Case No.QB-2018-003060

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

[2022] EWHC 593 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 March 2022

Before :

MASTER DAVISON

- -

Between:

SUSAN MILNER	**Claimant**
- and -	
BARCHESTER HEALTHCARE HOMES LIMITED	**Defendant**

- -
- -

Mr Matthew Flinn (instructed by **Leigh Day**) for the **Claimant**
Ms Nicola Greaney (instructed by **BLM**) for the **Defendant**

Hearing date: 15 February 2022

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Approved Judgment

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

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Introduction

1. This is an application to strike out or grant to the defendant summary judgment on the claim.

2. The claim arises out of the treatment of Mrs Elsie Casey ("Elsie") in Stamford Bridge Beaumont Care Home near York between 25 April 2013 and her death there on 12 November 2017. Elsie was born on 22 December 1922 and so was 94 years of age when she died. The cause of death on the death certificate was given as "I(a) Pneumonia and II Dementia". There was no post mortem and no inquest. Elsie had been married to Norman, who predeceased her. They had no children and, at the time of her death, she had few living relatives. The only one mentioned in the evidence was a second cousin of her husband. The person closest to her was the claimant, Susan Milner ("Susan").

3. Susan's mother and Elsie had been lifelong friends. Susan grew up considering Elsie and her husband Norman as part of the family. She was referred to as "Aunty Elsie". She and her husband were Godparents to Susan's daughter, Cheryl. As Elsie became more elderly, her capacity deteriorated. On 11 February 2013, Susan was appointed her Deputy for property and affairs. By this time, Elsie had been admitted to hospital. She was frail and confused. Concerns had been expressed by health and social services and by the police about her capacity to care for herself and about her vulnerability. When she left hospital, it fell to Susan to find a suitable care home to which Elsie could be discharged. She chose Stamford Bridge Beaumont Care Home because of its proximity to her own home. Elsie moved in on 25 April 2013. Susan was named on a "Pre-Admission and Admission Assessment" as Elsie's "next of kin / meaningful person". The "second contact" was Susan's daughter, Cheryl. No member of Elsie's (or her late husband's) actual family was mentioned on the form.

4. Elsie lived at the Home for 4½ years until her death. She was subject to a Deprivation of Liberty authorisation under Schedule A1 of the Mental Capacity Act 2005 and Susan was her representative for the purposes of the authorisation.

5. Although initially satisfied with the care that Elsie was given, Susan became increasingly concerned for her welfare. Summarising the allegations in the Particulars of Claim, those concerns can be expressed as follows. There were repeated instances of Elsie being left unable to access the toilet and left in a soiled state for prolonged periods. There were persistent failures to deal with other aspects of her personal care, including chiropody and skincare. She was often encountered by Susan in an unkempt and unhygienic state. There was a prolonged failure to address her dental and oral health. There were failures in assisting Elsie to mobilise, such that her mobility declined dramatically whilst at the Home. She was at risk from other residents at the Home, which staff managed by isolating her. She was exposed to inappropriate methods of restraint by untrained staff, compromising her dignity and well-being. She was not provided with appropriate care and assistance in relation to her nutrition and hydration; it is likely that she was often left thirsty and hungry. Her risk of choking was not managed adequately. Her risk of falling was not appropriately managed; she fell on multiple occasions.

6. Following a report from a whistle-blower, the Care Quality Commission carried out unannounced inspections in August and September of 2017. In October 2017 (and apparently following a safeguarding alert) East Riding of Yorkshire Council carried out an investigation. Susan attended meetings at the Home in respect of both these interventions. The reports of the local authority and the CQC were published on 27 October and 14 November 2017 respectively. I have read only the summaries in the Particulars of Claim. Both were critical of the standards of care given to residents. The local authority report stated that the Home had been "neglectful in their care for Elsie and have put her at increased risk of harm". The criticism attracted the attention of the national media.

7. Following Elsie's death, Susan felt "angry that she had been so badly treated in the last few precious years of her life", that she had "no one else to stand up for her and get some recognition of what happened to her" and that "the way she was treated went against basic standards of decency and humanity and that the care she received, when she was so

vulnerable, put her very life at risk and contributed to her decline". These are the sentiments expressed in Susan's witness statement and I have no reason to doubt that they are both genuine and deeply felt. She consulted solicitors. This claim was commenced on 12 November 2018, seeking "damages as an indirect victim of breaches of Articles 2 and 3 of the European Convention on Human Rights" pursuant to sections 7 – 8 of the Human Rights Act 1998; (Particulars of Claim). There were originally 6 defendants, which included the local authority. But in the case of all defendants other than Barchester Healthcare Homes Limited, who operated the Home, ("Barchester"), the claim has either not been served or it has been discontinued.

8. By Application Notice dated 4 March 2021, Barchester have applied for the relief described above.

9. It is not in dispute that, pursuant to section 73 of the Care Act 2014, Barchester were a public authority for the purposes of section 6 of the Human Rights Act 1998.

