 2 October 2000. The outcome in one case involving pre-Act happenings could differ from the outcome in another comparable case depending solely on when the cases were heard by a court.[14] *Parliament cannot have intended section 3(1) should operate in this unfair and arbitrary fashion.*

19. The answer to this difficulty lies in the principle underlying the presumption against retrospective operation and the similar but rather narrower presumption against interference with vested interests. These are established presumptions but they are vague and imprecise. As Lord Mustill pointed out in L'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd [1994] 1 AC 486 , 524-525, the subject matter of statutes is so varied that

[14] Emphasis highlighted by the Defendants.

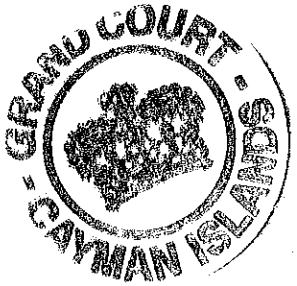
these generalised maxims are not a reliable guide. As always, therefore, the underlying rationale should be sought. This was well identified by Staughton LJ in Secretary of State for Social Security v Tunnicliffe [1991] 2 All ER 712, 724:

> *"the true principle is that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree— the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended."*

Thus the appropriate approach is to identify the intention of Parliament in respect of the relevant statutory provision in accordance with this statement of principle.

20. Applying this approach to the Human Rights Act 1998, I agree with Mummery LJ in Wainwright v Home Office [2002] QB 1334 , 1352, para 61, that in general the principle of interpretation set out in section 3(1) does not apply to causes of action accruing before the section came into force. The principle does not apply because to apply it in such cases, and thereby change the interpretation and effect of existing legislation, might well produce an unfair result for one party or the other. The Human Rights Act was not intended to have this effect.

21. I emphasise that this conclusion does not mean that section 3 never applies to pre-Act events. Whether section 3 applies to pre-Act events depends upon the application of the principle identified by Staughton LJ in the context of the particular issue before the court. To give one important instance: different considerations apply to post-Act criminal trials in respect of pre-Act happenings. The prosecution does not have an accrued or vested right in any relevant sense.



22. In the present case Parliament cannot have intended that application of section 3(1) should have the effect of altering parties' existing rights and obligations under the Consumer Credit Act 1974. For the purpose of identifying the rights of Mrs Wilson and First County Trust under their January 1999 agreement the Consumer Credit Act 1974 is to be interpreted without reference to section 3(1).

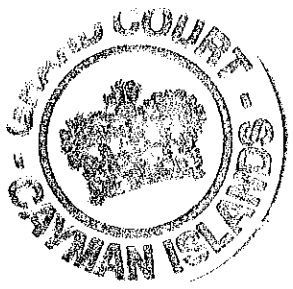
23. It follows that, in this transitional type of case concerning the Consumer Credit Act, no question can arise of the court making a declaration of incompatibility. For the reasons already considered, it is only when a court is called upon to interpret legislation in accordance with section 3(1) that the court may proceed, where appropriate, to make a declaration of incompatibility. The court can make a declaration of incompatibility only where section 3 is available as an interpretative tool. That is not this case."

67. Having regard to ***Wilson***, the Defendants submit that there are three stages in the process. The first stage is for this Court to consider whether s.12 is compatible with the BOR and Convention rights in the circumstances of P's case. The second step for the Court to consider is, if s.12 is incompatible, can s.25 be used to remedy the incompatibility. Then the third stage for the Court is, if s.25 cannot be used, then a declaration can be made. The Defendants contend that the critical stage in P's case is whether the legislation is incompatible with her rights and that turns on the question of retroactivity. It is submitted by the Defendants that stage 2 or stage 3 cannot be reached, as there is no incompatibility on the facts of the case, and no duty existing because the alleged breach occurred before the Court had the jurisdiction.

68. The Attorney General agrees that due to the similarities between the BOR and the HRA that one should have in mind the case law from England and Wales. P highlights that ***Wilson*** was not a case involving ongoing procedural duties in ss.2 and 3 of the HRA. I agree with the Attorney General that, although the facts in ***Wilson*** are distinguishable from those before me, the general principles that the HRA cannot be applied retroactively to "*make unlawful conduct which was lawful at the time that it took place*" still applies.

69. In ***Law & Others v The Society of Lloyd's*** [2003] EWCA Civ, 1887 the applicants sought to amend earlier pleadings to add a claim that their human rights had been infringed by the Lloyds Act 1982 ("LA"), which gave the respondents certain immunities. The Court of Appeal held that the HRA was not retrospective. At the time when it should have been made, the amendment would have been doomed to failure by virtue of the 1982 Act. Waller LJ, between paragraphs 27 and 30, carefully set out certain reasoning of the Members of the House of Lords in ***Wilson***. He then concluded that review by stating at paragraph 31:

> *"31. To summarise, Lord Nicholls was of the view that section 3(1) of the HRA did not apply to "causes of action accruing before the section came into force", but he emphasised that that did not mean that "section 3 never applies to pre-Act events". He instanced post-Act criminal trials relating to pre-Act events stressing the prosecution not having "an accrued or vested right in any relevant sense". Lord Hope was of the view that the section of the Consumer Credit Act was "a typical example where the legislation*



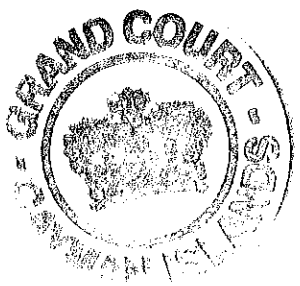
in question affects transactions that have created rights and obligations which the parties to it seek to enforce against each other"; he distinguished that from legislation which affects transactions that have resulted in the bringing of proceedings in the public interest by a public authority (such as in R v Field). He was clear that the presumption would be violated in the case of section 127(3). Lord Hobhouse was clear that there should be no retrospectivity and Lord Scott was also clear that there was nothing in the HRA to rebut the presumption against the HRA operating retrospectively "so as to alter accrued rights" [para 162], and was of the view that his reasons were substantially those of Lords Nicholls, Hope and Rodger [para 163].

32. It seems to us that so far as civil cases are concerned there was unanimity that the HRA was not to be construed as affecting "accrued rights……"

70. The Court of Appeal in ***Law & Others***, applying the principles set out in ***Yew Bon Tew*** and in ***Wilson***, held that the Defendant had an accrued right under s.14(3) of the LA and therefore had no liability in damages except where bad faith could be established. Section 14 of the LA was plainly not a mere procedural bar, it conferred a substantive immunity. The Court also held that s.3(1) of the HRA could not be used retrospectively to construe that section in such a way as to alter that accrued right, which depended upon the way in which s.14(3) would be construed but for s.3 of the HRA. At paragraph 33 Waller LJ stated that from 1982 the Defendants had been entitled to conduct their affairs with reference to the immunity, and that many others also conducted their affairs on the basis of the existence of the immunity.

71. In ***A v Iorworth Hoare and others*** [2006] 1 WLR the Court of Appeal again grappled with this issue and helpfully reviewed the cases of ***Wilson***, ***Yew Bon Tew***[15], ***Laws and Others*** and ***Rowe v Kingston–upon-Hull City Council*** [2003] EWCA Civ 1281. In ***A v Iorworth*** the plaintiffs claimed damages in negligence in relation to attempted sexual abuse and rape. The respondents argued that the claims were out of time, being subject to the fixed 6-year limitation period from the date of assault or from the claimants' majority if later which applied to claims arising out of intentional sexual assaults. It was held that the HRA could not be used retrospectively to prevent a defence based on limitation.

72. Sir Anthony Clarke MR at paragraphs 47-48 stated:



"47. It is common ground that the HRA does not have retrospective effect in the sense that it does not retrospectively confer upon a claimant a cause of action which he would not otherwise have had. There is ample authority for this proposition: see eg Wilson v First County Trust Limited (No 2) [2003] UKHL 40, [2004] 1 AC 816. The respondents and the Secretary of State submit that the same applies to accrued defences, and that in each case the respondent had an accrued right to rely upon section 2 of the 1980 Act when the HRA came into force……

48. We accept the submission that limitation is a procedural defence and that it must be pleaded. However, we are unable to accept the claimant's contention that the defendants did not have a relevant accrued right to rely upon Section 2 of the 1980 Act before the HRA came into force. Nor or we able to accept the submission, if it is different, that they are entitled to rely upon

[15] A case which Sir Anthony Clarke MR opined was the case which "*showed the position most clearly.*"

Section 3 of the HRA to defeat the defendant's defences of time bar (if it is otherwise good), notwithstanding the fact that the six year period expired in each case before 2 October 2000."

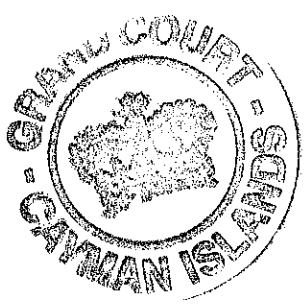
73. At paragraph 56 the judgment continues as follows:

*"In **Rowe v Kingston-upon- Hull City Council** [2003] ELR 771, the claimant claimed damages for breach of duty by his teachers committed before 1991. It was suggested on his behalf that Section 3(1) of the HRA should affect the construction of Section 14(1) of the 1980 Act. In agreeing with the judgment of Keene LJ, who did not comment on this point, Mummery LJ said at paragraph 46:*

> *"It is import to note that Mr Rowe's cause of action in this case is alleged to have arisen before the Human Rights Act 1998 came into force on 2 October 2000. Although no retrospectivity point has been taken on behalf of the appellant it is my opinion that, on the present state of the authorities, Section 3 of the Human Rights Act 1998 does not in general apply retrospectively to a cause of action which arose before the Human Rights Act 1998 came into force, so as to take away from the defendant public authority, the limitation defence which would otherwise have been available to it before the Human Rights Act 1998 came into force."*

We agree."

74. P contends that the Defendants' interpretation of s.5 of the Constitution is wrong, but adds if it were correct it would in itself be incompatible with s.2 and s.3 of the BOR. P argues that the s.25 interpretive obligation and the power to declare a statute incompatible applies to pre and post November 2012 legislation. As mentioned at paragraph 56 herein, P suggests that the Court needs to look no further than s.5(1) of the Constitution and that the words "*on and after*" and "*as if they had been made in pursuance of the Constitution*" mean that all existing laws



should be treated as though they were made consistent with the Constitution and the Court should, when construing a provision in an existing statute, do so bringing it into conformity with the Constitution. It is argued that the Court may make declarations of incompatibility in respect of legislation which preceded the coming into force of the BOR and in respect of still continuing obligations which flow from events prior to the coming into force of the BOR.

75. P argues that the Defendants' submission in relation to s.5(2) of the Constitution, namely that because any amendment to the existing law is due to take effect from the appointed date for the BOR and the BOR cannot apply to any pre-BOR events, is wrong as that would mean that the Legislature has no power to pass law that is retrospective and that "*would be a significant infringement on the notion of parliamentary sovereignty*". P states that s.5(2) of the Constitution cannot be interpreted in such a way so as to fetter the Legislative Assembly's power by preventing them from being able to repeal legislation that is incompatible with the BOR. P contends that s.23 and s.25 indicate that the Privy Council's intention was to ensure that the Legislative Assembly was the final arbiter and that the Court could not override it by striking down legislation. So, for example, the Court is not able to adapt or construe laws which are clear and unambiguous to ensure compatibility with the BOR, all it can do is make a declaration of incompatibility.

76. The Attorney General rightly observed that the Cayman Islands are not sovereign and they exercise the powers conferred upon them by her Majesty in Council or

by order in Council or legislation passed by the UK Parliament. If the Cayman Islands introduced legislation purporting to effect rights which existed before the appointed day it would be acting unlawfully.

77. It is contended by P that s.5(2) of the Constitution only applies to amended law and s.12 (HSAL 2004) is not an amended law. It is argued that where a law is amended because a section is incompatible and cannot be interpreted as consistent with the BOR pursuant to s.25 as the wording is clear and ambiguous, that amended section only takes effect from the appointed day. It is argued that what was intended was that a person could not bring a damages claim for a substantive breach prior to the appointed day pursuant to s.26, but that did not mean that a person could not bring a claim for a s.23 declaration of incompatibility. It does not address the content of that Law which can apply retrospectively. It is submitted that if s.5(2) of the Constitution is unclear and ambiguous that it has to be interpreted in line with the BOR and not with the interpretation given by the Defendants.

78. P contends that any submission based on ***Wilson***[16] means that the Court must go through the interpretative obligation in s.25 before being able to consider making a s.23 declaration of incompatibility, and that in this case the Court does not get to consider s.23 as s.25 cannot be used to interpret s.12 to deprive the Defendants of the right to use the defence of immunity. It is suggested that the cumulative

[16] ***Wilson*** endorses a cumulative approach starting at s.3 of the HRA, namely that one must first try to construe the legislation pursuant to s.3 of the HRA, and if that cannot be done in accordance with s.3 of the HRA only then move on to consider a s.4 of the HRA declaration of incompatibility.

approach in ***Wilson*** should not be adopted in the Cayman Islands because it is dependent upon the link between s.3 of the HRA and s.4 of the HRA and the English legislation is different as s.3(1) of the HRA says that it must be construed "*so far as possible*" in a way that is compatible with a Convention right before going on to s.4. This means that the Courts in England must do all they can to ensure compatibility with the ECHR. If it cannot ensure compatibility then the Court will move on to s.4(2) of the HRA as it then "*may*" make a declaration of that incompatibility. Under s.23(1) of the BOR there appears to be no such discretion as the Court in such circumstances "*must*" make a declaration of the incompatibility. It is contended by P that a further difference is that s.23 of the BOR and s.25 of the BOR are not cumulative, but are alternatives. So if a Court rules that the wording of the relevant section in the statute is clear and unambiguous then s.25 of the BOR plays no part and the Court has to then consider whether it is compatible under s.23 of the BOR.[17] It is contended by P that ***Wilson*** has limited application when interpreting the BOR and the criteria for making declarations under s.23.

79. P suggests that the Defendants' three-stage approach for the making of a declaration of incapacity based on ***Wilson*** is contrary to the wording of s.25 and established case law.

[17] See Henderson J. ***In The Matter of Nairne*** [2103 (1) CILR 345 at paragraphs 20-23 , which is highlighted at paragraphs 121-126 in my Judgment of 19 February 2016.

80. As already mentioned, although the Court has no jurisdiction to consider the substantive aspect of s.2 of the BOR where a death or life threatening injury occurs prior to the entry into force of the ECHR, that does not automatically preclude the Court from considering the procedural obligation. As agreed by the parties and the Attorney General, that procedural duty has been held in a number of cases to apply to pre-commencement events where facts concerning the alleged procedural breach continue after the ECHR applies, or where credible new evidence is presented.

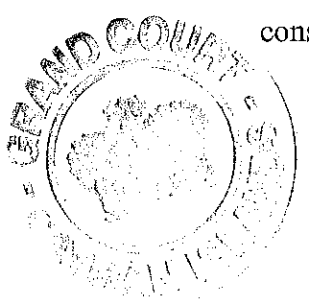
81. The Defendants contend that ***Wilson*** and the later cases which rely upon it should still be considered alongside the developing case law about the timing of the applicability of the procedural duty. The Defendants make this contention as they contend that P is still trying to create a liability that did not exist at the time of the birth. P contends that *"scant reference"* is made to ***Wilson*** in the following cases and this supports her contention that the ***Wilson*** approach should not be applied as Courts have become less willing to adopt it.

82. The starting point for my review about consideration of the timing of the procedural obligation is ***Re McKerr*** [2004] 1 WLR 807[18], in which the House Of Lords held that the Article 2 obligations to carry out proper investigations did not apply before the HRA came into force and that it was inappropriate for the Courts to impose a common-law obligation on the State corresponding to the Article 2

[18] See ***Re McCaughey*** at paragraph 86 below where the Supreme Court departed from this decision and for the reasons why.

obligation. This meant that there was no obligation on the State to carry out an effective official investigation into the death of a person who had been shot by police officers in 1982.

83. This approach has been modified in both the Strasbourg Courts and the Courts in England and Wales. In ***Silih v Slovenia*** (2009) 49 EHRR 966 the Grand Chamber considered whether the investigatory duty could apply where a death predated entry into the ECHR by Slovenia. The matter concerned the death of the applicants' son in a hospital after he had been injected with drugs to which he was allergic. The applicants complained that the authorities had failed to hold an effective investigation into their allegation that the death had been caused by clinical negligence. The Court found a violation of Article 2 and its procedural aspect, primarily due to the excessive length of the civil proceedings which were still pending 13 years later. The Court, by virtue of the non-retroactivity principle, found that the Court had no jurisdiction to consider the substantive aspect of Article 2 where a death occurs prior to the entry into force of the ECHR in a given State, but also found that did not automatically preclude the Court from considering the procedural obligation. At paragraph 91 to 94 the Court stated that:



> *"Whether it is appropriate to consider the procedural aspect of the complaint in the absence of competence to deal with the substantive aspect therefore depends on the facts of the particular case and the scope of the right involved."*

So where the facts concerning an alleged procedural breach continue after the ECHR applies, the procedural obligation may be engaged.

84. The Grand Chamber of the ECtHR ruled that Article 2 imposed, in certain circumstances, a freestanding obligation in relation to the investigation of a death which applied even where the death itself had occurred before the member state ratified the ECHR. The ECtHR stated at paragraph 163 that there must exist a genuine connection between the death and the entry into force of the ECHR in the state for the Article 2 procedural obligations to come into effect. Therefore, the obligation was to apply where "*a significant proportion of the procedural steps*" that Article 2 required (assuming that it applied) in fact took place after the Convention had come into force. Thus if a State decided to carry out those procedural steps long after the date of the death, they had to have the attributes that Article 2 required. Slovenia was not under a continuing obligation under Article 2 to carry out an investigation into these deaths over 20 years earlier, but as an inquest was going to be held as a matter of international obligation Slovenia had come under a freestanding obligation under Article 2 to ensure that the inquest complied with the procedural requirements of that Article, at least in so far as that was possible under domestic law.