10. The application raises two broad issues, which are (1) whether Articles 2 and 3 are engaged on the pleaded facts and (2) whether Susan has *locus standi* to bring the claim.

The claimant's pleaded claim – Article 2

11. Article 2 states as follows:

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which the penalty is provided by law.
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> 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
> (a) in defence of any person from unlawful violence
> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained, and
> (c) in action lawfully taken for the purpose of quelling a riot or insurrection."

12. The claimant's case on Article 2 is pleaded as a twofold obligation. It is said that the Home was under a duty (1) to maintain and implement appropriate administrative measures and systems of work at the Home in order to protect the lives of its residents (a "systems" obligation) and (2) to take reasonable steps to protect a vulnerable resident's life where it knew, or ought reasonably to have known, of a real and immediate risk to life (an "operational" obligation); (Particulars of Claim, paragraphs 3 iii. a. & b.).

13. The pleaded breach of the systems obligation alleges that there was poor record-keeping, inadequate training and inadequate competency checks; (Particulars of Claim, paragraph 86). The pleaded breach of the operational obligation alleges that Elsie's risk of choking was not adequately assessed, recorded or managed (including by referral for more specialist advice and care); (Particulars of Claim, paragraph 88).

The claimant's pleaded claim – Article 3

14. Article 3 states as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

15. The claimant's case on Article 3 is pleaded as threefold obligation. It is said that in carrying out its functions the Home was subject to an absolute prohibition on the infliction of inhuman and degrading treatment (a "negative" obligation). Further, the Home was under a duty (1) to maintain and implement appropriate administrative measures and systems of work at the Home in order to protect its residents from treatment prohibited by Article 3 (a "systems" obligation) and (2) to take reasonable steps to protect vulnerable residents from treatment prohibited by

Article 3 where it knew, or ought reasonably to have known, of a real and immediate risk of such treatment (an "operational" obligation); (Particulars of Claim, paragraphs 3. iv. a., b. & c.).

16. The pleaded breach of the systems obligation is that set out in paragraph 86, (see paragraph 13 above). The pleaded breaches of the negative obligation (i.e. the obligation on the Home not to inflict inhuman and degrading treatment) and the operational obligation are set out in paragraph 87, which I have already summarised in paragraph 5 above.

Strike-out / summary judgment – the relevant legal principles

17. The law relevant to striking out and/or granting summary judgment in favour of a defendant was usefully summarised in *AB v Worcestershire County Council* [2022] EWHC 115 (QB) by Margaret Obi sitting as a Deputy High Court Judge at paras. 21 – 26:

> "***Strike Out***
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> *21. The Court has the power to strike out a claim if it appears that no reasonable grounds are disclosed for bringing the claim (CPR 3.4(2)(a)). Examples include cases "… which are incoherent and make no sense," and those claims "… which contain a coherent set of facts but those facts, even if true, do not disclose any legally recognisable claim against the defendant." (see CPR Practice Direction 3A, paragraph 1.4).*
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> *22. The core principles are as follows:*
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> *i. Particulars of Claim must include " a concise statement of the facts on which the claimant relies", and "such other matters as may be set out in a Practice Direction": CPR r 16.4(1)(a) and (e). The facts alleged must be sufficient, in the sense that, if proved, they would establish a relevant and recognised cause of action.*
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> *ii. An application under CPR 3.4(2)(a) calls for analysis of the statement of case, without reference to evidence. The primary facts alleged are assumed to be true. The Court should not be deterred from deciding a point of law; if it has all the necessary materials, it should " grasp the nettle ": ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725. However, it should not strike out unless it is "certain" that the statement of case, or the part under attack discloses no reasonable grounds of claim: Richards (t/a Colin Richards & Co) v Hughes [2004] EWCA Civ 266. Even then, the Court has a discretion. The Court should consider whether the defect might be cured by amendment; if so, it may refrain from striking out and give an opportunity to make such an amendment.*
>
> *23. In the recent case of Owens v Chief Constable of Merseyside Police [2021] EWHC 3119 (QB) Fordham J stated [at §6] that it may be appropriate for the court to " grasp the nettle " on an application to strike out and determine an issue of law which arises between the parties, even if the facts are in dispute.*
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> ***Summary Judgment***
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> *24. The Court has the power to give summary judgment against a claimant pursuant to CPR 24.2, on the whole of the claim or a particular issue, if:*
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> *i. The Court considers that the claimant has no real prospect of succeeding on the claim or issue (CPR 24.2(a)(i)); and,*
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> *ii. There is no other compelling reason why the case or issue should be disposed of at a trial (CPR 24.2(b)).*
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> *25. The correct approach to applications for summary judgment made by defendants was helpfully summarised by Lewison J. (as he then was) in Easyair Limited (trading as Openair) v Opal Telecom Limited [2009] EWHC 339 (Ch) at §15, as follows:*

"i) The court must consider whether the claimant has a 'realistic' as opposed to a fanciful prospect of success: Swain v Hillman [2001] 2 All ER 91;

ii) A 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8];

iii) In reaching its conclusion the court must not conduct a 'mini-trial': Swain v Hillman;

iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10]; However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No 5) [2011] EWCA Civ 550;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 ltd [2007] FSR 63;

vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim…If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725."