85. The issue was whether that obligation was, on a true interpretation of the HRA, one to which that Act applied. There were two relevant principles that Parliament intended should govern the application of the HRA, and they were potentially in conflict. The first was that the HRA does not have retroactive effect. The second was that the ambit of application of the HRA should mirror that of the ECHR. ***Silih*** made it clear that the Article 2 procedural obligation was not an obligation

that continued indefinitely. In so far as Article 2 imposed any obligation, that was a new freestanding obligation that arose by reason of current events. To guarantee the principle of legal certainty, the ECtHR indicated that its competence encompasses only procedural acts or omissions in the period subsequent to the critical date, namely in the period subsequent to the ECHR's entry into force. The relevant event in ***Silih*** was the fact that the coroner was to hold an inquest. There is no similar relevant event in the matter before me. ***Silih*** established that this gave rise to a freestanding obligation to ensure that the inquest satisfied the procedural requirements of Article 2.

86. In ***Re McCaughey (Northern Ireland Human Rights Commission Intervening)*** 2012 1 AC 725 the Supreme Court held that if the United Kingdom chose to hold an inquest into a death resulting from acts by agents of the state which occurred before the Human Rights Act 1998 came into force, that inquest had to comply with the procedural obligations of Article 2 ECHR. The Supreme Court allowed an appeal (Lord Rodger dissenting) by the claimants from a decision of the Court of Appeal in Northern Ireland dismissing an appeal against the refusal of a judge to grant a declaration that the coroner at the inquest to be held into the deaths of two individuals who were shot and killed by members of the British Army in 1990 was obliged to conduct the inquest in a manner compliant with Article 2 ECHR. The question for the Supreme Court in ***Re McCaughey*** was whether, as a result of the decision of the ECtHR in ***Silih***, the Supreme Court ought to overrule

the decision of the House of Lords in ***Re McKerr***[19] that Article 2 applied, by virtue of the HRA, only to deaths occurring after 2 October 2000. The practical significance for the relatives of the deceased concerned whether the inquest could enquire as to "*in what broad circumstances*", rather than "*by what means*", the men had been killed. Lord Phillips, who delivered the leading speech, said that Article 2, by implication, gave rise not merely to a substantive obligation on the State not to kill people but, where there was an issue as to whether the State had broken that obligation, a procedural obligation on the State to carry out an effective official investigation into the circumstances of the deaths. This case was a departure from the decision in ***Re McKerr.***

87. Lord Phillips stressed at paragraph 47 that ***Silih*** *"did not decide that there is a continuing obligation to hold a procedural investigation that persists from the time of the death until the obligation has been satisfied."* Where, as in ***McCaughey***, "*"a significant proportion of the procedural steps"*" required by that provision *"(assuming that it applies) in fact take place after the Convention has come into force"*[20] the procedural aspects of Article 2 applies.

Lord Phillips accepted at paragraph 50 that the obligation for such steps to be Article 2 compliant:

> *"Appears to be a free standing obligation" on which there was "no temporal restriction ... other than that the procedural steps take place after the Convention has come into force."*

[19] See paragraph 82 above.
[20] Lord Phillips at paragraph 50.

At paragraph 52 Lord Phillips stated that:

> *"The United Kingdom is not under a continuing obligation under article 2 to carry out an investigation into the deaths over 20 years ago of Martin McCaughey or Dessie Grew. But an inquest is going to be held into those deaths. As a matter of international obligation it is now apparent that the United Kingdom has come under a free standing obligation under article 2 to ensure that the inquest complies with the procedural requirements of that article, at least in so far as this is possible under domestic law."*

He reiterated at paragraph 26 (after referring to ***Wilson***) and at paragraph 58 that:

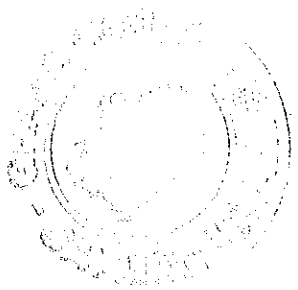
> *"The HRA does not have retroactive effect."*

Lord Phillip's view expressed at paragraph 61 was that the most significant aspect of ***Silih*** was that it:

> *"It makes it quite clear that the article 2 procedural obligation is not an obligation that continues indefinitely."*

88. Lord Phillips added at paragraph 61 and 62 that:

> *"61. ....The spectre that the House of Lords confronted in McKerr is shown to be a chimera. Just because there has been an historic failure to comply with the procedural obligation imposed by article 2 it does not follow that there is an obligation to satisfy that obligation now. Insofar as article 2 imposes any obligation, this is a new, free standing obligation that arises by reason of current events...."*
>
> *"62. Is the presumed intention of Parliament when enacting the HRA that there should be no domestic requirement to comply with this international obligation? This is a very different question to*



that considered by the House of Lords in McKerr, and so far as I am concerned it produces a different answer. The mirror principle should prevail. It would not be satisfactory for the Coroner to conduct an inquest that did not satisfy the requirements of article 2, leaving open the possibility of the appellants making a claim against the United Kingdom before the Strasbourg Court..."

89. Lord Hope agreed that the recognition in ***Silih*** about the separation of the substantive and investigatory Article 2 duties provided the basis for a departure from ***Re McKerr*** and that, although there was no obligation under the HRA to investigate deaths which occurred prior to 1 October 2000, if the State chose to undertake an investigation then that had to be Article 2 compliant. Lord Kerr, Lord Dyson, Lord Brown and Lady Hale all agreed that, following ***Silih***, the inquest into the deaths was required by the HRA to be Article 2 compliant.

90. The fifteen applicants in ***Janowiec and others v Russia*** (2013) 58 EHRR were relations of twelve victims of the Katyn Massacre who were part of the 20,000 plus Polish prisoners who had been arbitrarily executed in 1940 by the Soviet People's Commissariat for Internal Affairs. A criminal investigation into their deaths ran from 1990 until 2004, at which time the Chief Military Prosecutor discontinued it on the grounds that any alleged suspects were dead. The applicants alleged violation by Russia of Article 2 in its procedural limb, complaining that the Russian authorities had not carried out an effective investigation into the death of their relatives. The ECtHR held that it had no competence to examine

complaints relating to the adequacy of Russia's criminal investigation into events that had occurred prior to the adoption of the ECHR in 1950.

91. In ***Janowiec*** the ECtHR re-stated the overarching principles determining the scope of the ECHR, including the principle that the ECHR does not bind a State in relation to any act or acts which took place before the critical date, the date when the ECHR came into force in that State. The ECtHR reconfirmed that the duty to carry out an effective and independent investigation had evolved into a separate and autonomous duty and, unlike the substantive aspect of Article 2, it could bind a State even when the deaths occurred prior to the critical date. The ECtHR in ***Janowiec*** clarified and summarised the principles in the judgment in ***Silih*** in the following manner:

(i) where the death occurred before the critical date the Court's temporal jurisdiction will extend only to the procedural acts or omission in the period subsequent to that date;

(ii) the procedural obligation will come into effect only if there was a "*genuine connection*" between the death as the triggering event and the entering into force (in this case for domestic purposes, of the BOR); and

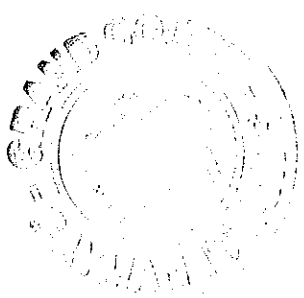
(iii) a connection which is not "*genuine*" may nonetheless be sufficient to establish the Court's jurisdiction if it is needed to ensure that the guarantees and the underlying values of the ECHR are protected in a real and effective way.

92. The ECtHR in ***Janowiec*** then examined each of those elements. Firstly at paragraph 144 that a procedural admission subsequent to the critical date may

include inactivity in response to the emergence of compelling new material, for example fresh evidence or information or a plausible allegation. Secondly, in relation to the genuine connection test, the ECtHR recognised that at paragraph 163 in ***Silih*** it had created two limitations on jurisdiction where the substantive event occurred before the critical date. At paragraph 141 the ECtHR stated that it must successfully apply the genuine connection test in order to demonstrate its jurisdiction. At paragraphs 141, 145 and 147 the ECtHR in ***Janowiec*** reiterated that only if there is a genuine connection between the triggering event and the ECHR entry into force will the Court have jurisdiction to consider whether the investigation was adequate and effective. The Court stated that the decisive factor is whether "*a major part of the proceedings or the most important procedural steps*" of the investigation took place, or ought to have taken place, in the period following the relevant critical date.

93. For completeness sake, I note that at paragraphs 141 and 149 in ***Janowiec*** the ECtHR also said that if there has been no genuine connection, the Court may alternatively apply the "Convention Values Test" and exercise jurisdiction if the Court determines that jurisdiction is "*needed to ensure that the guarantees and the underlying values of the Convention are protected in a real and effective way.*" However, the case before me does not fall into the category of extraordinary situations required for the test to apply.

94. In ***Keyu & Others v Secretary of State for Foreign Affairs and Commonwealth Affairs and Anr*** [2015] UKSC 69, the Supreme Court held that the Secretary of State for Foreign and Commonwealth Affairs and the Secretary of State for Defence were not under a duty, under Article 2 or domestic law, to hold a public enquiry or similar investigation into the circumstances in which twenty four unarmed civilians were killed by British soldiers in 1948 in Malaya, which at the time was a British protected state. The applicants contended that the public enquiry was required in relation to their relatives' deaths under the ECHR which had been extended in 1953 to Malaya. The applicants also contended that an inquest was required under common law. Lord Neuberger highlighted that the law relating to the obligation to investigate suspicious deaths had been developed in ECtHR decisions, making specific reference to the decisions in ***Silih*** and ***Janowiec.*** Lord Neuberger reiterated that the investigatory duty was now regarded as a separate and detachable obligation which, whilst acknowledging that the ECHR was not retrospective, could bind a State even if the event had occurred prior to the date when the State subscribed to the ECHR. He recognised that (i) the relevant acts or omissions had to be after the critical date and (ii) that there had to be a genuine connection, not exceeding ten years between the death and the critical date. He found that the first criterion had been met as the first evidence pointing towards unlawful killings did not emerge until 1969/1970 and prior to 1970 there had been no full or public investigation of the killings. The issue which troubled the Supreme Court was in relation to the second criterion, and whether the critical date was the date of the ECHR coming into force in 1953



or the date when the right of petition was recognised in 1966. This was important when determining whether the gap between the critical date and the date of the events in question were greater than 10 years. The majority held that 1966 was the date, but Lady Hale considered that it should be 1953 and Lord Kerr was undecided. The majority finding that it was 1966 meant that the claim failed to meet the genuine connection test because the aforementioned gap was greater than ten years.

95. The Defendants agree that these cases mean that BOR procedural obligations may apply to inquests, a criminal trial and civil proceedings which are conducted after the appointed day in relation to a death or serious injury that occurred before 6 November 2012. However, the Defendants rightly highlight that these cases also make clear that the Article 2 (s.2 of the BOR) procedural obligation does not undermine the principle of non-retroactivity.

96. The Attorney General and P contend that she can rely upon the procedural obligation under s.2 of the BOR because (i) the clinical acts which give rise to the claim took place under ten years prior to the BOR coming into force; (ii) no inquiry which meets the s.2 procedural requirements took place during that period or subsequently; and (iii) any inquiry will necessarily post-date the coming into force of the BOR because P's claim was not issued until 2013.

97. The Court can make a declaration of incompatibility only where s.25 was available as an interpretative tool, but if there are no breaches of a right under the BOR, then the Court cannot make a declaration. That was not the case here, because where events occurred prior to the appointed date, the Privy Council could not have intended the application of s.25 to alter the parties' existing rights and obligations. The words "*not being earlier than the appointed day*" found in s.5(2) of the Constitution highlights the Legislative intention that vested rights which were in place before the BOR was in force cannot be removed in order to bring them into compliance with the BOR. The abovementioned cases set out the meritorious reasoning as to why this is also an established approach in England and Wales.

98. Having regard to the approach to ***Wilson*** the rights arising under the BOR cannot, in the absence of clear words, apply retrospectively to remove the Defendants' immunity from liability defence that they could rely upon at the time of the events in 2005. If the Defendants could not rely upon the immunity defence then a new liability would be created or a new obligation imposed upon them. Therefore, there is no entitlement to bring civil proceedings against the Defendants or make a declaration of incompatibility to that effect, as the asserted liability did not exist at the time of P's birth.

99. The presumption against retroactivity still applies. Despite Mr. Jones Q.C.'s ingenious and prodigious submissions, reliance is correctly placed by the

Defendants upon the principles established in the House of Lords' decision in ***Wilson*** and applied in the cases reviewed at **paragraphs 63-73** above. Section 12 of the HSAL 2004 clearly provided the Defendants with an accrued right to rely upon the defence except where bad faith could be established. As the birth and the alleged breach of P's rights occurred before the BOR appointed day, there were no breaches of a right under BOR. Upon the cumulative reading of s.5 of the Constitution the then existing accrued rights cannot be removed by the rights under the BOR being applied retrospectively. The BOR cannot create a new obligation on the Defendants that did not exist at that time.

100. Before moving on I deal with P's submission that if the ***Wilson*** approach is adopted then this case falls within an exceptional feature envisaged by Lord Nicholls in ***Wilson***. This is submitted for four reasons. Firstly, it is suggested that at the time of P's birth in 2005 the Defendants' insurers did not appear to be aware of a s.12 defence, or if they were aware, whether it had any substance. Secondly, neither the Authority nor its insurers suffered any detriment as at the time the Authority were insured and premiums were paid to the insurance company. Thirdly, the Defendants were under a legal obligation to have insurance coverage for clinical negligence. Fourthly, s.12 has been *"a windfall to the Defendants"* as the insurers charged a premium to bury risk that it is now contended that they never in fact had. It is submitted that a further exceptional feature is that when you compare the detriment in P's position to the Defendants'

position, namely that the mother said that she had not seen any sign at the hospital indicating that no action could be brought, and the extent of P's serious injuries.

101. Although I agree that there might be benefit to P and to the public, I do not accept P's submission that the presumption against retroactivity should be rebutted as it would cause no detriment to the Defendants. The taking out of insurance does not remove any detriment. The Defendants rightly highlight that insurance operates as an indemnity if all the policy conditions are met, but it does not remove the liability of the Defendants. So for example there may be some cases where the insurance has an excess that must be paid and which would not be paid unless there was a claim made following the s.12 defence being removed retroactively.[21] There would also be detriment where a payment is made pursuant to a claim made to the insurers as that would likely lead to an increase in the premium to be paid in the future.

Issue of Retroactivity –The Health Service Authority (Amendment) Law 2016

102. As mentioned at Paragraph 20 herein, following my Judgment, s.12 was amended to remove the immunity from liability in negligence as well as all references to employees. This means that employees are no longer covered by any immunity and that the Authority is now directly liable for an act or omission which was negligent or in bad faith.

[21] Affidavit of Lizzette Yearwood (Chief Executive Officer of the Authority) sworn on 14 September 2016 which provides detail that the Authority is responsible under the policy for the first CI$50,000 of each and every successfully made by any plaintiff during the term of the insurance.

103. P contends that the amended law applies and in such circumstances a declaration of incompatibility is not actually needed. P highlights that the HSAL does not specify (i) the date from when the amendment will apply; (ii) the date of the acts or omissions which will need not be covered by the immunity if due to negligence; and (iii) any form of commencement or transitional provision.

104. P contends that the wording "*unless ....the act or omission was negligent or in bad faith*" pre-supposes that the act or omission must have occurred in the past and the wording "*it is shown*" is looking to the future and that it can only been shown to be negligent when that has been determined by the Court in legal proceedings. It is submitted that, on a linguistic interpretation, the amended section is continuous and prospective and not retrospective and so applies to P's claim. In other words the amended s.12 of the HSAL only "*bites*" once negligence is found by the Court and only then would there be a liability for damages.

105. However, I agree with the Defendants and the Attorney General that this is plainly wrong as it would mean that it applies to any claim for negligence, even before the HSAL came into force, provided that a Court at a later date found that the act was negligent. The cause of action arises at the time of the alleged negligent act and s.12 excluded liability and has effect from that time. I have already found that s.12 of the HSAL 2004 has excluded liability/debarred any claim and that was from the time of the alleged negligent act or omission. I do not accept that

s.12 HSAL 2004 or in its 2016 amended form only operates at the time when a Court considers whether the act was negligent or in bad faith.

106. P suggests that if the Legislative Assembly had not intended the amendment to apply to pre-2016 acts and omissions it would have made that clear by simply deleting the words "*is it shown that*" from the amended section. P also highlights that the Memorandum of Objects and Reasons makes no mention of any limitation.