26. It is also necessary to bear in mind the Court's duty to actively manage cases to achieve the overriding objective of deciding them justly and at proportionate cost. CPR 1.1(2)(e) states that the overriding objective includes allotting a case " an appropriate share of the court's resources, while taking into account the need to allot resources to other cases ". If the Court concludes that the claim has no realistic prospect of success, and the question arises whether there is " some other compelling reason " for a trial, it is bound to have regard to considerations such as saving expense, proportionality, and the competing demands on the scarce resources (CPR 1.1(2)(b), (c) and (e)"

18. To this summary of the relevant principles, I add one more, which is that the court should be wary of dismissing a claim in a developing area of law on the basis of assumed facts; see the speech of Lord Browne-Wilkinson in *Barrett v Enfield London Borough Counci*l [2001] 2 AC 500 at 557 where he said:

"In my speech in the Bedfordshire case [1995] 2 AC 633 , 740-741 with which the other members of the House agreed, I pointed out that unless it was possible to give a certain answer to the question whether the plaintiff's claim would succeed, the case was inappropriate for striking out. I further said that in an area of the law which was uncertain and developing (such as the circumstances in which a person can be held liable in

negligence for the exercise of a statutory duty or power) it is not normally appropriate to strike out. In my judgment it is of great importance that such development should be on the basis of actual facts found at trial not on hypothetical facts assumed (possibly wrongly) to be true for the purpose of the strike out."

Article 2 – the law

19. The Guide on Article 2 published by the Registry of the ECHR describes the scope of Article 2 thus:

> "10. Article 2(1) enjoins the State not only to refrain from the intentional and unlawful taking of life but also to take appropriate steps to safeguard the lives of those within its jurisdiction *(*Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania [GC], § 130). In broad terms, this positive obligation has two aspects: (a) the duty to provide a regulatory framework; and (b) the obligation to take preventive operational measures."

(The case references in the Guide take the form of URLs, which I have not reproduced in this judgment.)

20. This case spans both healthcare and personal care. In the healthcare context, the Strasbourg jurisprudence makes it clear that "mere" clinical negligence does not engage Article 2. Paragraphs 48 – 49 of the Guide describe the exceptional circumstances in which Article 2 may have relevance:

> "48. In two very exceptional circumstances, the Court has accepted that the responsibility of the State under the substantive limb of Article 2 was engaged as regards the acts and omissions of health-care providers: firstly, where an individual patient's life was knowingly put in danger by a denial of access to life-saving emergency treatment (Mehmet Şentürk and Bekir Şentürk v. Turkey) and, secondly, where a systemic or structural dysfunction in hospital services resulted in a patient being deprived of access to life-saving emergency treatment where the authorities knew about or ought to have known about that risk and failed to take the necessary measures to prevent that risk from materialising, thus putting the patients' lives, including the life of the particular patient concerned, in danger (Aydoğdu v. Turkey).
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> 49. For the Court, in order for a case to be qualified as denial of access to life-saving emergency treatment, the following factors, taken cumulatively, must be met:
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> ▪ firstly, the acts and omissions of the health-care providers had to go beyond a mere error or medical negligence in that those health-care providers, in breach of their professional obligations, denied a patient emergency medical treatment despite being fully aware that the person's life is at risk if that treatment is not given;
> ▪ secondly, the impugned dysfunction had to be objectively and genuinely identifiable as systemic or structural in order to be attributable to the State authorities;
> ▪ thirdly, there had to be a link between the impugned dysfunction and the harm sustained; and
> ▪ finally, the dysfunction must have resulted from the failure of the State to meet its obligation to provide a regulatory framework in the broader sense (Lopes de Sousa Fernandes v. Portugal [GC], §§ 191-196)."

21. In the context of personal care in a care home, the Strasbourg jurisprudence distinguishes between persons "detained", (for example prisoners or those compulsorily detained under the Mental Capacity Act 2005), and persons "placed" in social care homes. Elsie came into the latter category. The operational duty (i.e. the positive obligation to protect life) is not owed to a resident of a care home merely by virtue of the fact that their liberty is restricted by a DOLS authorisation; see *R (Maguire) v HM Coroner for Blackpool & Fylde* [2020] EWCA Civ 738 at paragraph 63. In respect of such persons paragraph 57 of the Guide has this to say:

> "57. The Court has adopted a similar approach in respect of the medical treatment of vulnerable persons under the care of the State when the domestic authorities, despite

> being aware of the appalling conditions that later led to the death of persons placed in social care homes or hospitals, had nonetheless unreasonably put the lives of these people in danger (see, in particular, Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania [GC], §§ 131 and 143-144, which concerned the death of a young mentally disabled HIV positive Roma due to lack of adequate care, including medical care, in a psychiatric hospital and, by contrast, Dumpe v. Latvia (dec.), §§ 56 and 57, which concerned allegations of medical negligence in the care provided to the applicant's son who was suffering from several serious illnesses in a State social care institution)."

22. The trigger for the duty to take reasonable steps to avert the danger is a "real and immediate risk to life" about which the authorities knew or ought to have known at the time; see e.g. *Savage v South Essex Partnership NHS Foundation Trust* [2009] AC 681 at paragraph 100. (The "real risk" test ultimately derives from *Osman v United Kingdom* (2000) 29 EHRR 245.) A real risk is one that is substantial or significant and not remote or fanciful; see *Rabone v Pennine Care NHS Trust* [2012] 2 AC 72 at paragraph 38. Lord Dyson in *Rabone* was reluctant to elaborate upon the meaning of an ordinary word such as "immediate". But he said that the phrase "present and continuing" captured its essence; see paragraph 39. In *Van Colle and another v Chief Constable of the Hertfordshire Police* [2009] AC 225, Lord Hope rejected the claim on the basis that there was no indication that "the threat to life was seriously meant or, more importantly, was imminent".

23. So far as standing is concerned, the following extract from the decision of Lang J in *Daniel v St George's Healthcare NHS Trust & Anor* [2016] EWHC 23 (QB) conveniently summarises the correct approach:

> "152. The Claimant submitted that the text underlined below from Supperstone J.'s judgment in Morgan at [70] was an appropriate test for me to apply. Supperstone J. said:
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> > "It is clear from the decisions of the ECtHR that the Court takes a broad view for the purposes of determining whether a person is capable of claiming to be a "victim" of a breach of Article 2 of the Convention. The Strasbourg authorities suggest a test that involves consideration of whether the relationship between the applicant and the deceased is such that the applicant has "suffered gravely" as a result of serious violations [Veilkova v Bulgaria] and is "personally concerned" by them [Yasa v Turkey (1998) 28 EHRR 408]. Each case is to be determined on its particular facts. A family member as distant as a nephew can bring a claim; so too can a partner of the deceased, in particular if that person is also the parent of a child of the deceased. I have not been referred to any case where the applicant is a fiancée of the deceased, but in my view, such a person is capable of being a victim as falling into the category of persons who "suffered gravely" as the result of serious violations of Article 2. If the First Claimant was "merely in a relationship with the Deceased" whether that would suffice will have to be determined on the particular facts of the case. The nature and length of the relationship and whether the Second Claimant is the biological child of the Deceased will be important factors for consideration. If she is not biologically the Deceased's daughter but "has been brought up on the understanding that she is" whether that is sufficient to make her a victim, again, will depend on the facts of the particular case…"
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> 153. Whilst not intending any criticism of the passage underlined, I do not agree that it ought to stand alone as the test to be applied, because, when taken out of context of the rest of the judgment, it does not sufficiently explain the special basis upon which indirect victims have been permitted to apply in Article 2 claims and not others, and that so far they have been limited to next-of-kin and family members (including partners). The class of indirect victims has not included close friends, lovers, housemates, or colleagues from a common workplace or other institutions, such as a college or club. One can readily envisage circumstances in which such persons could "suffer gravely" and be "personally concerned" at the ill-treatment and death of their friend or colleague. Yet the Claimant's counsel rightly does not suggest that the ECtHR would accept them as indirect victims. Some additional family tie or legal relationship appears to be required.

154. In my judgment, the likely approach of the ECtHR in determining the status of the Claimants in this case would be to consider all the facts and circumstances to assess:

i) the nature of the legal/family relationship between the Claimants and JB;

ii) the nature of the personal ties between the Claimants and JB;

iii) the extent to which the alleged violations of the Convention (1) affected them personally and (2) caused them to suffer;

iv) involvement in the proceedings arising out of JB's death."

Article 3 – the law

24. I adopt the neutral statement of the law set out in Ms Greaney's skeleton argument at paragraphs 33 – 35:

"33. In order to fall within Article 3, treatment must attain a minimum level of severity. The case-law is summarised in *AB v Worcestershire CC* at paragraphs 27 – 32). It is an objective case based on the circumstances of the case. The Article 3 threshold is set at a high level. The assessment of the minimum level is relative and depends on all the circumstances of the case including the duration of the treatment, its physical and mental effects, and in some cases, the sex, age and state of health of the victim (*Ireland v UK* (1979 – 80) 2 EHRR 167 at 162). In *Ireland v UK*, wall standing, hooding, subjection to noise, sleep deprivation and deprivation of food and drink were found to be degrading treatment because "they were such as to arouse in their victims feelings of fear, anguish and inferiority, capable of humiliating and debasing them and possibly breaking their moral and physical resistance" (at 167).