107. P contends that the application of the amended law would confer a benefit on her without affecting a corresponding detriment on any other person and therefore it would be in the public interest to find it to be applicable. In support of this contention P refers to the section headed "*conferring the benefit*" at page 295 in Bennion which provides:

> *"If the retrospective construction would confer a benefit on some person without inflicting a corresponding detriment on some other person, or on the public generally, the principle against doubtful penalisation obviously does not apply. Furthermore the fact that such a benefit is conferred may even outweigh the general presumption against retrospectivity. If to confer such benefits appear to have been the legislator's object, then the presumption that an act would should be given a purpose of construction will carry great weight. This is the justification for not treating procedural provisions as they cheated by retrospectivity."*

108. P again refers to page 295 in Bennion when she raises that, when considering whether a Law should be given a retrospective construction, regard should be had to the principle of public good construction, namely that the construction adopted should serve the public interest. In regard to this P repeats the following factors and contentions:

(i) The HSA must have realised that they could have been sued for negligence back in 2006 and they took steps to be insured. It was not until 2014 that any discount was provided in respect of clinical negligence claims due to s.12[22];

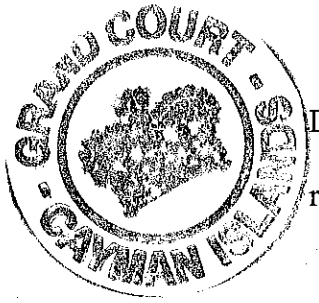
(ii) The Legislature intended individuals to be able to claim for clinical negligence as they required that the Authority obtained such insurance pursuant to the Health Practice Law (2005 Revision);

(iii) The public reasonably believed that a claim could be brought for clinical negligence and P's mother was not informed otherwise in advance of the medical procedure nor that the Authority enjoyed immunity from suit; and

(iv) The applying of this principle in the circumstances of P's claim would confer significant benefit on P.

109. The issue is whether from the provision the Court can deduce that the Legislature expressly or by necessary implication intends this section to apply retrospectively. I accept that a significant benefit to the wider public without detriment can be evidence of an intention of the Legislature. However, it is also clear that the

[22] Lizzette Yearwood stated in her affidavit sworn on 23 August 2016 that the Medical Protection Society, who provided the insurance coverage for doctors at the hospital and employees of the Authority, indicated a willingness to offer a 20% discount based on the Grand Courts decision about s.12 in ***McCoy v Cayman Islands Health Service Authority*** (referred to at paragraphs 41-42 of the Judgment) on the understanding that future premiums would be affected if a future case determined that to be an incorrect approach in relation to s.12.



Defendants would suffer detriment if their statutory defence was removed retroactively.

110. P's primary contention is that on a strict interpretation of the words in the amended Law they should be interpreted as applying to P's claim and the proceedings should be allowed to continue. Alternatively, the amended law should be construed as being retrospective and also thereby apply to the claim. However, if the Court finds differently, P contends that one should then look at the details of the 2016 debate in Hansard. P relies upon the statement of the Minister in opposition that, at the time that s.12 was passed, it was not intended to grant an exclusion and that the Premier of the Cayman Islands was relying on an incorrect recollection of the background. P contends that the amended Law should be given effect under s.25 of the BOR as applying to P's claim in preference to the assertion of the Premier recorded in Hansard.

111. The Defendants contend that prior to the amended s.12 coming into force on 20 June 2016, S.12 from 2004 continued to operate. For the same reasons already set out herein, the Defendants contend that the amended section could not affect the right to a defence accrued by the Defendants under the 2004 Law.

112. Having regard to the above, it is not necessary for me to get into a balancing exercise between the public interest and the circumstances that might rebut the presumption which is advocated by P. I am satisfied that the HSAL 2016 does

not apply retrospectively to create a liability that did not exist under s.12 of the HSAL 2004. It would have required clear and unambiguous language to the effect that it was to be applied retrospectively, which it does not. As correctly contended by the Defendants and the Attorney General, the interpretative obligation under s.25 of the BOR does not apply, as I am satisfied that the compatibility of HSAL 2016 with the BOR is not unclear or ambiguous.

113. For completeness sake, even if this was a matter in which I have found there to be any ambiguity in the wording in the amended section (which I have not) thereby enabling me, subject to the ***Pepper v Hart***[23] principles and conditions of admissibility, to look at Hansard to determine the proper interpretation of the section, that would not help P as the Premier made it very clear at the second reading of the Bill on 29 April 2016 that a policy decision could not be taken to make the legislation retroactive.

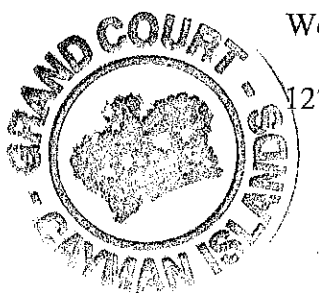
114. P argues that if the Court finds that the HSAL 2016 is not retrospective and does not apply, then it should make a declaration of incompatibility in relation to it. The Defendants repeat their contention which I have already analysed above. The Court cannot make a declaration of incompatibility without going through the three stages mentioned above when analysing the 2004 law. Section 5(2) of the Constitution illustrates that it is not intended that the Legislature could introduce legislation that has effect before the appointed date and the basis for which it is

[23] These are fully set out and applied in a review of the relevant case law at paragraphs 57-67 in ***Thompson v Health Services Authority*** [2016 (1) CILR 93] at 115 and do not need to repeated again herein.

contended by P that the amended Law is incompatible is "*not within the parish of the Legislature.*"

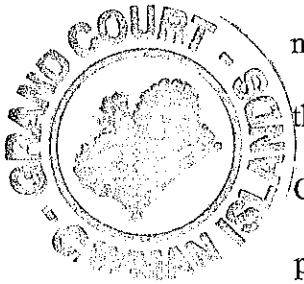
Making a Declaration of Incompatibility after Legislation is Enacted to Remove Incompatibility

115. As mentioned at paragraph 41 herein, the Attorney General submits that, even if the Court finds incompatibility, it is "*strongly arguable*" that the Court does not have jurisdiction to make a s.23 declaration of incompatibility, since HSAL 2016 has removed any incompatibility. He refers to the remarks of Lord Hobhouse of Woodborough concerning declarations of incompatibility expressed at paragraph 127 in ***Wilson***:



> *"The declaration applies only to the present: section 4(2) and section 4(4). If the legislation in question has been amended or repealed no question of a declaration under section 4 can arise."*

116. In ***R (M) v Secretary of State for Health*** [2003] UKHRR 746, the Secretary of State acknowledged the incompatibility. Mr. Justice Kay went on to make a declaration of incompatibility despite the fact that the Government had announced plans to enact comprehensive amending legislation which it submitted would address the incompatibility. The Learned Judge, when exercising his discretion, was conscious about the lengthy period of time that had elapsed since the incompatibility had been acknowledged and the present, during which no bill had reached first reading stage. I accept that this is different to a situation where the Law has already been amended. What the case does make clear is that it is for the Court to interpret legislation and to decide whether or not it is compatible. It also



makes clear that in England, although a s.4 HRA declaration creates a power for the Legislature to take "*fast-track*" remedial action using s.10 of the HRA, the Courts have no duty to take remedial action. However, in the Cayman Islands, pursuant to s.23(3) of the BOR, the Legislature "*...shall decide how to remedy the incompatibility.*"

117. A similar approach was taken by the House of Lords in ***Bellinger v Bellinger*** [2003] 1 AC 467 where it was submitted that, for two reasons, a declaration of incompatibility would serve no useful purpose. Firstly, the Minister's powers to amend the offending legislation under the s.10 procedure had already been triggered in under s.10(1)(b), by reason of the decisions of the ECtHR in two relevant cases. Secondly, the Government had already announced its intention to bring forward primary legislation on this subject.

118. Lord Nicholls stated at paragraph 55:

> *"I am not persuaded by these submissions. If a provision of primary legislation is shown to be incompatible with a Convention right the court, in the exercise of its discretion, may make a declaration of incompatibility under section 4 of the Human Rights Act 1998. In exercising this discretion the court will have regard to all the circumstances. In the present case the government has not sought to question the decision of the European Court of Human Rights in Goodwin. Indeed, it is committed to giving effect to that decision. Nevertheless, when proceedings are already before the House, it is desirable that in a case of such sensitivity this House, as the court of final appeal in this country, should formally record*

that the present state of statute law [24] *is incompatible with the Convention. I would therefore make a declaration of incompatibility as sought. I would otherwise dismiss this appeal."*

119. I am unable to locate any submissions made by Mr. Bowen Q.C. concerning this issue raised by the Attorney General. P, on the other hand, contends that Lord Hobhouse's remarks in ***Wilson*** may be distinguished due to the different wording between ss.4(2)/(4) of the HRA and s.23 of the BOR. In England, if incompatibility is established, the Court has a discretion in the light of all the circumstances of the case as to whether to make a declaration, whereas, under s.23 of the BOR, if primary legislation is found to be incompatible the Grand Court must make a declaration recording that the legislation is incompatible with the relevant section(s) of the BOR and the nature of that incompatibility.

120. I accept that if incompatibility is established in relation to primary legislation that is still in force, it is irrelevant whether the making of any declaration is unnecessary and undesirable. There is no discretion, a declaration must be made and the Legislature must then decide how it is going to remedy the incompatibility. The purpose of s.4 is to require the Court to make a declaration if existing primary legislation is incompatible and to then require the Legislature to remedy that existing incompatibility. There is force in the Attorney General's submission that the primary legislation referred to in s.23(1) of the BOR is primary legislation in its present form. It is for a Court to determine whether a

[24] My emphasis by underlining.

section in the present legislation is incompatible and if it is, for the Legislature to remedy that incompatibility. Despite the difference in the wording between s.4 of the HRA and s.23 of the BOR, as stated in ***Wilson*** the declaration applies to the present and if the legislation in question has been amended or repealed "*no question of a declaration ... can arise.*"

Incompatibility

121. Although I have found that the BOR is not capable of having retrospective effect and that a declaration cannot be made as the offending legislation has been amended, at the request of the parties, I still go on to consider whether s.12 was incompatible with any substantive positive obligation under s.2 and s.3 BOR; whether it is incompatible with any s.2 and s.3 procedural obligation; and whether it is incompatible with ss. 7, 9 and 17 of the BOR.

Substantive Obligation Section 2 of the BOR

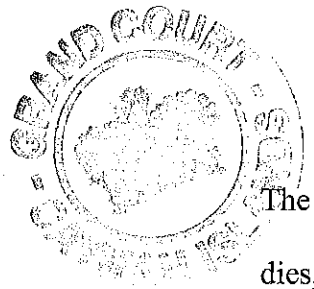
122. The Defendants do not accept that the circumstances surrounding the injuries suffered by P at her at birth amount to a breach of any substantive positive obligation under s.2.

123. P claims that there has been a breach of a substantive positive obligation.

124. The Attorney General made very limited submissions on the point, as he did not feel it was necessary for the Court to consider this issue.[25]

[25] See paragraph 134 below.

125. Section 2 of the BOR[26] articulates the right to life and provides that:



"(1) Everyone's right to life shall be protected by law.

(2) No person shall intentionally be deprived of life"

The parties rightly agree that s.2 applies not only to a situation where a person dies, but that it also may be engaged if an individual suffers life threatening injuries.[27]

126. The substantive obligations imposed on the State by s.2 are threefold, namely a law making duty, a systems duty and an operating duty. In 2002 the Grand Chamber of the Court at paragraph 49 in ***Calvelli and Ciglio v Italy*** *[2002] ECtHR 32967/96* confirmed the extension of these three Article 2 obligations into the field of health care policy, by it making clear that the implied requirement for the State to take appropriate steps to safeguard the lives of those within its jurisdiction applied not only to criminal law enforcement but also in the public health sphere.

127. The first duty is a negative obligation to refrain from the unlawful taking of life except in exceptional circumstances.

128. The second obligation imposes a positive duty on the State to take appropriate steps to protect and safeguard the life of patients. This duty includes two elements, (i) a general organisational (systems) duty on the State "*to put in place*

[26] Same as Article 2 ECHR.

[27] ***R (L) Secretary of State for Justice*** [2009] 1 A.C. 588.

a legislative and administrative framework designed to provide an effective deterrent against threats to the right to life"[28] and (ii) as mentioned at paragraph 89 in ***Vo v France*** (2005) 40 EHRR 259 an operational duty whereby in certain defined circumstances the State is required *"to make regulations compelling hospitals, whether private or public, to adopt appropriate measures for the protection of patients' lives."*

129. P's Amended Statement of claim does not contain any allegation of a breach of the systems duty or the operational duty, as P accepted that the BOR was not in force in 2005 and that it is not retrospective in respect of the substantive breaches of s.2.

130. The third obligation is the second positive duty and it is an investigative duty. The investigative obligation also extends beyond cases where death has resulted, to cases where life-threatening injuries have occurred. In such cases there will not, of course, be a coroner's inquest, thus the consideration has to be given to alternative forms of enquiry. The type of investigation which is required will depend on the circumstances in each specific case; in serious circumstances a more rigorous and detailed investigation will be required. This obligation has arisen in the context of health care decisions.

[28] ***Oneryldiz v Turkey*** (2004) 41 EHRR 325 at 89 applying the dicta of ECtHR in ***Osman v United Kingdom*** (200) 29 EHRR 245.

131. The Defendants accept that in the public health sphere there is a duty to put in place a legislative framework and a systems duty by recruiting qualified medical staff and providing the appropriate medical facilities and equipment. However, they contend that case law has found that the operational duty does not arise in clinical negligence cases in hospitals unless it falls into one of certain exceptions. The Defendants contend that although an operational duty can arise, the circumstances of this case can be characterised as being a 'mere negligence case' not falling into one of the exceptions and therefore the operational duty has not arguably been breached.

132. P contends that there has been a breach of the operational obligation and relies upon the ECtHR 2016 decision in ***Lopes de Sousa Fernandes v Portugal*** (App. No. 56080/13)[29] to support her contention that an act of medical negligence can amount to a substantive breach of s.2.

133. It is clear that there is a substantive duty and a procedural duty to protect life. I will first consider the substantive duty and decide whether there have been any breaches and then go on to the investigative duty. This is necessary for, as I will elaborate upon later herein, there are two relevant types of investigation which may be required under s.2. The first is an enhanced investigation which requires the State to take the initiative in relation to the investigation into the breach of a substantive obligation. The second type of investigation requires the establishment of an effective independent judicial system, but does not need there

[29] See paragraph 151 below.

to be an arguable breach of any substantive obligation for it to apply. The parties accept that the enhanced investigation requires redress by means of damages[30], but a prime area of dispute between them is whether the provision of a judicial system requires the same civil redress. P says it does whereas the Defendants' contend that it does not.

134. The Attorney General submits that it is "*unnecessary*" to consider whether the events surrounding P's birth would have amounted to a substantive breach of s.2 if it had occurred after the BOR came into effect (bringing with such a finding the enhanced investigative duty) because of his view that the suggested disciplinary and complaints procedure would result in an arguable incompatibility with the judicial system duty.

135. The positive duty on the State is highlighted in ***Osman v United Kingdom*** (1998) 29 EHHR 245, namely to take appropriate steps to safeguard the lives of those within its jurisdiction. In ***Osman*** the operational duty to take preventative measures to safeguard an individual's life was identified and expressly developed. The case concerned a schoolteacher who had seriously injured a pupil and killed his father after he had been harassing them and making criminal threats to their lives. The ECtHR was not satisfied that there was a breach of Article 2, but came up with a test for determining whether the operational duty applies and whether it has been breached where a public authority has failed to protect an individual from criminal acts committed by a third party. The Court held that there is, in

[30] ***Z and Others v United Kingdom*** Application No. 29392/95 (10 May 2001).

certain circumstances, a positive obligation for the State and its organs to take preventative operational measures to protect individuals whose life is at risk from other private individuals/third parties.

136. In ***LCB v United Kingdom*** (1999) 27 EHRR 212, the ECtHR started to apply Article 2 to the field of health care. In ***LCB*** the applicant's father was on Christmas Island during nuclear tests conducted by the British. The applicant was diagnosed with leukaemia. She claimed the UK should have warned her parents of the risks associated with exposure to radiation and monitored her health. The Court found that the UK could only have been required of its own motion to provide advice to her parents and monitor her health if it had appeared likely at that time that any such exposure of her father to radiation might have engendered a real risk to her health. The trigger for the obligation would have been the authorities' awareness of the 'real risk'. On the facts, the Court held that the obligation had not been triggered in respect of the applicant. However the Court stated that there was an obligation on the part of the State to do "*all that could have been required of it to prevent the applicant's life from being unavoidably put at risk.*"

137. In ***Powell v United Kingdom*** (App No. 45305/99) (4 May 2000) the Grand Chamber considered the positive duties set out in ***Osman***. In ***Powell*** the applicants' son, a 10-year-old boy, died in an NHS hospital from an undiagnosed, but potentially fatal if untreated, illness which was initially suspected by one

general practitioner, but during later numerous medical examinations by different practitioners remained unconfirmed. The applicants claimed that their son's death had been caused by the hospital failing to treat him more promptly when the disease was suspected and there had, as a result, been a breach of the operational positive duty highlighted in ***Osman***. The Court found that when the disease was suspected that in itself did not trigger an operational obligation on the medical staff to do something other than treat him appropriately.

138. At page 17 of its decision the Court restated the established law that Article 2 required the State to refrain from the intentional and unlawful taking of life and that it also had to take appropriate preventative steps to safeguard individuals within its jurisdiction. It went on to say on page 18 that it accepted that:

> "*... it cannot be excluded that the acts and omissions of the authorities in the field of health care policy may in certain circumstances engage their responsibility under the positive limb of Article 2.*"

139. Although not specifying what it was, importantly the Court found that in such circumstances something more than mere negligence (a failure by the hospital to meet the standards imposed by common law standard of care to a patient) was required to establish a breach of the positive Article 2(1) obligation, when stating on page 18 of its decision:

> "*... where a Contracting State has made adequate provision for securing high professional standards among health professionals and the protection of the lives of patients, it cannot accept that*

matters such as error of judgment on the part of a health professional or negligent coordination among health professionals in the treatment of a particular patient are sufficient of themselves to call a Contracting State to account from the standpoint of its positive obligations under Article 2 of the Convention to protect life."