34. Actual bodily injury of sufficient severity or intense suffering is required for inhuman treatment (*A v United Kingdom* (1999) 27 EHRR 611).

35. Neglect and inadequate home standards can meet the requisite threshold depending on the seriousness and severity – see *Z v United Kingdom* (2002) 34 EHRR 3 where the children had a "horrific experience" and suffered "appalling neglect" over a prolonged period, where it was conceded that the threshold was met."

25. The test of "real and immediate risk" of the prohibited treatment applies to Article 3 in the same way as it does to Article 2; see e.g. *AB v Worcestershire* at paragraphs 33 – 35.

26. Paragraph 27 of the Admissibility Guide published by the Registry of the ECHR sets out the requirements that must be met in order for a relative to bring an Article 3 claim as an indirect victim:

"27. As regards complaints of ill-treatment of deceased relatives under Article 3 of the Convention, the Court has accepted the locus standi of applicants in cases where the ill-treatment was closely linked to the death or the disappearance of their relatives (Karpylenko v. Ukraine, § 105; Dzidzava v. Russia, § 46). The Court has also affirmed that it may recognise the standing of applicants who complain about ill-treatment of their late relative if the applicants show either a strong moral interest, besides the mere pecuniary interest in the outcome of the domestic proceedings, or other compelling reasons, such as an important general interest which requires their case to be examined (Boacă and Others v. Romania, § 46; Karpylenko v. Ukraine, § 106; see also Stepanian v. Romania, §§ 40-41; Selami and Others v. the former Yugoslav Republic of Macedonia, §§ 58-65)."

27. Those principles therefore require either or both of (a) a close link between the prohibited conduct and the death of the relative and (b) a strong moral interest in the claim.

The defendant's submissions summarised

28. So far as the operational obligation imposed by Article 2 was concerned, Ms Greaney for the defendant submitted that the case was about medical negligence (the failure to manage a risk of choking) and therefore Article 2 was not engaged at all. If, contrary to this submission, it was engaged, then the duty to take reasonable steps was not triggered unless and until the Home knew or ought to have known of a "real and immediate risk to [Elsie's] life". There was no credible case that such a trigger point had ever been reached, nor that Elsie's death was in fact caused by the eventuation of such a risk. (It was accepted that "caused" here had to be used in the sense of loss of a substantial chance of a different outcome as opposed to "but for" causation.) To the extent that failings in Elsie's personal, as opposed to medical, care were invoked (which would have required amendment to paragraph 87 of the Particulars of Claim), the defendant submitted that the pleaded allegations in paragraph 87 whether taken individually or cumulatively could not credibly amount to "a real and immediate risk to life", nor that the Home either had or ever ought to have known of such a risk, nor that Elsie's death was caused by such failings.

29. Ms Greaney submitted that the parameters of the systems obligation were as drawn in the *Lopes de Sousa Fernandes v. Portugal* case; see paragraph 49 of the Guide quoted above. These criteria were not met (as was indeed conceded by the claimant) (a) because there had been no denial of life-saving emergency treatment and (b) because there was no, or an insufficient, pleaded link between the systemic dysfunction and the harm suffered (Elsie's death).

30. The defendant submitted that Susan lacked standing to bring the Article 2 claim because she did not satisfy the test set out by Lang J in *Daniel*; see above. I was also referred to *Thevenon v France* (2476/02) (28 February 2006) where a close friend of 25 years standing who was also a beneficiary under the will of the deceased victim was not permitted to continue a claim for violations of Article 2 which had been commenced by the deceased in his lifetime.

31. So far as Article 3 was concerned, the defendant submitted that Elsie's treatment did not attain the minimum level of severity required to support a claim. The claim was properly characterised as one of neglect. It fell substantially short of the threshold for inhuman or degrading treatment. Ms Greaney compared the facts of this case to those of *AB*, where Deputy Judge Obi had found that 10 incidents over 11 years were too "isolated and sporadic" to have crossed the line into treatment that violated Article 3. Further, in order to qualify as an indirect victim, Susan had to show "either a strong moral interest, beside the mere pecuniary interest in the outcome of the domestic proceedings, or other compelling reasons, such as an important general interest which required their case to be examined"; see *Selami v The former Yugoslav Republic* (78241/13). The claimant could demonstrate no such interest.

The claimant's submissions summarised

32. The claimant fully accepted the principle that something more than negligence in Elsie's care was required to engage the operational obligation under Article 2. But Mr Flinn submitted that there was a spectrum at one end of which were cases of simple clinical negligence and at the other end of which were cases of protracted neglect and/or abuse sufficient to trigger Article 2. He said that it would be wrong to strike out the case or grant summary judgment to the defendant before the processes of disclosure, evidence gathering and trial had enabled the court decisively to determine where on the spectrum Elsie's case lay. By reference to a number of the authorities, he submitted that it lay at the "protracted neglect" end of the spectrum. The principal authorities were *Câmpeanu*, *Nencheva* and *Dumpe*, all discussed at paragraphs 72 – 75 of *R (on the application of Maguire) v HM Senior Coroner for Blackpool & Fylde* [2020] EWCA Civ 738. He said that Elsie had been assessed as at a medium risk of choking, which was sufficient to establish "real and immediate risk to life". The claimant had pleaded that the cause of death was probably aspiration pneumonia rather than simple pneumonia and that, subject to expert medical evidence, causation would be made out.

33. As to the systems obligation, he submitted that this was not, or not exclusively, a clinical negligence case and therefore the strict criteria set out in *Lopes de Sousa v Portugal* and paragraph 49 of the Guide did not apply. The claimant had pleaded a "systems" failure to maintain and implement appropriate administrative measures and safeguards to protect the

lives of residents and the pleaded lapses in Elsie's care (for which there was ample support in the reports of the CQC and the local authority) would establish that such a failure had occurred.

34. Mr Flinn submitted that Susan had ample standing as someone who was much more than a close friend; her relationship with Elsie was akin to a daughter-mother relationship and, additionally, she was Elsie's Deputy, her representative for the purposes of DOLS safeguards and her nominated next of kin.

35. So far as Article 3 was concerned, Mr Flinn invited me to consider carefully the allegations of breach of the negative obligation not to inflict inhuman or degrading treatment. He submitted that they were well capable of meeting that description and that this was a matter for trial. In relation to *AB*, he submitted that Elsie's treatment was plainly worse and that, in contrast to that case, (a) the court would be able to draw inferences as to a wider pattern of treatment and (b) it was likely that additional evidence would be available at trial – particularly in relation to the systemic obligations arising under Article 3. Mr Flinn's stance on Susan's *locus standi* was that she qualified as an indirect victim because she had a strong moral interest in the proceedings and also as an indirect (perhaps better characterised as "direct" – see paragraph 56 below) victim with standing to bring the claim on Elsie's behalf because she had been named by Elsie as her next of kin.

Discussion – Article 2

36. As noted above, this case straddles healthcare and personal care. It has been remarked that to identify the precise legal principles governing such cases has "not been free from difficulty"; see *Maguire* at paragraph 27. In particular, it is not always easy to identify a bright line between the two types. And in both categories, (but particularly the latter), the existence and scope of the duty are influenced by the extent to which the state has assumed or must be taken to have assumed responsibility, the degree of vulnerability of the person under the care of the state and considerations relating to the duration and severity of the neglect said to have caused death.

37. (I note that on 23 February 2022 the Supreme Court gave permission to appeal in *Maguire*. Thus, the extent of the operational duty to those in vulnerable positions in care homes must now be regarded as not only a difficult area of law but also an area where jurisprudence is developing.)

38. In the light of this, Mr Flinn was, in my view, correct to characterise the overall effect of the case law as presenting a spectrum between simple medical negligence at one end and protracted neglect at the other and correct also that the exercise of placing Elsie's treatment on that spectrum was not one appropriate to be carried out in the context of an application to strike out or grant summary judgment. For the same reasons, it is not a profitable exercise to embark upon an exhaustive analysis of the cases that were cited to me or a comparison of their facts to the facts of this case.

39. But matters do not end there because however the case is categorised and wherever it is placed on the spectrum, it is clear that the operational duty is triggered by a "real and immediate risk to life" and that for both the operational duty and the systems duty (in whatever context), there must be a link between the matters impugned and the harm. For the reasons that follow, the Particulars of Claim disclose "no reasonable grounds" in support of either matter and/or the claimant has no "real prospect of succeeding" on them.

40. It has been said that "real and immediate risk to life" is an extremely high threshold and that it has "rarely been shown"; see *Savage* at paragraph 100 (Baroness Hale). Only one such risk has been identified in the Particulars of Claim and this is the risk of "choking or aspirating". This was a risk to Elsie that was never described as more than a "medium" risk. Self-evidently, that could not qualify as a real and immediate risk to her life. As Ms Greaney observed during the hearing, many old people are at some risk of choking and to characterise that risk as one such as to "call the state to account" (*Maguire* paragraph 8) is unrealistic. Further, the "real and immediate" risk test sits very uneasily with a risk which was present when Elsie was admitted to the Home and which then persisted for 4½ years at the same or a similar level. To put that slightly differently, the claimant has not identified any specific point in time when there was an

immediate risk to Elsie's life from choking, or, for that matter, anything else. If Elsie's risk of choking were to be accepted as a real and immediate risk to her life then many other relatively benign, chronic conditions such as a risk of falling, or a risk of a person with dementia wandering off into danger, or a risk of hypoglycaemia from diabetes (to name but a few) would also qualify. It would be highly undesirable to extend the ambit of Article 2 in that way.