This principle is relied upon by the Defendants when they contend that the circumstances surrounding the injuries suffered by P at her birth do not amount to a breach of the operational positive obligation under s.2.

140. In ***Savage v South Essex Partnership NHS Trust*** [2009] 1 AC 681 the House of Lords, showing a willingness to adopt guidance in Strasbourg case law, extended the operational duty so that it may apply where a patient under the care of a health authority has been harmed by a third party or has self-harmed and an applicant contends that the health authority has failed to prevent the harm. The Lords held that Article 2 put health authorities under an overarching obligation to protect the lives of their patients. This case concerned a 50-year-old patient who had been detained under the Mental Health Act 1983. The patient committed suicide by throwing herself in front of a train after she left a hospital operated by a mental health trust in which she was being cared. Her daughter alleged that there had been a failure to ensure sufficient and adequate observations of patients. She brought a claim and the Court held that hospitals detaining patients pursuant to the Mental Health Act owed a positive duty under Article 2 of the ECHR to ensure that patients do not inflict life-threatening injuries to themselves. The

Court found that the trigger for the operational duty is whether there is a "*real and immediate*" risk to life for that particular patient which the authorities or staff knew or ought to have known.

141. Lord Scott of Foscote stated at paragraph 45 that the State must ensure that medical authorities take appropriate measures to protect their patients' lives, including employing competent staff, training those staff to ensure high professional standards are maintained, and putting in place suitable systems of work. Lord Scott then referred to the case of ***Powell*** and went on to say that:

> *"If the hospital authorities have performed these obligations, casual acts of negligence by members of staff will not give rise to a breach of Article 2."*

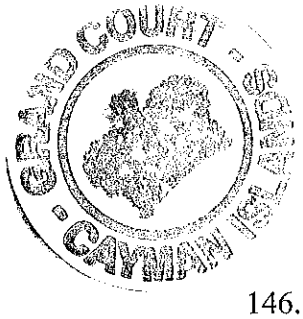
142. The principles developed in ***Savage*** were further extended in the Supreme Court decision in ***Rabone and another v Pennine Care NHS Trust (Inquest and Others intervening)*** (2012) 2 A.C. The Supreme Court expanded the operational duty under Article 2 into new circumstances in the sphere of healthcare and also widened the class of persons being able to apply and found that the parents were able to claim damages pursuant to HRA for the violation of Article 2.

143. The Supreme Court considered and identified the exceptions to ***Powell*** and, as Lord Dyson stated at paragraph 22, when doing so the Court reviewed the decisions of the ECtHR to see if they gave "*some clues*" as to why in the past the operational duty had been found to exist in some circumstance and not in others.

He said that from the cases he felt that there were "*certain indicia which point the way.*"

144. In ***Rabone*** a claim was brought by surviving relatives of a woman who had been admitted as a voluntary patient within a psychiatric unit at a hospital. When she was admitted the hospital recorded that, if she requested to leave, she should be assessed under the Mental Health Act to consider whether she required protective detention. When she requested home leave she was able to do so after she had been assessed and her leaving approved by a consultant psychiatrist. After she left she took her own life. At trial it was found that the consultant psychologist had been negligent and that the patient should not have been allowed to leave the hospital. Despite succeeding in the claim for negligence, Ms. Rabone's parents were unable to claim a sum from the defendants representing the fact that they had suffered bereavement as part of the overall damages awarded, as they were excluded from the small class of persons permitted to claim for bereavement prescribed in the Fatal Accidents Act 1976. They sought damages from the hospital for breach of their daughter's Article 2 rights as they identified themselves as qualifying victims of the breach.

145. The Supreme Court accepted that detention by the State might be a relevant factor in determining whether the operational duty is owed, but it is not a necessary condition. The Court found that the operational duty applied to voluntary patients due to their vulnerability, as well as to detained patients, and that in this case it



had been breached by the hospital. It is evident the principles in this case not only applied to psychiatric patients but also to patients who have physical conditions.

146. At paragraphs 22-24 in ***Rabone*** Lord Dyson highlighted certain circumstances that might amount to an exception to the ***Powell*** principle and a finding that the operational duty will be held to exist. The first was where there "*has been an assumption of responsibility by the state for the individual's welfare and safety (including by the exercise of control).*" The second is where persons are "*especially vulnerable by reasons of their physical or mental condition*" and that this may apply not only to detainees but also where there has been no assumption of control by the state such as where the local authority fails to exercise powers to protect a child who it knows to be at risk of abuse. The third involves consideration of the nature of the risk. An ordinary risk of the kind that individuals "*in the relevant category*" should reasonably be expected to take will not give rise to a breach of the obligation, whereas an exceptional risk may do so. There is no requirement for all three factors to be present for the operational duty to exist. Lord Dyson went on to state at paragraph 25 that, although these may all be relevant factors, they do not provide a "*sure guide*" as to when the operational duty exists and he noted that the circumstances have been and will continue to expand.

147. I am satisfied that although P could be regarded as being extremely vulnerable it is clear that the Defendants did not assume control of P as the mother retained the

right to consent to 'their' admission to hospital. Lord Dyson made clear that the vulnerability of a patient is not all that is required before the operational duty comes into play. The nature of the risk was one which the mother could reasonably have expected to take on her and P's behalf that cannot be regarded as being exceptional. Lord Dyson stated at paragraph 38, when considering the "real and immediate risk" test applied in ***Osman,*** that for the risk to be real it has to be "*a substantial or significant risk and not a remote or fanciful one.*" At paragraph 39 Lord Dyson indicated that immediate did not require the risk to be imminent but it should be "*present and continuing.*" He also added at paragraph 43 that "*the standard demanded for the performance of the operational duty is one of reasonableness"* and he felt that this brought in "*consideration of the circumstances of the case, the ease or difficulty of taking precautions and the resources available.*[31]" The alleged negligent treatment in the circumstances did not amount to an exception to the principle in ***Powell.***

148. In ***Cojocaru v Romania*** (2016), Application No, 7114/12 (22 March 2016) the applicant mother's daughter was admitted to hospital when she was eight months' pregnant following her gynaecologist's diagnosis of imminent premature birth. She was placed into intensive care but her condition worsened. Another doctor diagnosed a different condition and recommended an emergency Caesarean to save her life. The applicant said that her daughter's doctor refused to perform the procedure but, after a lapse of time, agreed that she should be transferred to a clinic which was over 150km away for surgery. She was transferred by

[31] As per Lord Carswell in ***re Officer L*** [2007] 1 WLR 2135, paragraph 21.

ambulance where the Caesarean was carried out. The applicant's daughter died ten minutes after the surgery and two days later the new-born child also died. The applicant alleged that the first hospital had been responsible for the daughter and her granddaughter's deaths due to the medical malpractice of one of their gynaecologists.

149. At paragraph 100 in its judgment the ECtHR re-emphasised the ***Powell*** principle which is set out at paragraph 139 herein. The ECtHR found that there was a breach of the operational obligation and placed the emphasis on their finding at paragraph 106 that there were:

> *"Certain dysfunctionalities in the coordination of the medical services involved in her treatment and a delay of the appropriate emergency treatment required by her condition."*

The Court indicated that the denial of healthcare which was available to the population in general may amount to the circumstances which an operational obligation will be found to exist as a result of medical negligence, when stating at paragraph 107 that:

> *"An issue may arise under Article 2 where it is shown that the authorities of a Contracting State put an individual's life at risk through the denial of health care they have undertaken to make available to the population in general."*

150. It is clear P's case does not involve a denial of healthcare that was available to the population in general but that the health care that was received was negligent.

Again, the alleged negligent treatment in the circumstances did not amount to an exception to the principle in ***Powell.***

151. Although the above cases widened the categories of circumstances in which an operational obligation was found to exist, the general principle established in ***Powell*** was reaffirmed in each of them. However, ***Lopes de Sousa Fernandes v Portugal*** (App. No. 56080/13) (January 2016), if authoritative, is a radical departure from the established case law set out in ***Powell*** and developed in the above subsequent cases as to what is required for proof of a substantive Article 2 violation. In this case the applicant's husband was admitted to a hospital to undergo a nasal polypectomy. The patient returned home the next day but later that day he suffered from severe headaches and he immediately went back to the emergency unit at the hospital. The doctors on duty diagnosed psychological disorders, prescribed him tranquilisers and, despite the applicant's objections, they recommended that he leave hospital. On the next day he was examined by a new medical team which detected bacterial meningitis and he was transferred to intensive care until 5 December 1997. He was then taken into the general medicine department, where he was treated by a doctor. He left the hospital eight days later. His pain subsequently persisted and he went again three times to the emergency unit at the same hospital, where he was hospitalised twice. On 3 February 1998 the same doctor authorised him to leave hospital but, his state of health having worsened, he was admitted on 17 February 1998 to a different hospital. He died in that hospital on 8 March 1998 from the consequences of

septicaemia. The Applicant lodged an application in the ECHR alleging that there has been a violation of her late husband's right to life under Article 2.

152. The ECtHR held by five votes to two, that there had been a violation of the substantive limb of Article 2 of the Convention as to the right to life and, unanimously, that there had been a violation of the procedural limb of Article 2. The Chamber found in particular that the mere fact that the patient had undergone a surgical operation presenting a risk of infectious meningitis should have warranted a medical intervention in conformity with the medical protocol on post-operative supervision. It also took the view that the lack of coordination between the ear, nose and throat department and the emergency unit inside the hospital revealed a deficiency in the public hospital service, depriving the patient of the possibility of accessing appropriate emergency care.

153. The majority of the Chamber's decision was that *"mere"* negligence may in certain circumstances be sufficient to establish a violation. In that case, the relevant circumstance was negligent coordination of information between units in the same hospital. I note that, on 2 May 2016, the case was referred to the Grand Chamber at the Portuguese Government's request, so the original Chamber decision is not final. I also note the concurring opinion of Judge Sajo in ***Cojocaru*** in which he agreed that the Article 2 rights of the applicant in that case were violated but, unlike his colleagues, found the violation to be of a strictly

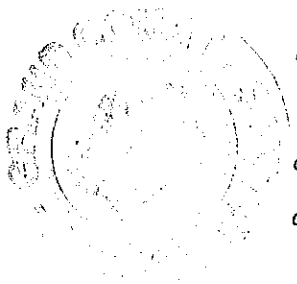
procedural nature. Although not mentioning the case by name, Judge Sajo went on to reaffirm the principle in ***Powell*** when stating at paragraph 7:

> *"I had the opportunity to express my concerns regarding this departure from the Court's case-law on medical negligence in a joint dissenting opinion prepared together with Judge Tsotsoria, in Lopes de Sousa Fernandes v. Portugal, no. 56080/13, 15 December 2015. In the present case too there is a noticeable trend to discreetly impose a duty to provide a specific level of healthcare service under Article 2 (1). Here too the Court disregards the findings of the domestic experts without proper reason and in disregard of the natural boundaries of its capacity to review issues of medical expertise on matters dealt with by the national forensic experts. The Court did not offer any reasons for departing from its own case-law as reaffirmed for a factually similar situation in Eugenia Lazăr v. Romania, no. 32146/05, 16 February 2010, quoted in at least a dozen cases. Where a Contracting State has made adequate provision for securing high professional standards among healthcare professionals and the protection of the lives of patients, it cannot accept that matters such as an error of judgment on the part of a healthcare professional or negligent coordination among healthcare professionals in the treatment of a particular patient are sufficient of themselves to call a Contracting State to account from the standpoint of its positive obligations under Article 2 of the Convention to protect life*[32] *(see Stihi-Boos v. Romania (dec.), no. 7823/06, § 54, 11 October 2011, and Florin Istrăţoiu v. Romania, no. 56556/10, § 74, 27 January 2015)."*

154. P relies upon ***Lopes*** when contending that the pleaded circumstances which showed deficiencies in the hospital and the deprivation of appropriate obstetric

[32] My emphasis by underlining.

care amount to an arguable substantive breach of s.2. P summarises the allegations of negligence against the Authority's clinicians and the second Defendant as follows:



"a. *Failing to respond to a pathological CTG;*

b. *Failing to appreciate the urgency of the situation by failing to perform an emergency Caesarean section within 30 minutes;*

c. *Delivering the plaintiff with undue force;*

d. *Failing to communicate properly with the rest of the medical team so all parties were aware of the urgency of the situation; and*

e. *Failing to perform the Caesarean section within 30 minutes of the decision at 16.55 hrs."*

155. As accepted by the parties, the decision in ***Lopes*** is regarded as being a radical departure from the established case law which has consistently followed and developed the decision in ***Powell.*** This controversial majority decision should not be regarded as representing the current state of the law in the ECtHR, especially as it has been referred to the Grand Chamber and I do not find it to be persuasive. The position that remains is that where a State has made adequate provision securing high professional standards in health care, a doctor or member of the medical team's error of judgment or negligent coordination concerning treatment of a patient by the health professionals are not sufficient to amount to breaches of the positive obligation to protect life. Accordingly, I am not satisfied that there is an arguable breach of a substantive s.2 obligation to protect life. However, if the Grand Chamber rules in the same way as the Chamber did in ***Lopes***, then I recognise that later Courts may form a different view. I note that the approach in

Lopes was not followed in the judgment of ***Cojacaru*** which was delivered at a later date than the ***Lopes*** judgment.

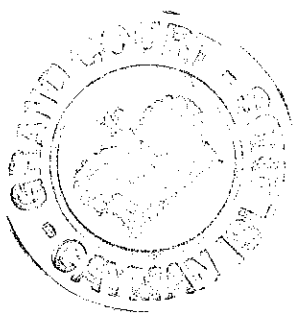
156. Section 12 is not incompatible with s.2 of the BOR on the basis of any substantive positive obligation owed by the Authority.

Procedural Obligation

157. As mentioned earlier herein, there are two relevant types of investigation which may be required under s.2. The first is an enhanced investigation which involves an obligation to conduct an effective investigation into a death or life threatening injury where there was a real issue as to whether the State had breached its obligation to protect life. In cases where there is evidence of possible systemic failings then the State's obligation under Article 2 would be engaged to initiate an effective enhanced investigation. The investigation requires the State to take the initiative in relation to the investigation into the breach of a substantive obligation and it is agreed that such an investigation would require there to be available the cause of action in damages to comply with Article 2.

158. The Defendants contend that as there has not been an arguable breach of a substantive obligation the enhanced duty has not been triggered and is not relevant.

159. At paragraph 83 of P's Skeleton Argument, P agrees that a breach or arguable breach is required for the State to carry out an enhanced investigation. I have already found in this ruling that no substantive obligations have been breached and therefore there is no obligation for the State to carry out an enhanced investigation.



160. The second type of investigation is often referred to as a judicial system duty and it may arise when a death or life threatening injury in hospital arises due to medical negligence. It does not give rise to the duty of enhanced investigation, but requires the establishment of an effective independent judicial system so that responsibility for any death or life threatening injury may be determined and persons responsible made accountable. This type of investigation does not require the State to take the initiative in bringing on the investigation, but it must provide an appropriate system which can be utilised by an appropriate person who is seeking an investigation.

161. Both parties referred to the Court of Appeal decision in ***R (Humberstone) v Legal Services Commission*** [2011] 1 WLR 1460 in which Smith L.J., at paragraph 67, highlights the distinction between the two types of investigation as follows:

> *"I am satisfied from examination of all these authorities that, in respect of duties of investigation, there are two senses in which article 2 may be said to be engaged. It may be engaged in a very wide range of cases in which there is an obligation to provide a legal system by which any citizen may access an open and independent investigation of the circumstances of the death. The*

system provided in England and Wales, which includes the availability of civil proceedings and which will in practice include a coroner's inquest, will always satisfy that obligation. In addition, article 2 will be engaged in the much narrower range of cases where there is at least an arguable case that the state has been in breach of its substantive duty to protect life; in such cases the obligation is proactively to initiate a thorough investigation into the circumstances of the death."

162. P contends that there must be an effective judicial system provided by the Cayman Islands to investigate her life threatening injury for there to be a discharge of the State's obligation in respect of the alleged clinical negligence and this includes the provision of a procedure for obtaining redress through damages, namely by making available a cause of action in damages for negligence. P contends that the bringing of civil proceedings, which will afford a victim a remedy in the civil court, is the "*baseline*" which has to be met in every case to which criminal and disciplinary proceedings may be added, but not used in substitution. P contends that the effect of s.12 is that it has removed her right under the procedural duty to bring civil proceedings.

163. The Defendants agree at paragraph 60 of their Skeleton Argument that there is no requirement for there to be a breach of any substantive obligation for the judicial system duty to apply. However, the Defendants contend that any procedural obligation in the absence of a breach, or an arguable breach, of a substantive positive obligation means that s.2 of the BOR does not create any cause of action

in damages. The Defendants accept that, although civil proceedings can discharge the judicial system duty where a domestic cause of action exists, there is not a requirement for there to be civil proceedings. The Defendants claim that s.12 does not prevent an investigation or bringing of account because the obligation could be met by other practical and effective means, including disciplinary proceedings before the Cayman Islands Medical and Dental Council ("MDC") and under the Health Practice Law (2013 Revision) ("HPL") if P were to make a complaint. The Defendants accept that the complaints mechanism to the HSA is in itself incapable of discharging the s.2 obligation, although it is a factor to take into account when considering all of the investigatory mechanisms which are available. The Defendants concede that, in the matter before me, P may have a right under s.2 to institute disciplinary proceedings to investigate any breach by the clinicians of their professional duties.