41. Secondly, the only part of the statement of case setting out a link between the risk of choking (or anything else) and death is, as already noted, the allegation that, on the balance of probabilities, Elsie contracted and died of aspiration pneumonia; see paragraph 85 of the Particulars of Claim. That is not what was stated on the death certificate. Other than bare assertion, there is no basis for it in the pleading. A Note of a "best interests" meeting at the Home on 8 November 2017, which Susan attended, records that Elsie was "unwell with acute chest infection and has been prescribed antibiotics by her GP Dr Gibson". She died four days later. The meeting specifically discussed "safeguarding issues" and health problems including the chest infection, ulcers, skin condition, dental assessment and a possible referral to SALT (speech and language therapy – relevant to swallowing and aspiration). The referral to SALT was deferred "due to management of dental issues and stability in weight". Despite the context, there is no mention at all in the Note of Elsie having aspirated food or liquids or that her chest infection was connected to any such issue. That would be a surprising omission if such an event had occurred or there were grounds to suspect it. Mr Flinn courageously submitted that "logically Elsie *could have* aspirated" (my emphasis), that expert medical evidence from a geriatrician *might* support such a finding (ditto) and that the court would be able to "draw inferences". None of this came close to meeting the obvious objection, which is that the plea that Elsie contracted aspiration pneumonia is pure conjecture.

42. These findings render a finding on *locus standi* academic. However, if it had been relevant I would have found that the claimant had sufficient standing for an Article 2 claim. As was common ground at the hearing, the principles applicable to standing for the purposes of Article 2 are more liberal than for Article 3. This is because the Article 2 right is so fundamental and because the direct victim, *ex hypothesi*, cannot bring the claim herself. This case is closely analogous to *Daniel* where the claimant was a former foster mother of the deceased. The relationship between Susan and Elsie was akin to a daughter and mother relationship and the aptness of the analogy increased when Susan's own mother died and Elsie became more and more helpless and more and more reliant on her.

43. Applying the list of factors formulated by Lang J in *Daniel* to this case I find as follows. The nature of the relationship was as described above and Susan was also in a formal legal relationship with Elsie because she was her Deputy for property and affairs and her representative for the purposes of the DOLS authorisation. She had very close personal ties with Elsie. Based upon the contents of her and her daughter's witness statements, Susan has suffered greatly from the violations that she alleges (albeit that I have rejected them as violations of Article 2 for the reasons I have given). These proceedings are the only legal proceedings arising out of Elsie's death and Susan, as claimant, is closely involved in them. There are, realistically, no other proceedings which she can bring.

44. These factors favour a finding that Susan qualifies as an indirect victim under Article 2. She was, I find, much more than a "close friend" and the case of *Thevenon v France* relied upon by the defendant is therefore of limited assistance.

45. I address her argument that she can also claim as "next of kin" below.

Discussion – Article 3

46. Ms Greaney's submissions on Article 3 addressed each of the obligations arising. Her core submission on the negative obligation, i.e. the obligation not to have subjected Elsie to inhuman or degrading treatment, was that the allegations in paragraph 87 of the Particulars of Claim were allegations of inadequate care, which might found a case in negligence, but which fell substantially short of the Article 3 threshold.

47. I have read, and re-read, the narrative and the allegations of inhuman and degrading treatment in the Particulars of Claim, (which I must assume to be true). I have done so having first carefully read the cases referred to by counsel and by Deputy Judge Obi in the *AB* case – in particular the case of *Z & Ors v United Kingdom* (2002) 34 EHRR 3. My purpose in taking this approach has been to try to calibrate the allegations in this case against the facts of decided cases in order to arrive at a determination whether this claimant can truly be said to have "no reasonable grounds" for bringing the claim and/or "no real prospect" of success.

48. I have noted the following features:-

    i. Elsie was very elderly and she suffered from dementia. This made her peculiarly vulnerable to ill-treatment.

    ii. The duration of the ill-treatment that it is acknowledged that she suffered was 4½ years, which is a long time.

    iii. That ill-treatment included:

        a) Leaving her in her bedroom alone having been incontinent of urine and faeces and shouting for help;
        b) Leaving her unkempt and unwashed;
        c) Leaving her in clothes that were soiled with food spillages and body fluids;
        d) Segregating her from other residents;
        e) Allowing her to become dehydrated – often;
        f) Allowing her to fall – often;
        g) Restraining her inappropriately.

    iv. Elsie would cry and call for Susan in her sleep. (This appears to have been a frequent occurrence; but it happened particularly when Elsie was removed to a room in the attic area, away from other residents, and which had a window which she could not see out of.) When Susan visited, Elsie was reluctant to let her leave. She was often agitated. These are indicators that Elsie suffered considerable anguish and it is obvious that some of the treatment described in the Particulars of Claim and in Susan's statement would arouse feelings of humiliation and despair – even though Elsie, due to her dementia, might not have been able fully to articulate those feelings.

    v. The ill-treatment was censured in forthright terms by outside agencies.