164. Therefore, save for the retroactivity issue and putting aside my finding that the BOR and HSAL 2016 are non-retroactive, the central issue between the parties is whether the provision of a judicial system requires civil redress to be provided by means of damages. To address this, in the absence of any relevant case law in the Cayman Islands, I now review the case law addressing the procedural duty which has been produced by the parties, the vast majority of which has emanated from the Strasbourg Courts. However, when I conduct this exercise I have regard to cautionary observation made by the Attorney General set out in paragraph 207 herein.

165. In ***Erikson v Italy*** ECtHR application 32867/96, (26 October 1999) the applicant's mother died due to an intestinal occlusion which had not been diagnosed at the public hospital where she had been x-rayed. The applicant filed a criminal complaint, but investigations were discontinued, reinstated then discontinued again. The criminal proceedings could not identify the doctor who had failed to note her condition. The applicant complained that the failure of the authorities to provide a system for identifying those responsible for the death amounted to a breach of Article 2 rights. The Court noted that Article 2 obliges states not only to refrain from intentionally causing death, but also to take adequate measures to protect life. The Court implied not only that the right to an effective investigation will be engaged even when the death is not as a result of lethal force, but, more specifically:

> "*for the protection of their patients' lives*" a state also has "*the obligation to establish an effective judicial system for establishing the cause of a death which occurs in hospital and any liability on the part of the medical practitioners concerned.*"

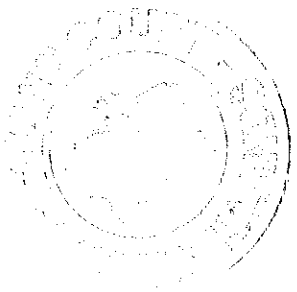
The ECtHR held the application inadmissible on the ground that the authorities had carried out a sufficient criminal investigation into the events and it was open to the applicant to bring a civil action for negligence against the hospital. The Court commented that:

> "*...the criminal investigations had only aimed at establishing identity of the practitioners concerned not also at assessing whether there had been any negligence in treating the applicant's mother: this question has therefore remained open. In civil proceedings, the applicant would have enjoyed the possibility of*

seeking and adducing further evidence and his scope of action would not have been limited as in criminal proceedings."

Although the Court was espousing the merits of civil proceedings, including when amassing evidence as part of an investigation, it was not saying that civil proceedings were required to meet the procedural obligation.

166. In ***Powell*** the applicant parents complained about the falsification of medical records and contended that this had been done as part of a 'cover up.' The ECtHR did not feel that these post-death "*offences*" altered the course of events leading to the applicants' son's death. The Court indicated that the duty arose in the public health sphere, noting that there was an investigative obligation to establish the cause of death of an individual under the care and responsibility of health professionals as well as their possible liability, stating at paragraph 57:



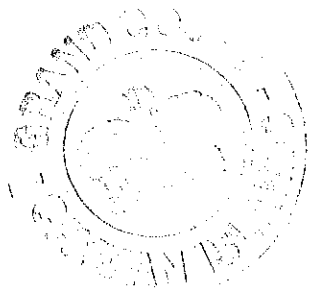
"The court considers that the procedural obligation as described cannot be confined to circumstances in which an individual has lost life as a result of act of violence. In its opinion, and with reference to the facts of the instant case, the obligation at issue extends to the need for an effective independent system for establishing the cause of death of an individual under the care and responsibility of health professionals and any liability on the part of the latter."

167. In ***Calvelli and Ciglio v Italy*** Application No. 32967/96 the applicants' newborn baby died and they launched a criminal complaint against the doctor who had been in charge of the delivery. Due to procedural delays the criminal proceedings

became time-barred. The applicants also brought a civil action in damages against the doctor, but they voluntarily waived their right to pursue those proceedings after agreeing to a settlement with the insurers. The Court indicated that the applicants, by taking that course, had denied themselves access to what would have been the best means of determining the extent of the doctor's responsibility for the death and which would have offered them the best redress. The Court, in these circumstances, found that there was no violation of Article 2.

168. The Grand Chamber also set out broad guiding principles on the scope of the investigatory duty. At paragraph 51 the Court stated that:

> *"...the positive obligation imposed by article 2 to set up an effective judicial system does not necessarily require the provision of a criminal – law remedy in every case. In the specific sphere of medical negligence the obligation may for instance also be satisfied if the legal system offered victims a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts, enabling any liability of the doctors concerned to be established and any appropriate civil redress, such as an order for damages and for the publication of the decision, to be obtained. Disciplinary measures may also be envisaged."*



169. The Defendants contend that the words "*if the legal system affords victims a remedy in the civil courts*" means that, although the judicial duty system may be discharged if an individual is able to bring civil proceedings in negligence, the duty cannot create any cause of action in damages where no such remedy is available. Having regard to the fact that s.12 prevents victims seeking a remedy in

the civil courts, the Defendants state that the duty must be discharged by some other means, for example public enquiry or disciplinary proceedings.

170. In the case of ***Vo*** the ECtHR echoed the observations in ***Calvelli*** concerning what types of investigation/remedies may meet the justice system obligation. In ***Vo*** the ECtHR was dealing with a situation where medical negligence had resulted in the death of an unborn child. The applicant mother and her partner lodged a criminal complaint, together with an application to join the proceedings as civil parties, alleging unintentional injury resulting in unfitness for work for a period not exceeding three months and unintentional homicide of her child. The charge of unintentional injury was dismissed under an amnesty law, and the charge of unintentional homicide was dismissed, as the child was not considered to be a human person at that stage and the doctor had been acquitted of causing injury to the foetus. The applicant complained of the authorities' refusal to classify the taking of her unborn child's life as unintentional homicide. She argued that the absence of criminal legislation to prevent and punish such an act amounted to a violation of Article 2 of the ECHR, which requires protection of the right to life by law. The majority of the Court did not find that there was a breach of Article 2 as it was not necessary for there to be criminal sanctions in the case of death caused unintentionally. The Court then went on to consider whether the applicant should have had a remedy in the criminal law. The ECtHR said that, if the infringement of the right to life was not caused intentionally, the positive obligation to set up an effective judicial system did not necessarily require the

provision of a criminal –law remedy in every case. They felt an effective remedy had been available to the applicant in the civil courts as highlighted in paragraphs 89 and 90 where the Court stated that investigating obligations:

> *"89. ...also require an effective independent judicial system to be set up so that the cause of death of patients in the care of the medical profession, whether in the public or the private sector, can be determined and those responsible made accountable."*
> *90. ....In the specific sphere of medical negligence, "the obligation may for instance also be satisfied if the legal system affords victims a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts, enabling any liability of the doctors concerned to be established and any appropriate civil redress, such as an order for damages and for the publication of the decision, to be obtained. Disciplinary measures may also be envisaged"*[33]

171. At paragraph 104 in ***Byrzykowski v Poland*** (2008) 46 E.H.R.R. 32 the Court reiterated that a State had an obligation to put in place an effective independent judicial system capable of establishing the facts of the patient's death, holding those responsible to account and providing appropriate redress to the victim. In ***Byrzykowski*** the mother died and there was serious injury to the new born child following a caesarean section. The conduct of the relevant medical professionals was questioned and this involved civil proceedings, criminal proceedings and disciplinary investigations. Although there were not issues about the State providing these avenues, the ECtHR examined "*how this procedure worked in the*

[33] Footnote refers to ***Calvelli and Ciglio v Italy*** (2002) at [49 and 51]; App No.53749/00, ***Lazzarini and Ghiacci v Italy***, Dec 07.11.2002 and App No.37703/97 ***Mastromatteo v Italy***, October 24, 2002, at [90]

concrete circumstances" of the case and whether it actually amounted to a practical and effective investigation. The Court found that there had been deficiency in the operation of the judicial system as illustrated by the delays in the criminal process and the discontinuation of investigations on three occasions. There was uncertainty about the status of the disciplinary proceedings and, after seven years, no final decision had been reached in any of the proceedings. "*In the circumstances of the case seen as a whole*" the Court found that the procedures applied in order to elucidate the allegations of medical malpractice did not amount to an effective examination into the cause of the mother's death and that this amounted to a procedural violation of Article 2. Despite recognition of the potential complexity of the medical questions involved in the case, the Court considered the overall length of the investigation unjustifiable commenting at paragraph 117:

> *"...the Court observes that, apart from the concern for the respect of the rights inherent in Article 2 of the Convention in each individual case, more general considerations also call for a prompt examination of cases concerning death in a hospital setting. This is because the knowledge of facts and possible errors committed in the course of medical care should be established promptly in order to be disseminated to the medical staff of the institution concerned so as to prevent the repetition of similar errors and thereby contribute to the safety of users of all health services."*

The Court by saying this was highlighting that one of the purposes of the judicial system obligation was to protect the public.

172. At paragraph 105 the Court, reiterated the view expressed in ***Calvelli*** when stating that, in medical negligence cases, the positive obligation to ensure an effective judicial system:

> *"might be satisfied if the legal system afforded victims a remedy in the civil courts, either alone or in conjunction*[34] *with a remedy in the criminal courts, enabling any liability of the doctors concerned to be established and any appropriate civil redress to be obtained."*[35]

The Court also stated that disciplinary measures: "*could also be envisaged.*"

173. ***Mehmet and Bekir Senturk v Turkey*** APP No. 13423/09 is another case which followed the approach in ***Cavelli.*** The first applicant's wife, who was pregnant, went to a university hospital complaining of persistent pain. Doctors who examined her found that the child had died and that she needed immediate surgery. It was alleged that she had been told that there was a fee for the operation and that a substantial deposit had to be paid. As the first applicant didn't have the money, a doctor arranged for her to be transferred to another hospital, but she died on her way there. The Court found that, due to blatant failings of the hospital who were aware that transferring would put her life at risk, she had been denied access to appropriate emergency treatment. The Court found that the State had failed to comply with its obligation to protect the physical integrity. At paragraph 83 the Court stated that, in medical negligence cases, the positive obligation imposed by

[34] My emphasis by underlining.
[35] My emphasis by underlining.

Article 2 to set up an effective judicial system does not necessarily require the provision of a criminal law remedy but may also be satisfied if the system:

> *"afforded victims a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts, enabling any liability of the doctors concerned to be established and any appropriate civil redress, such as an order for damages and for the publication of the decision, to be obtained."*

The Court also noted that disciplinary measures may also be envisaged.

174. In ***Oyal v Turkey*** Application no. 4864/05 (23 March 2010) the applicants' son had been infected with HIV through a blood transfusion following his premature birth. The parents and their son brought criminal proceedings, civil proceedings and administrative proceedings for medical negligence. The domestic courts in the civil and administrative proceedings found the supplier and the Ministry of Health liable in damages, establishing that one of the reasons why HIV had not been detected was that donor blood had not been tested by the medical staff due to the costs involved. The applicants complained that the state authorities had failed to take measures to prevent the spread of HIV through transfusions and had not conducted an effective investigation. Although liability of those identified as being responsible was established, the order for damages only covered one year's treatment and the family were unable to meet the high ongoing costs of the medication. The EctHR indicated that "*a crucial question*" was "*whether the redress in question was appropriate and sufficient*" and stated that the most appropriate remedy would have been to have ordered the authorities to pay for the

treatment and medication throughout the patient's lifetime. The Court concluded that the redress offered was far from satisfactory for the purpose of the positive obligations under Article 2.

175. At paragraph 54 the EctHR reiterated the principles that the obligations:

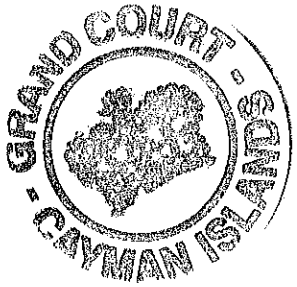
> *" ... also require an effective independent judicial system to be set up so that the cause of death of patients in the care of the medical profession, whether in the public or the private sector, can be determined and those responsible made accountable (see, among authorities, Calvelli and Ciglio v. Italy [GC], no.32967/96, § 49, ECHR 2002-, and Powell v. the United Kingdom (dec.), no.45305/99, ECHR 2000-V).*

176. At paragraph 66 the ECtHR, adopting the same formulation seen in ***Calvelli*** and a number of the aforementioned cases, stated that:

> *"If the infringement of the right to life or to personal integrity is not caused intentionally, the positive obligation imposed by Article 2 to set up an effective judicial system does not necessarily require the provision of a criminal-law remedy in every case. In the specific sphere of medical negligence, the obligation may for instance also be satisfied if the legal system affords victims a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts, enabling any liability of the doctors concerned to be established and any appropriate civil redress, such as an order for damages. Disciplinary measures may also be envisaged (see Calvelli and Ciglio, cited above, § 51;Lazarini and Giacci v. Italy (dec.), no. 53749/00, 7 November 2002;Vo v.*

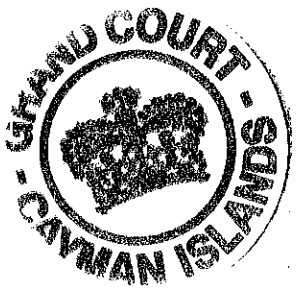
France [GC], no. 53924/00, § 90, ECHR 2004-VIII; and G.N. and Others, cited above, §82)."

177. In ***Silih*** the EctHR reiterated that the procedural steps required by Article 2 include not only an effective investigation into the death of the person concerned but also the institution of appropriate proceedings for the purpose of determining the cause of the death and holding those responsible to account. The Court made the following remarks about the judicial system duty at paragraphs 194 and 195 as follows:



"194. Even if the Convention does not as such guarantee a right to have criminal proceedings instituted against third parties, the Court has said many times that the effective judicial system required by Article 2 may, and under certain circumstances must, include recourse to the criminal law. However, if the infringement of the right to life or to personal integrity is not caused intentionally, the procedural obligation imposed by Article 2 to set up an effective judicial system does not necessarily require the provision of a criminal-law remedy in every case (Mastromatteo, cited above, § 90). In the specific sphere of medical negligence the obligation may for instance also be satisfied if the legal system affords victims a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts, enabling any responsibility of the doctors concerned to be established and any appropriate civil redress, such as an order [36] *for damages and/or for the publication of the decision, to be obtained. Disciplinary measures may also be envisaged (Calvelli and Ciglio, cited above, § 51, and Vo, cited above, § 90).*

[36] My emphasis by underlining.



195. A requirement of promptness and reasonable expedition is implicit in this context. Even where there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities is vital in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts (see Paul and Audrey Edwards, cited above, § 72). The same applies to Article 2 cases concerning medical negligence. The State's obligation under Article 2 of the Convention will not be satisfied if the protection afforded by domestic law exists only in theory: above all, it must also operate effectively in practice and that requires a prompt examination of the case without unnecessary delays (see Calvelli and Ciglio, cited above, § 53; Lazzarini and Ghiacci v. Italy (dec.), no. 53749/00, 7 November 2002; and Byrzykowski, cited above, § 117)."

178. Unlike the matter before me, it appears that these cases are primarily dealing with whether there was a need for there to be a criminal law mechanism/remedy to prevent a violation of the procedural obligation. In these cases the Court appeared, at least in non-custodial situations, to be placing greater emphasis on the procedural requirements of an effective judicial system and not on whether there was no requirement for prosecution following an official investigation.

179. P contends that ***Cavelli*** and almost all the cases which later refer to it support her submission that civil proceedings are the baseline that has to be met in every case, because they should be interpreted as ruling that there has to be an effective legal system affording victims redress in the form of damages in the civil courts. She

contends that the cases mean that criminal and disciplinary proceedings may also occur, but they are not necessarily required.

180. However, it is important to recognise that in ***Calvelli*** (and in the majority of the other cases referred to) the ECtHR was considering and primarily concentrating on whether a criminal law remedy was required in every case to meet the procedural obligation (whether alone or combined with other investigatory options) and, as the Attorney General points out, the Court was not dealing with a situation where all civil claims in negligence had been statutorily excluded. Despite this, it is evident that in ***Calvelli*** and a number of the cases the ECtHR, in the context of the Article 2 procedural duty, stressed the importance and benefit that may come with civil remedies in medical negligence cases, on occasion stating that they were the best means of determining the extent of the doctor's responsibility for the death and for the obtaining of damages.

181. In ***Mastromatteo v Italy*** App. No. 37703/97 (24 October 2002) the applicant's son was an innocent bystander who was murdered by three people escaping from a bank robbery. Two of the men were serving prison sentences for violent offences, and one of whom had been granted a short period of prison leave and had absconded a few days before the murder. The other had been granted a semi-custodial regime which allowed him to work outside prison but required him to return there in the evening. It was felt that the prisoners no longer represented a threat to public safety on the basis of reports by the prison governors and

prison officers concerned. The two men were convicted of the murder of the applicant's son and given lengthy prison sentences. They were also ordered to pay the applicant damages in an amount to be determined by the civil courts. However, the applicant did not bring proceedings in the civil courts, considering that the perpetrators would be unable to pay damages. The applicant sought compensation from the State, due to the lack of careful consideration given to the risk posed by the criminals' release. The ECtHR Grand Chamber viewed this complaint as one based under Article 2 of the Convention, namely that the authorities, by granting leave to these criminals, had caused a breach of the positive duty to protect the applicant's son's life. A complaint that the State had violated its substantive obligation under Article 2 was rejected by the Court as the murder was not one of the crimes which could have been foreseen by the authorities.

182. Although the Court found that there was a procedural obligation to determine the circumstances of the death the Court also rejected the complaint that the State's procedural obligation had been violated. The Court decided that the procedural requirements under Article 2 of the Convention had been satisfied because the State, having held a trial at which the murderers were convicted and at which a compensation order was made, had put in place a judicial system for the punishment of murder. The Court stressed that, in cases involving allegations of negligence by the state authorities, for the judicial system to be effective it must be one by which the cause of a death and accountability for death can be

determined, but that this did not necessarily require there to be a criminal law remedy.

183. The Defendants argue before me that judicial system duty can be discharged in a number of ways and this does not necessarily include by civil proceedings/remedies. It is also contended that it could be discharged by a disciplinary remedy. In support of this they rely upon the following wording found at paragraph 90 in ***Mastromatteo***:

> *"The form of investigation may vary according to the circumstances. In the sphere of negligence, a civil or [37] disciplinary remedy may suffice (see Calvelli and Ciglio..."*

184. P suggests that this is the only case that appears to suggest that disciplinary measures without any other proceedings or remedy would suffice and that this may be because the Court had misquoted ***Calvelli.*** Although I am satisfied that in ***Mastromatteo*** the Court was reiterating the thinking in ***Calvelli*** that the judicial system duty may be discharged by different remedies, it is clear that in ***Mastromatteo*** the Court was giving a clearer indication that disciplinary measures might also be sufficient, rather than in ***Calvelli*** where, by saying they might be envisaged, they were not clearly expressing them to be an alternative to civil or other remedies.

[37] My emphasis by underlining.

185. In support of their contention that civil proceedings are not always required, the Defendants also rely upon the cases of ***Banel v Lithuania*** [2013] ECHR 558 (18 June 2013) and ***Binisan v Romania*** Application No. 39438/05 (20 May 2014) which used very similar wording. In ***Banel v Lithuania***, ECtHR, 18 June 2013 the applicants' thirteen-year old son died from injuries sustained when he was struck by a part of a balcony which detached. The applicant made a civil claim for non-pecuniary damage in criminal proceedings that had been instituted as a result of the accident. The prosecutor established that the city municipality had known for some time that the building was in a poor state of repair and two municipal officials were indicted for failing to perform their duties. However, due to administrative changes requiring a reallocation of duties and responsibilities, there was no one at the municipality with specific responsibility for derelict and abandoned buildings. After the investigation had been discontinued and re-opened several times, the charges against the two officials were dropped. Following an appeal by the applicant, the regional court upheld the decision to discontinue the criminal proceedings under the statute of limitations. The ECtHR found that although the national authorities had opened a criminal investigation, the investigating officers had not acted with due diligence when collecting evidence, and had ignored possibilities of identifying those accountable, for example by bringing charges against the managers concerned. The Court found that the criminal investigation had not been thorough and that the legal system as a whole, faced with an arguable case of negligence causing death, had failed to provide an

adequate and timely response consonant with the State's obligations under Article 2 of the Convention.

186. In ***Banel*** the Court gave its ruling on the issue of admissibility at the same time as its decision on the merits. The Court considered whether the exhaustion of domestic remedies was a requirement for a complaint to be brought. An examination was conducted as to whether the applicant, after having used criminal law remedies, could have obtained a more effective investigation of the case by pursuing civil or administrative remedies and whether they would have objectives that are any different from the ones pursued by the criminal law remedy. The Court considered that it was not necessary to pursue civil and administrative remedies in addition to those provided in criminal law. The Court stated at paragraph 48 that the form of investigation for an effective judicial system does not necessarily require the provision of a criminal law remedy and that:

> *"In the sphere of negligence, a civil or disciplinary remedy may [38]suffice (see Calvelli and Ciglio v. Italy [GC], no. 32967/96, § 51, ECHR 2002-I, and Mastromatteo v. Italy [GC], no. 37703/97, § 90, ECHR 2002-VIII)."*

187. I note that Judge Sajo on the first page of his partly dissenting judgment made these wise remarks:

> *"I agree with my colleagues that the case is admissible, but I base my finding on slightly different grounds. In cases of unintentional*

[38] Mu emphasis by underlining.

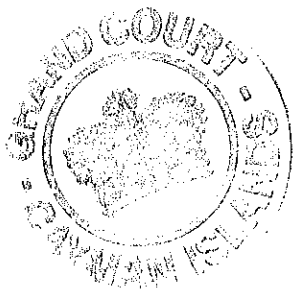
death, the Court is not required to consider the merits of a complaint regarding a criminal remedy where the applicant, in choosing to forgo a civil remedy, has "denied [herself] access to the best means – and one that, in the special circumstances of the instant case, would have satisfied the positive obligations arising under Article 2 – of elucidating the extent" of the responsibility for her child's death (see Calvelli and Ciglio v. Italy .....). The applicant need not, however, exhaust remedies that exist only in theory; rather, she is required only to exhaust remedies that "operate effectively in practice" (see Calvelli and Ciglio.....)."

188. In ***Binisan*** the Applicant was a customs inspector, who was asked to carry out an inspection on railway train wagons. He was electrocuted when he was on top of a wagon. He received very serious burn injuries and was permanently disabled. Criminal proceedings were brought against the manager of the company, but these did not proceed as the chief prosecutor decided that the applicant alone was responsible for the accident. The applicant brought civil proceedings against the company on account of their negligence in the organisation of the customs inspection. The civil court held that both the applicant and the railway company/the manager were equally responsible for the accident and ordered the company and the manager to pay half of the damages claimed. Upon appeal the company was successful in quashing the judgment and that decision was not overturned by the Court of Appeal. When the matter came before the ECtHR it found that the legal system as a whole, faced with an arguable case of negligence causing such serious injuries, had failed to provide an adequate response consonant with the State's obligations under Article 2. At paragraph 75 in

Binisan the Court, with reference to what was set out at paragraph 90 in ***Mastromatteo*** and that Court's interpretation of what was said by the Court at paragraph 52 in ***Calvelli***, similar to paragraph 48 in ***Banel***, stated in almost identical terms that in the sphere of negligence, a civil or disciplinary remedy may suffice.

189. In ***Dodov v Bulgaria*** (2008) 47 E.H.R.R 41 the Court was dealing with a case in which the applicant's mother, who suffered from Alzheimer's, disappeared from a nursing home. The Court felt able to assume that the mother had died and it found that there had been a failure by the staff at the home to adequately supervise her and that this was directly linked to her disappearance. Under Bulgarian law criminal, civil and disciplinary avenues of redress existed, but the authorities had failed to provide the applicant with the means to establish the facts and bring those responsible to account. The Court found that, faced with an arguable case of negligent acts endangering human life, the legal system as a whole had failed to provide an adequate and timely response as required under the procedural obligations under Article 2. The ECtHR outlined at paragraph 83 that the Court's duty in such proceedings is to:

> *"The Court must examine, therefore, whether or not an issue of State responsibility under Article 2 of the Convention may arise in respect of the alleged inability of the legal system to secure accountability for negligent acts that had led to Mrs Stoyanova's disappearance. It must examine whether the available legal remedies, taken together, as provided in law and applied in practice, could be said to have secured legal means capable of*



establishing the facts, holding accountable those at fault and providing appropriate redress to the victim (see Byrzykowski v. Poland, no.11562/05,§§104-118, 27 June 2006). Article 2 of the Convention will not be satisfied if the protection afforded by domestic law exists only in theory: above all, it must also operate effectively in practice (see Calvelli and Ciglio, cited above,§53).

Importantly the Court was making clear that the legal system must be independent and, looking at all the available remedies, whether it secure the legal means capable of establishing facts in the circumstances, as well as holding those at fault accountable and providing appropriate redress to victims.

190. The ECtHR in ***Cojocaru,*** repeated the wording seen in ***Cavelli*** and a number of the aforementioned cases. However, the Court placed additional emphasis on there being appropriate civil redress such as an order for damages. At paragraph 102-103 the ECtHR stated:

> *"102. … Although the right to have third parties prosecuted or sentenced for a criminal offence cannot be asserted independently, the Court has stated on a number of occasions that an effective judicial system, as required by Article 2, may, and under certain circumstances must, include recourse to the criminal law. However, if the infringement of the right to life or to physical integrity is not caused intentionally, the positive obligation imposed by Article 2 to set up an effective judicial system does not necessarily require the provision of a criminal-law remedy in every case. In the specific sphere of medical negligence, "the obligation <u>may</u> for instance <u>also</u> be satisfied <u>if</u>[39] the legal system*

[39] My emphasis by underlining.

affords victims a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts, enabling any liability of the doctors concerned to be established and any appropriate civil redress, such as an order for damages and for the publication of the decision[40]*, to be obtained. Disciplinary measures may also be envisaged. (see Vo v. France [GC], no. 53924/00, § 90, ECHR2004-VIII, with further references; and Bajić, cited above, § 76).*

103. Article 2 of the Convention will not be satisfied if the protection afforded by domestic law exists only in theory: above all, it must also operate effectively in practice (see Calvelli and Ciglio v. Italy.....). Therefore the Court is called to examine whether the available legal remedies, taken together, as provided in law and applied in practice, could be said to have constituted legal means capable of establishing the facts, holding accountable those at fault and providing appropriate redress to the victim. In other words, rather than assessing the legal regime in abstracto, the Court must examine whether the legal system as a whole adequately dealt with the case at hand..."

The Defendants contend that the cases of ***Calvelli***[41], ***Vo***, ***Silih*** and ***Cojocaru*** do not support a contention that the civil remedy must be available, but instead that a civil remedy is but one of a number of alternatives.

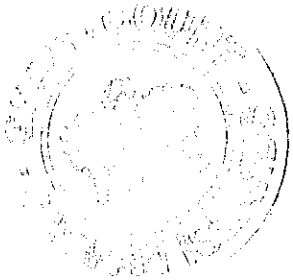
191. P relies on the case of ***Rowley v United Kingdom*** Application No. 319114/03 (22 February 2002) and ***Pearson v United Kingdom*** Application No. 40957/07 to support the case that a civil remedy, either alone or in conjunction with criminal

[40] My emphasis by underlining.
[41] As well as the cases above which adopt the wording in ***Cavelli***.

disciplinary measures is required to discharge the judicial system duty. In ***Rowley*** the applicant's son, who had cerebral palsy, died in a residential care home owned by Salford City Council as a result of drowning in his bath after a carer had left him unattended. She complained under Article 2, alleging that it had been violated by the death of her son whilst in the care of the State, that legal protections against careless killing by corporations were inadequate and that the various investigations into her son's death were insufficient. The applicant argued that the definition of corporate manslaughter in domestic law rendered it almost impossible to apply to large organisations and that this also breached Article 2. Her claim was struck out both on the basis of her lack of victim status and also because it was found to be ill-founded. The Court held that there is no absolute right to have recourse to the criminal law under Article 2.

192. When dealing with the issue of the investigative duty the Court said:

> *"In the case of deaths of patients in care, whether in the public or private sector, this entails an effective independent judicial system by which the cause of death can be determined and those responsible made accountable (see, among other authorities, Calvelli and Ciglio v. Italy [GC], no. 32967/96, ECHR 2002 I, § 49; Erikson v. Italy (dec.), no. 37900/97, 26 October 1999; and Powell v. the United Kingdom (dec.), no. 45305/99, ECHR 2000-V).*
>
> *While the Court has said on a number of occasions that the effective judicial system required by Article 2 may, and in certain circumstances, must, include recourse to the criminal law, if the infringement of the right to life or to personal integrity is not*



caused intentionally, the positive obligation imposed by Article 2 to set up an effective judicial system does not necessarily require the provision of a criminal law remedy in every case. In the sphere of medical negligence, the obligation may for instance also be satisfied if the legal system affords victims a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts, enabling any liability of the doctors concerned to be established and any appropriate civil redress, such as an order for damages and for the publication of the decision, to be obtained, together with the additional possibility of disciplinary measures (see Calvelli and Ciglio, cited above, § 51; Mastromatteo v. Italy [GC], no. 37703/97, § 90, ECHR 2002-VIII; Vo v. France [GC], no. 53924/00, § 90, ECHR 2004 ...)[42]*."*

This case clearly does state that disciplinary measures are an additional possibility, but by using the word *"together"* it is not an authority for saying that they may be freestanding.

193. In ***Pearson*** the ECtHR held that a State investigation into the death of a drug abuser with a history of mental health problems was sufficient to satisfy Article 2 of the ECHR. In this case a civil remedy was available. The ECtHR stated at paragraph 70 that disciplinary procedures could be considered, in combination with a civil or criminal investigation, as an additional component when satisfying the procedural obligation. At paragraph 78 the Court said that in the facts of that it considered *"the possibility of disciplinary measure"* to be *"also relevant to the fulfilment of art. 2 procedural objectives"* in that case. It stated at paragraph 70:

[42] My emphasis by underlining.

"... If the infringement of the right to life or to personal integrity was not caused intentionally, the obligation imposed by art. 2 to set up an effective judicial system does not necessarily require the provision of a criminal law remedy. In the case of deaths ..... through alleged medical negligence (whether in the public or private sector), the Court has found that that obligation may be satisfied if the legal system affords victims a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts, enabling any civil liability to be established and appropriate civil redress to be obtained, such as an order for damages and for the publication of the decision, to be obtained, together with the additional possibility of disciplinary measures.[43]

194. P also highlights the 2016 decision in the case of ***Vasileva v Bulgaria*** Application No. 23796/10. In 2002 the applicant was diagnosed with cancer and had to have a vasectomy of a breast. After a bone scan in early 2003 she had to have further surgery to remove a suspected metastasis in her chest. When she saw her medical reports she suspected that the surgeon had removed parts from the wrong ribs, leaving in place the rib which had shown lesions in the bone scan. She complained to the Ministry of Health about the hospital which resulted in an inquiry being carried out. A hospital commission, upon reviewing the case, made a finding of no misconduct by the surgeon. The applicant also brought a claim of damages against the hospital and the surgeon. The court at first instance admitted and considered a number of reports ordered from various medical experts and it dismissed her case. On appeal, the Court of Appeal relying upon all but one of the

[43]Reference was then made Reference to the cases of ***Powell***, ***Mastromatteo*** and ***Rowley v United Kingdom*** Application number 31914/03 (22 February 2005).

expert reports found that the operation had been necessary and the surgeon had acted in line with established medical practice. When the case was remitted to the Court of Appeal on a point of law by the Supreme Court, the Court of Appeal considered the previous expert reports and a new report and it again upheld the decision from the court at first instance, concluding that the surgeon had not acted negligently. Relying in particular on the right to respect for private and family life (Article 8) and the right to a fair hearing and access to court (Article 6.1), the applicant alleged that Bulgarian law lacked a system to effectively ensure the impartiality of medical experts in medical malpractice proceedings. She complained that this prevented her from obtaining compensation, made the proceedings she brought for damages unfair and resulted in her not having effective access to a court. The ECtHR found that there were no violations of either Article.

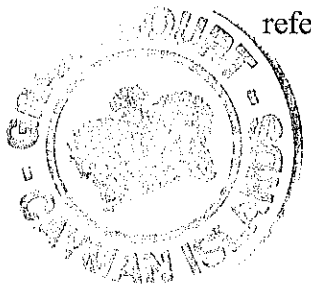
195. The ECtHR stated at paragraph 63:

> *"It is now well established that although the right to health is not as such among the rights guaranteed under the Convention or its Protocols ..... the High Contracting Parties have, parallel to their positive obligations under Article 2 of the Convention, a positive obligation under its Article 8, firstly, to have in place regulations compelling both public and private hospitals to adopt appropriate measures for the protection of their patients' physical are integrity and, secondly, to provide victims of medical negligence access to proceedings in which they could, in appropriate cases, obtain compensation for damage."*

196. The ECtHR made clear that states:

> *"enjoyed considerable freedom in the choice of the means calculated to ensure that their judicial systems met its requirements."*

The Court recognised the risk that medical practitioners can be unjustifiably exposed to liability which can result in defensive medicine. The Court found in ***Vasileva*** that seeking compensation for medical malpractice by way of a claim of damages was not a possibility that only existed in theory. The Court said, referring to a number of Bulgarian cases, that:



> *"While apparently difficult to make out, medical malpractice has been established and has led to award damages in the number of cases."*

As a consequence of s.12, that is not now the position in the Cayman Islands, save for those occasions upon which the Authority has, despite the defence given by s.12, been willing to make a without prejudice financial settlement.

197. In relation to the comment at paragraph 63 in ***Vasileva*** about access to proceedings in which compensation for damage could be obtained, reference was made to paragraph 66 of the 2014 decision in ***S.B. v. Romania***, Application No. 24453/04. The case concerned alleged medical negligence for dental treatment by a dentist. The applicant contended that the treatment was not correctly carried out by the dentist and resulted in various complications including infected gums, cuts and pain. The Applicant, as required, first made a criminal

complaint requesting a detailed medical expert report which would establish whether there had been medical negligence in her case and seeking compensation. An expert report was carried out and it found that the treatment had been inadequate. However, the Court acquitted the dentist of medical negligence, finding that the Applicant was at fault and this decision was subsequently upheld on appeal in October 2011. Relying in particular on Article 8 (right to respect for private and family life), the applicant complained about the lack of opportunity to establish whether the dental treatment she had undergone had constituted medical negligence and to obtain appropriate redress. She submitted in particular that it had been impossible in Romania in cases of medical negligence to obtain a medical expert report without first having lodged a civil or criminal complaint. The Court found that there had been a violation of Article 8.

198. At paragraph 66 the ECtHR stated:

> *"Even though the applicant's complaint concerns a private practitioner and not a State employee, the Court reiterates that Contracting States are under a positive obligation to maintain and apply in practice an adequate legal framework enabling victims to establish any liability on the part of the physicians concerned and to obtain appropriate civil redress, such as an award of damages, in appropriate cases*[44] *(see Codarcea, cited above,§103; compare, with regard to positive obligations under Article 2 of the Convention, Colak and Tsakiridis v. Germany, nos. 77144/01 and 35493/05, §30, 5 March 2009, and Calvelli and Ciglio v. Italy [GC], no.32967/96, §51, ECHR 2002 -I)."*

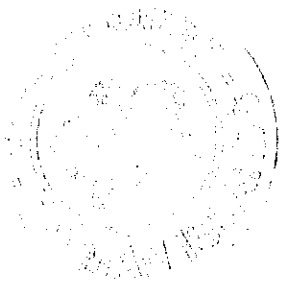
[44] My emphasis by underlining.

199. The case of ***Pearson*** and, in particular, the cases of ***S.B. v. Romania***, ***Vasileva*** all reiterate the importance of the availability of civil redress in appropriate cases. Although the latter two are only Chambers decisions, I do not accept the Defendants' submission that they have little bearing, as they more forcefully reaffirm the benefit and the importance of civil remedies already stated in ***Calvelli*** and a number of the other Grand Chamber decisions in which the ECtHR was commenting when concentrating more on whether or not there was a requirement for a civil remedy rather than directly focusing on whether there was a requirement for a remedy.

200. The Courts in England and Wales place great emphasis upon the facts of each case. ***R v (Takoushis) v HM Coroner for Inner North London*** [2005] EWCA Civ 1140 was a case which involved the enhanced duty because, as borne out by the facts below, there had been systematic hospital failures. The case concerned the suicide of a male who had been taken to hospital after expressing an intention to commit suicide. The Accident and Emergency Ward assessed him to be a high suicide risk, but they failed to ensure that he was seen by a clinician within ten minutes of that assessment. By the time a clinician attended, the male had left the hospital and he shortly thereafter committed suicide. The Court of Appeal, recognising that it did not necessarily have to link the procedural obligation and positive obligation, highlighted that an effective investigation of events could be held when agents of the state may bear responsibility for loss of life and it did not require there to be an arguable breach of the positive obligation. The Court

recognised that different principles applied where the event occurred in a hospital when compared to it happening in police custody. In the matter of the latter an Article 2 investigation was automatically required, whereas in the former it could be triggered by operational failings or gross negligence. The Court highlighted that a State, whether in the public or private health sector, must make provision for securing high professional standards amongst health professionals and in hospitals and for an effective independent system for establishing the cause of death, and I would add life-threatening injuries, and any liability on the part of the treating medical professionals. At paragraphs 94 and 95 the Court of Appeal made clear that it was not saying that there was an independent obligation to investigate every time the medical negligence had arguably occurred. The Court found that the investigation could be a civil/criminal or disciplinary one, but this would depend on the circumstances.

201. Sir Anthony Clarke MR, who handed down the judgment of the Court, stated obiter when describing the judicial systems obligation under Article 2 at paragraph 105:



> *".....however it is analysed, the position is that, where a person dies as a result of what is arguably medical negligence in an NHS hospital, the state must have a system which provides for the practical and effective investigation of the facts and for the determination of civil liability. Unlike in the cases of death in custody, the system does not have to provide for an investigation initiated by the state but may include such an investigation. Thus the question in each case is whether the system as a whole,*

including both any investigation initiated by the state and the possibility of civil and criminal proceedings and of a disciplinary process, satisfies the requirements of article 2 as identified by the European Court in the cases to which we have referred, namely (as just stated) the practical and effective investigation of the facts and the determination of civil liability."

202. The Court of Appeal in ***Takoushis*** reiterated that the availability of civil proceedings may not in itself discharge the State's obligation in all instances. It may not be practical to bring proceedings or, in some cases, liability has been admitted. The Court felt that there was no reason to give precedence to civil or administrative remedies when the relevant circumstances should be established in a criminal investigation and, if appropriate, prosecution.

203. It is contended by the Defendants that, as paragraph 105 is *obiter,* reliance should not be placed upon it. However, P points out that at paragraphs 64/65 in ***Humberstone v Legal Services Commission*** [2011] 1 WLR 1460, Smith L.J. referred to paragraph 105 in ***Takoushis*** and accepted the *obiter* comments.

204. To summarise, the Defendants rely upon the cases reviewed above to support the submission that the judicial system duty may also be discharged in different ways, namely in criminal proceedings or also in civil proceedings which would provide civil redress including damages, but only if the legal system affords victims a remedy in the civil courts. The Defendants contend that this means that each type of investigation is in the alternative and that the s.2 obligation can be discharged

by any of these measures without the need for a civil remedy to be available. The Defendants contend that the procedural obligation does not require a civil remedy and that under civil redress it is only an option if the State's legal system affords victims that remedy for negligence in the civil courts. They submit that s.12 does not prevent an investigation as this could be done by means of disciplinary proceedings before the MDC and under the HPL. The Defendants contend that, until P has made a complaint to exhaust the remedies that are available to her, the Court cannot conclude that those options are not capable of meeting the requirements of the judicial systems duty. However, I remind myself that an applicant need not exhaust remedies that exist only in theory but instead is required only to exhaust remedies that "*operate effectively in practice.*"

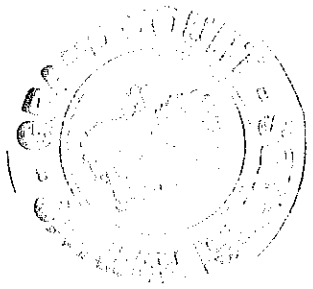
205. Often when there have been serious or life-threatening injuries in the cases falling under Article 2 and Article 3, irrespective of whether they are caused deliberately or by negligence, the criminal jurisdiction is often, at least initially, used. In the case before me no criminal remedies have been sought at any time. The criminal mechanisms have, in some cases, been found to be an effective investigation to ascertain who is responsible and make them accountable for the actions and the consequences of them. This does not support a contention that the ***Calvelli*** line of cases should be read as authority that the baseline is that civil proceedings must be available in every case. However, the Courts in those cases were not considering whether there was such a necessity.

206. That said, Mr. Jones Q.C. reiterated, as he did at the first hearing, that there appears to be no precedent for a State completely removing clinical negligence from the range of civil claims that can be brought against the State. He rightly observes that there does not appear to have been a case in which the ECtHR has had to consider the lawfulness of a statutory provision removing access to civil proceedings in respect of all claims for clinical negligence. He highlights that, in many of the above cases, civil proceedings had been brought and were ongoing or determined outside of the proceedings.

207. Following on from Mr. Jones Q.C.'s above comments, I have in mind the following remarks made by the Attorney General at paragraph 53 of his written submissions[45] concerning the sufficiency of disciplinary and complaints processes and the applicability of the case law referred to by the parties:

> *"This issue is novel: none of the cases referred to by either party (or any others of which the Attorney General's Chambers are aware) involved a situation where the possibility of a civil claim in negligence was statutorily excluded and/or any argument that disciplinary proceedings were sufficient to discharge the investigative obligation. In practice, courts have looked no further than "the availability of a civil action in negligence and/or the applicant's settlement of such an action" to dispose of allegations that the investigative duty was breached in medical negligence cases. As such, there is limited utility in analysing whether the various descriptions of the procedural obligation used by the ECtHR in medical negligence cases contemplate that civil and*

[45] The Attorney General, as his oral submissions were brief at the hearing, invited the Court to rely heavily on his written submissions to deduce his position on the various issues.



disciplinary proceedings are potentially alternative, or necessarily complementary, measures.[46] *The question is whether, taken together, the disciplinary and complaints processes available in the Cayman Islands provided for an investigation that is both practical and effective."*

208. The Attorney General is quite right to make this observation. In the majority of the cases placed before me, the ECtHR was primarily focusing on the position in relation to criminal remedies and concluded that an effective judicial system does not always require an obligation for there to be in place a criminal law mechanism resulting in an investigation and prosecution of those responsible, but rather a system capable of ascertaining responsibility and/or damages. The ECtHR held in those cases that, if the infringement of the right to life or to physical integrity is not caused intentionally, the positive obligation to set up an "effective judicial system" does not necessarily require criminal proceedings to be brought in every case and may be satisfied if civil, administrative or even disciplinary remedies were available to the victims. The Court was approaching the cases from the criminal remedy perspective and not being asked to focus on and rule as to whether a civil law remedy is required in every case or whether such a remedy should be regarded as the baseline, instead they concentrated on whether civil

[46] "In particular, the suggestion in *Rowley v United Kingdom* (Application No. 31914/03, 22 February 2002) and *Pearson v United Kingdom* (2011) 54 EHRR SE11, at para. [70], that disciplinary measures are an "*additional possibility*" that need to be made available "*together with*" a remedy in civil courts in order to be effective; the indication in Mastromatteo v Italy (Application No. 37703/97, 24 October 2002, at para. [90] (followed in Banel v Lithuania (Application. No. 14326/11, 18 June 2013) and Binişan v Romania (Application No. 39438/05, 20 May 2014) that "[i]*n the sphere of negligence, a civil or disciplinary remedy may suffice*;" and the suggestion in para. [194] of *Šilih* (supra., n. 28) that publication could be a sufficient remedy without an order for damages."

remedies may, either alone or in conjunction with criminal remedies, satisfy the procedural requirements.

209. The Defendants contend that the disciplinary and complaints processes prescribed in the HPL are sufficient to meet the obligations, as the MDC can establish relevant facts, hold a medical practitioner accountable for fault and impose an appropriate sanction upon a medical practitioner who is found to have acted negligently.

210. P contends that in order to satisfy s.2 of the BOR in cases of medical negligence:

> *"The state must have a legal system (judged as a whole) which has the following minimum characteristics:*
>
> *i. It must be a judicial system.*
> *ii. It must be independent.*
> *iii. It must be capable of establishing the facts surrounding the serious injury/death.*
> *iv. It must be capable of establishing the cause of the serious injury/death.*
> *v. It must be capable of holding accountable those at fault by establishing civil liability.*
> *vi. It must provide redress to the victim(s), usually in the form of an award of damages.*
> *vii. Such redress must be both appropriate and sufficient.*
> *viii. It must publish the above findings.*
> *ix. It must carry out the above functions promptly.*
> *x. The family of the deceased or the person serious injured should be able to play a full part in the process."*[47]

211. It is submitted by P that, due to the effect of s.12, the Cayman Islands has failed to uphold requirements in respect of ensuring that there is an effective investigative

[47] Paragraph 74 of P's Skeleton Argument.

system capable of (i) establishing the facts and cause of P's serious injury; (ii) holding persons accountable for her injuries; and (iii) providing the ability to obtain financial redress. As a consequence, it is submitted that s.12 is incompatible with the BOR.

212. The Attorney General states at paragraph 54 of his written submissions that, when one looks at the cumulative effect of the features of the disciplinary and complaints processes, incompatibility with s.2 could arguably have arisen. In reaching this conclusion he notes that the MDC is a quasi- judicial and not a judicial body and expresses a concern that the disciplinary proceedings would likely focus on the culpability of a particular individual or individuals' clinical acts and that may be too narrow to properly establish the full range of relevant facts. He highlights that the outcome of disciplinary proceedings is not geared towards mitigating the consequences of any negligent acts for victims but is more focused on professional sanctions for the clinicians involved. He highlights that it is compensatory financial redress which would be the effective remedy for P, having regard to her medical condition and requirement for long-term care. He raises a concern also as to whether any disciplinary hearings would take place in public and whether decisions would be published. I endorse these insightful observations.

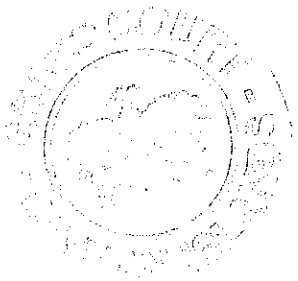
213. The Defendants' evidence about the procedures, to support their contention that the disciplinary and complaints processes are sufficient to meet the duty, is

contained in the Affidavit of Lizzette Yearwood, sworn on 15 July 2015. As I could not do it any better, I now replicate the helpful summary of how she in her affidavit outlines the processes which Mr. Jones Q.C. set out at paragraph 76 (the disciplinary process) and paragraph 79 (the complaints process) in his Skeleton Argument:

76. ....

a. Disciplinary Proceedings can be pursued by the Council either on its own behest or following a complaint from a member of the public (see paragraph 26).

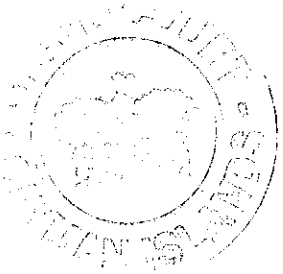
b. The Council is made up of 1) 3 registered practitioners, 2) one member recommended by the Medical and Dental Society, 3) one registered nurse, one midwife and one representative of the Nurses Association, 4) one member of the Pharmacy Council, and 5) one member who is not a registered practitioner. (See paragraph 18).



c. The test for instituting disciplinary proceedings is when a practitioner *"appears seriously to have disregarded or neglected his professional duties"*. This has been clarified as *"errors in diagnosis or treatment, only with the kind of matter which gives rise to action in the civil courts for negligence, only when the practitioners' conduct in the case has involved such a disregard of his professional responsibility to patients or such a neglect of his professional duties as to raise a question of serious professional misconduct."* (paragraph 27).

d. If the registered practitioner is found to be guilty, he may be censured, have conditions imposed upon him, his licence suspended or be removed from the register (paragraph 28).

e. There is investigation by way of the taking of affidavits and the obtaining of reports into the alleged act of negligent treatment (paragraphs 33 to 38).



f. The hearing is conducted by the Council who "*may hear evidence in public if it thinks it is in the public interest to do so or on request of the registered practitioner*".

g. The decision may be made public if the Council thinks "*it is in the public interest to do so.*" (paragraph 47).

h. Following a decision of the Council, an appeal may be made to an "*Appeals Tribunal*" which consists of 1) 3 registered practitioners 2) 2 attorneys-at-law 3) 2 other members who are not qualified to practise in any of the medical professions. (paragraph 51).

i. On receipt of the notice of appeal, a date is fixed for a hearing (para 56). At the hearing, the appellant is given an opportunity to address the Appeals Tribunal and a representative of the Council is heard. Witnesses may be asked to address the Appeals Tribunal.

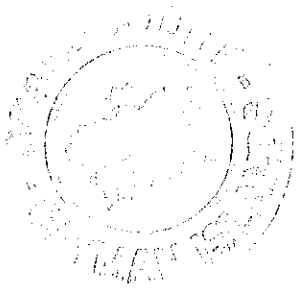
j. The Appeals Tribunal may make such order (including any order for costs or damages) as it thinks just and it may either confirm, modify or reverse the decision against which the appeal is made. The award of costs and damages is presumably to the registered practitioner whose appeal succeeds.

k. Ms. Yearwood does not address whether such appeals are in public or private, but presumably the same rule applies (see e. above)

79. As regards the complaints process:

a. When a patient wishes to make a complaint, he/she writes to the Patient Services Representative.

b. A written response is received within 30 days which might be a full response or a progress report. In respect of patient care, the response appears to be written by Mr. Roynne Etcitty who is the Human Resources Director.



c. There is a Complaints Committee which oversees the internal process and it is said that complaints of a clinical nature are reviewed by a Clinical Review Committee which includes a private sector physician (para 65). The basis of this evidence is not stated in Ms Yearwood's affidavit.

d. The only consequences of a complaint are 1) a possible termination of the clinician's contract of employment and 2) referral to the Council.

e. No guidance is given as to what the response should contain or whether any independent report is obtained from an expert.

f. There is no evidence that the results of such complaints are published.

214. At paragraph 81 of the Skeleton Argument dated 5 July 2016, P sets out the following submissions in support of her contention that the disciplinary and complaints system are not sufficient for the Cayman Islands to meet the requirements imposed under s. 2 of the BOR in a clinical negligence matter:

a. The disciplinary process is not a judicial system – rather it is an administrative system, adjudicated upon by other professionals, not judges. The Appeals Tribunal does have some involvement by lawyers but the tribunal also consists of medical professionals.

b. The complaints process is not a judicial system but a complaints process determined by employees of the Authority.

c. Since both processes involve other registered medical practitioners in the Cayman Islands, and since the Cayman Islands has a comparatively small number of healthcare professionals and the medical facilities are also limited in number and geographically proximate, it cannot be said that these practitioners are sufficiently separate and independent from any practitioner subject to the proceedings. Moreover, the complaints procedure is conducted by the Authority and is therefore not independent from any employee subject to a complaint.

d. Neither process would establish the facts surrounding P's birth on 9 July 2005. They would only investigate the specific complaint made against the individual. For example, any complaint made against Dr. Alexander would only investigate the allegations of negligence in so far as they related to her. They would not look at the actions of the midwives or other clinicians whose identities are not known.

e. Neither process would establish the cause of P's serious neurological injuries. The processes would only consider the acts of the clinicians, not the consequences of the acts.

f. Neither process would hold the clinicians accountable for P's injuries, rather both processes would just look at their clinical acts and omissions, not the consequences of such acts and omissions which are required to hold a person accountable.

g. Neither process provides for any redress for P or her mother, let alone appropriate and sufficient redress. There is no power to award damages to compensate P as well as to ensure adequate care provision for her health and disabilities, thereby extending her life expectancy. It is argued that the provision of civil proceedings with civil remedies for damages is a "*baseline*" requirement although there may also be disciplinary

or criminal proceedings, but the latter two cannot be alternatives for civil proceedings.

h. There is no obligation on the responsible Authority/Council to publish any findings made against a practitioner and inform the public of such findings. The policy of encouraging a guilty practitioner to report any sanctions or disciplinary action is inadequate.

i. There was no investigation of P's birth by the Authority or any initiation of disciplinary proceedings by the Council against Dr. Alexander. It should not have been left to P or her mother to make a complaint before such investigation/proceedings were initiated. Any investigation now of events which occurred over eleven years ago is bound to be limited.

j. Neither process could be described as allowing P's family to play a full part in the process. There is no obligation on the Council, the Appeals Tribunal or those involved in the Complaints Process to involve the family.

215. As the Defendants fairly and appropriately point out a further issue about whether the disciplinary process is sufficient arises under the Code of Practice which provides that the MDC is concerned with negligent matters:

> "*only when the practitioner's conduct in the case has involved such a disregard of his professional responsibility to patients and such a neglect of his professional duties as to raise a question of serious professional misconduct.*"

This appears to exclude the applicability of the range of sanctions under s.36 of the HPL in cases of simple negligence.

216. The MDC does have some of the characteristics of a judicial body as (i) it is a body recognised in law; (ii) the procedure it conducts is similar to that found in a court or in an adversarial tribunal; and (iii) and the outcome of the procedure involves a binding determination of the civil rights of the parties. There is however a valid concern about the small "*pool*" of available medical practitioners. I do not accept the submission that, if the MDC is not viewed as being independent in a clinical negligence case of this nature, it automatically means that the MDC could never be viewed as acting independently when it is engaged to make an enquiry concerning other types of conduct. However, this concern in itself would not be sufficient to conclude that the MDC disciplinary proceedings would not be sufficient.

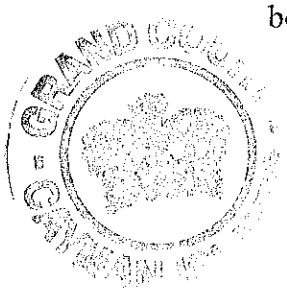
217. Any disciplinary proceedings against the Second Defendant for her alleged negligence would require the MDC to consider and reach conclusions about similar facts as a Court would in civil proceedings. However, I accept P's submission that although the MDC has a wide discretion concerning how to investigate any complaint, the hearing would be concentrating on the actions of the Second Defendant who the complaint would have been made against rather than other employees of the Authority.

218. Having regard to the importance of identifying persons responsible and to protect future patients, it appears from Mrs Grandage's affidavit evidence that the Gazette has not reported the outcome of any disciplinary proceedings. It is not clear

whether, after disciplinary proceedings make a finding of negligence, if all that happens is the practitioner is removed from the list published on the MDC website and whether the reason for any action taken by the MDC in disciplinary proceedings is published.

219. The significant issue, as highlighted by both the Attorney General and P, is the fact that in the disciplinary proceedings the redress would not include damages for P. Also of significance is the issue as to whether in disciplinary proceedings, due to the code of practice, the MDC will consider cases of simple negligence.

220. When considering the Defendants' contention that disciplinary proceedings alone would be sufficient, what is important is to have regard to the nature of the particular case and then consider whether the legal system as a whole satisfies the guarantees required by the BOR. As stated at paragraph 80 in ***Dodov*** there must be an:



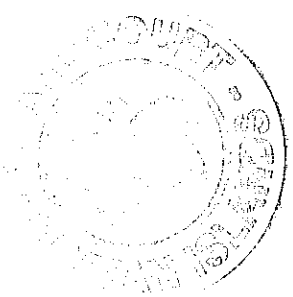
> *"effective independent judicial system so that the cause of death of patients in the care of the medical profession, whether in the public or the private sector can be determined and those responsible made accountable."*

And at paragraph 83 in ***Dodov*** the remark that proceedings must provide:

> *"legal means capable of establishing the facts, holding accountable those at fault in providing appropriate redress to the victim"* and they must operate effectively in practice, not just in theory.

221. The case law placed before the Court and relied upon by the Defendants cannot be read as amounting to a precedent that disciplinary proceedings alone will be sufficient. Apart from the cases of ***Mastromatteo, Binisan*** and ***Banel***, the ECtHR has viewed disciplinary proceedings as being an additional part of the overall system and not the sole means of investigation. Although I accept that the concerns expressed by P, except for the lack of a compensatory remedy, would not individually support a contention that disciplinary proceedings would be deficient, the cumulative effect, highlighted by the Attorney General makes incompatibility with s. 2 arguable on the basis that the disciplinary complaints processes alone would not meet the obligations. I do not accept the Defendants' submission that disciplinary proceedings alone would meet the obligation.

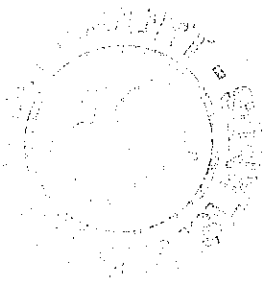
222. I am satisfied that the shortcomings in the law preventing P from seeking appropriate civil redress, having regard to the nature of this case, means that there has been a failure to provide an effective judicial system. If I had not made the findings in relation to the non-retrospectivity of the BOR, s.12 would have been incompatible with s.2 of the BOR as the State would be in violation in respect of its duty to make available judicial remedies capable of holding accountable those responsible for P's life-threatening injuries and providing appropriate civil redress to P.



Section 3 of the BOR

223. Section 3 articulates the right not to be subject to inhuman and degrading treatment.

224. There is a procedural obligation which requires adequate and regulatory framework. Similar to s.2 of the BOR there is a need for an effective judicial system when looked at as a whole. As all the parties rightly highlight, in the sphere of negligence there is great overlap between s. 2 and s.3 when assessing whether the judicial system obligation is an effective one. Accordingly, in light of my findings when dealing with s.2 of the BOR, the same conclusions set out in paragraph 222 above equally apply to s.3 of the BOR.



Section 7 of the Bill of Rights

225. Section 7 of the BOR articulates the right to a fair and public hearing in the determination of legal rights and obligations by an independent and impartial court within a reasonable time.

226. P contends that s.12 is a *"blanket immunity provision"* which prevents access to the court in civil proceedings and that this amounts to a breach of these s.7 rights.

227. In ***Ashingdane v United Kingdom*** (1985 7 EHRR 528) the Court considered the situation where access of a litigant to the court was being restricted. The applicant was a mental patient who complained that he was not able to challenge the

lawfulness of a refusal to transfer him from a secure hospital. This was due to the immunity created by the Mental Health Act 1959, barring civil actions by mental patients against staff or health authorities unless there was an allegation of bad faith or lack of reasonable care. A High Court judge had to give leave and had to be satisfied a prima facie case of bad faith or negligence had been made out. The Court held that there was no violation of Article 6, stating at paragraph 59 that the restrictions imposed, in limiting any liability of the responsible authorities did not impair the very essence of the applicant's right to a court hearing or transgress the principle of proportionality. The Court further held in this case that the applicant could have taken proceedings for negligence since he could, with leave, have brought a claim if bad faith or negligence was alleged. The Court indicated that:

> *"...the limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired..... Furthermore, the limitation will not be compatible with Article 6 para 1 (art. 6-1) if it does not pursue legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and that aims sought to be achieved."*

228. ***Osman v United Kingdom*** [1988] EHRR 245, concerned a public policy immunity from suit in negligence for the police acting in an investigative or preventative capacity. The Plaintiff brought proceedings which had been struck out on the basis of the police immunity. The Court held that the aim of the exclusionary rule might be accepted as legitimate since it was directed to the maintenance of police efficiency in the prevention of disorder and crime and

avoiding defensive policing. However, the application of the rule was not proportionate as, without further inquiry into competing public interest considerations, it served to confer a blanket immunity on the police for their acts and omissions. The Court found that this amounted to an unjustifiable restriction on an individual's right to have a determination on the merits of a claim. The Court therefore found a violation of Article 6 stating at paragraph 151:

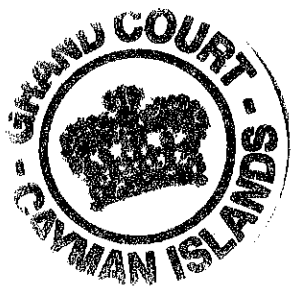
> *"... the application of the rule in this manner without further enquiry into the existence of competing public interest considerations only serves to confer a blanket immunity on the police for the acts and omissions during the investigation and suppression of crime and amounts to an unjustifiable restriction on the applicant's right to have a determination on the merits of his or her claim against the police in deserving cases..... it must be open to a domestic court to have regard to the presence of other public interest considerations which pull in the opposite direction to the application of the rule."*

229. However, this approach was subsequently reversed in the cases of ***Z and others v. United Kingdom*** (2002) 34 EHHR 3 and ***T.P. and K.M. v United Kingdom*** (2002) 34 EHRR 2. In the latter case, following an interview with the child, the local authority suspected that the mother's boyfriend had sexually abused her daughter (K.M). A place of safety order was obtained and K.M. was removed from the care of her mother and they were separated, save for limited contact, for over a year. The video and transcript of the interview with the child were relied on

by the local authority in justifying the continuation of care arrangements. The video was important as there existed a real issue as to identification as, despite the local authority's interpretation of the content, the child may not have been referring to the boyfriend. The applicants later issued proceedings, making allegations of negligence and breach of statutory duty against the local authority. The claim was struck out as disclosing no cause of action recognisable in English law. Before the ECtHR the applicants argued that the exclusionary rule concerning the liability of local authorities in child care matters had been imposed, and that this constituted a disproportionate restriction of access to the court and was in breach of Article 6. The Court rejected this complaint, finding that the applicants could not claim that they had been deprived of any right to a determination on the merits of their negligence claims. Reversing ***Osman***, the Court held that application of the exclusionary rule meant that there was no right in English law and Article 6 did not therefore apply. It found that the applicants' claims had been properly and fairly examined in light of the applicable domestic legal principles concerning the tort of negligence.

230. In ***Z and others,*** which is a related case, the local authority failed to place four children on the Child Protection Register or to bring timely public law proceedings to protect them despite their having been abused and neglected by their parents over a number of years. The children's claims in negligence against the Authority were struck out, culminating in the House of Lords decision in ***X v Bedfordshire County Council*** that it was contrary to public policy to impose

liability on the social services in such cases. The applicants contended that they had been denied access to court contrary to Article 6, as public policy considerations required in these circumstances for there to be a duty of care imposed on the social services and that there was no prior decision excluding liability. The government argued that the applicants had no civil claim in tort to which Article 6 could attach. However, the ECtHR did not view the House of Lords' decision (that as a matter of law there was no duty of care in the applicants' case) as being an exclusionary rule or an immunity which deprived the applicants' access to court. They accepted at paragraph 96 that the issue whether a novel category of negligence, that is a category of case in which a duty of care had not previously been held to exist, should be developed by the courts in their law-making role under the common law. The applicants could not therefore claim that they had been deprived of any right to a determination on the merits of their negligence claims. Their claims were properly and fairly examined in light of the applicable domestic legal principles concerning the tort of negligence. The Court indicated at paragraph 102 that the gap in the law which prevented them from pursuing their action in negligence should be examined under Article 13 (right to an effective remedy) rather than under Article 6. The Court observed at paragraph 98 that:



"It is not enough to bring Article 6(1) into play that the non-existence of a cause of action under domestic law may be described as having the same effect as an immunity, in the sense of not enabling the applicant to sue for a given category of harm."

231. In ***Roche v United Kingdom*** (2006) 20 EHRR 30 the applicant was a former member of the British Army who had suffered injury due to exposure to toxic chemicals at Porton Down. He complained that due to the Secretary of State issuing a certificate under s.10 of the Crown Proceedings Act 1947 ("s.10"), thereby granting the Ministry of Defence immunity, he could not bring a claim of negligence against the Ministry of Defence and that this amounted to a breach of his right to access to the court under Article 6(1). A majority in the Grand Chamber found that Article 6(1) did not apply as the Applicant did not have a civil right against the Ministry of Defence finding that:

> *"The impugned restriction flowed from the applicable principles governing the substantive right of action in domestic law."*

At paragraph 117 the Court stated that Article 6 (1) did not:

> *"guarantee any particular content for those (civil) "rights" in the substantive law of the Contracting States: the court may not create through the interpretation of Art 6(1) a substantive right which has no legal basis in the state concerned. It guarantees extend only to rights which can be said, at least on arguable grounds, to be recognised under domestic law."*

The Court found that s.10 did not intend to confer on servicemen any substantive right to claim damages against the Crown, as it was a provision of substantive law which kept the existing absence of liability in tort of the Crown to servicemen in the circumstances covered by s.10. The Court highlighted that s.10 did not remove a class of claim from the jurisdiction of the courts in England and Wales or confer any immunity from liability which had been previously recognised.

232. P accepts that the ECtHR's decisions after ***Osman***, for example in ***Roche***, have made it clear that s.7 does not create a substantive right and it only comes into play where rights are recognisable under domestic law. P accepts that if s.12 is a substantive bar then s.7 of the BOR cannot apply. The issue for me then is whether s.12 is a substantive or a procedural bar. P says that she has a cause of action which she is prevented from bringing through the courts and therefore s.12 is a procedural bar, whereas the Defendants and the Attorney General submit that s.12 is a substantive bar as its effect is that she has not had the cause of action at any time.

233. P claims that s.12 prevents any claims for damages but does not prevent claims for other remedies with some examples being specific performance, injunctions, and declaratory relief. P compares her case to ***Roche*** and comments that the differences between that case, in which a substantive bar was found to exist and the current case support a contention that s.12 is a procedural bar. The first is that in ***Roche*** reference is made to the cause of action, namely there being a prevention of liability in tort or to bringing proceedings in tort, whereas s.12 refers to the prevention being to the remedy of damages. The second is that in England and Wales, prior to the Crown Proceedings Act 1947, there existed an undisputed rule that the Crown was not liable in tort, whereas in the Cayman Islands parties could, prior to s.12, bring actions for medical negligence.

234. In the Judgment I found that s.12 debarred claims in medical negligence against the Authority, its directors and employees. The Defendant rightly highlight that the First Defendant only came into existence due to HSAL 2002. The s.12 restriction has been in place since the Authority's creation and therefore has prevented liability altogether rather than providing an immunity defence for liability that had existed against the Authority. Section 12 did not remove a class of claim against the Authority or confer an immunity from liability which had previously been recognised. The class of claim has never existed against the authority and one was not created by the HSAL 2002. The Defendants rightly point out that it matters not that, prior to the Authority's creation, individuals could sue the state-run hospital in claims for negligence. It is clearly a substantive liability and although the reasoning in ***Osman*** that arises when there is a procedural bar, for example in relation to legitimate aim and proportionality, and that procedural bars remain applicable despite the approach in later cases, it is not relevant to this case.

235. In the circumstances of this case P has no right recognised under domestic law which would attract the application of s.7 of the BOR. Accordingly, I find that s.7 is not applicable and that there has been no violation of s.7 of the BOR.

Section 9 of the Bill of Rights

236. Section 9 of the BOR articulates the right to private and family life.

237. The Defendants concede that s.9 may, similar to s.2, give rise to positive obligations of a substantive and a procedural nature. The Defendants accept that this also applies in the sphere of healthcare as evidenced by the case of ***Vasileva.***[48]

238. Having regard to the ***Powell*** principle analysed in some detail herein when considering Article 2, I again find for the same reasons no substantive positive obligation arises.

239. The reasoning applied herein when dealing with s.2 of the BOR about the requirements of the judicial system duty also applies when dealing with s.9 of the BOR. Although I accept that the State has a margin of appreciation in choosing how to comply with the positive obligations, I am again satisfied that there has been a failure to provide access in these appropriate circumstances to proceedings which would enable compensation for damages to be obtained in relation to an alleged medical negligence. The shortcomings in the law preventing P from seeking appropriate civil redress, having regard to the nature of this case, means that there has been a failure to provide an effective judicial system. If I had not made the findings in relation to the non-retrospectivity of the BOR, s.12 would have been incompatible with s.9 of the BOR as the State would be in violation in respect of the State's duty to make available judicial remedies capable of holding accountable those responsible for P's life-threatening injuries and providing appropriate civil redress to P.

[48] See paragraphs 194 below.

Section 17 of the Bill of Rights

240. Section 17 articulates the rights of the child.

241. Having regard to the content of the extremely brief submissions made by the P in relation to s.17 I am not persuaded that there is any basis for finding s.12 to be incompatible with s.17. It does appear that P, although raising s.17, did not seek with any vigour to persuade the Court that it was incompatible, recognising that there was a good reason why there was a complete lack of precedent for such a submission in circumstances similar to those in this case.

Footnote

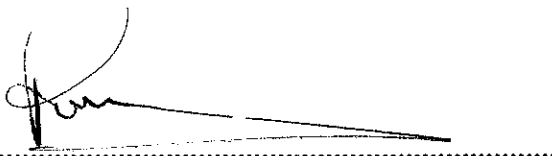
242. Although not having a bearing on my decision, some of the general remarks of Judge Bunello in his second opinion in the ECtHR judgment in ***Maurice v France*** Application No. 11810/03 are worth noting. I accept that this case can easily be distinguished as it was dealing with a 2002 Act which exempted some health professionals (those dealing with prenatal detection) or establishments from liability (which they had been subject to prior to the Act) for any material damage arising from their negligence. He stated at paragraph 6:

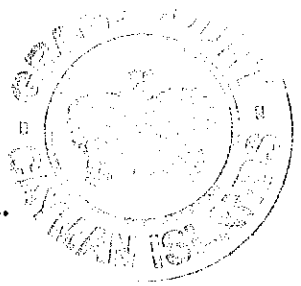
> *"The internationally accepted norm remains the principal of liability. Every person who has, through malice or negligence, caused harm to others is bound to make good all damage occasioned."*

243. He went on to say at paragraph 7 and 8:

"7. The 2002 Act not only improperly thwarted the applicant's Convention rights, but did this through the medium of an improper agency: the creation of a total immunity from the risk of material damages. Immunity, detestable by nature, appears doubly so when wielded to maim fundamental rights."

244. Last but not least, I thank Queen's Counsels for their impressive and prodigious contribution to these proceedings and for their and their clients' extreme patience in awaiting this decision.





The Honourable Mr. Justice Richard Williams
JUDGE OF THE GRAND COURT