49. At the outset of his oral submissions, Mr Flinn made a point that in the present context I should not overlook. When the claim was initially put forward, which was by letter dated 15 January 2020, the response was confined to Susan's status as an indirect victim. The Application Notice and supporting witness statement of Mr Dexter of BLM were similarly confined. Thus Susan, in her witness statement in response, had not gone into as much detail as she might have done as to the Article 3 threshold. This was a factor to be taken into account when evaluating what evidence the court might reasonably expect to be available at trial. Mr Flinn also pointed out that disclosure of Elsie's medical records (i.e. those kept by her GP rather than the Home) and such things as the whistle-blower's report, the safeguarding alert and the Home's training and systems documentation might reasonably be expected also to shed light on the Article 3 threshold and other matters.

50. The conclusion that I have reached is that whether the Article 3 threshold has been met in this case is a matter for trial. I acknowledge that the threshold is high. I acknowledge also that a court might take the view that the matters complained of in fact amount to no more than sub-standard care and fall short, perhaps well short, of that threshold. But these are matters of fact and degree that I cannot resolve (a) on paper and (b) without the full picture of evidence that would emerge at trial. To put that another way, it seems to me that I could not decide that the Article 3 threshold has not been, and never could be, met without conducting an impermissible "mini-trial" on incomplete evidence.

51. In those circumstances, I propose to say little about the "operational" and "systems" aspects of the Article 3 claim. If the claimant has a viable claim that the negative obligation not to inflict inhuman and degrading treatment was breached then these further obligations add little – for present purposes. I would only observe that Mr Flinn's remarks about further documentation have obvious and particular relevance to the systems obligation. This is a case where (to quote from paragraph vi of the *Easyair* principles) "reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case".

52. Turning to *locus standi*, I have found that there was not a close link between the prohibited conduct and Elsie's death. It was therefore incumbent on the claimant to demonstrate, as an indirect victim, that she had a "strong moral interest" in the claim or "other compelling reasons", such as an important general interest which required her case to be examined; see paragraph 27 of the Admissibility Guide.

53. I have concluded that this too is a matter for trial. I can set out my reasons for that conclusion as follows.

54. Although (subject to paragraph 56 below) it is correct that the claimant is seeking damages in her own right, that does not exclude her having a strong moral interest in the claim or the existence of other compelling reasons. A strong moral interest in the claim comes down, essentially, to motive. I have already quoted the relevant passages of Susan's evidence on this matter, which I have no reason to question. Although it is the claimant's claim, the action has been brought in order to seek acknowledgement and vindication of the breaches of Elsie's human rights which occurred during her lifetime; (see paragraph 7 d. of the Particulars of Claim). I do not see how that can sensibly be characterised as anything other than a "strong moral interest" in the claim. Further, it is obvious that the claim is at least capable of serving an important wider interest, namely the public interest that care homes should refrain from breaches of Convention rights and that any such breaches should be properly investigated so that lessons may be learned and repetitions avoided.

55. This claim for damages under the Human Rights Act is the only claim available to the claimant. That she might have other avenues for seeking redress falling short of legal proceedings is no more an answer to this claim than any other. But the avenues suggested, which were to take up matters further with the CQC or the local authority, or to pursue documentation via a request under the GDPR, were plainly not a reasonable substitute for a claim.

56. The claimant has, in any event, also framed her claim as Elsie's "next of kin". Such a claim is expressly pleaded in paragraphs 1 & 2 of the Particulars of Claim and in section A1 of the preliminary Schedule of Loss. The next of kin is a concept of the Strasbourg jurisprudence, which is reflected in the Admissibility Guide. The next of kin's role is in "representing the estate or interests of the deceased"; see the analysis of Lang J in the *Daniel* case at paragraph 150. Unfortunately, who qualifies as next of kin and/or whether that, of itself, confers *locus standi* to make a claim for and on behalf of the estate is far from clear from the Guide and was debated by counsel at the hearing before me in only the most general terms. The sense of the Guide is that next of kin is roughly equivalent to the personal representatives or the administrator of a deceased person's estate. However, by implication at least, in *Daniel* Lang J would have recognised the claimant as next of kin and capable of bringing an Article 2 and 3 claim in that capacity, if she had simply been nominated by the deceased as next of kin when the deceased was taken into custody. (He in fact nominated her husband.) The claimant in *Daniel* was the deceased's foster mother and I have already found the relationship between Susan and Elsie to be analogous. Susan was nominated by Elsie as her next of kin and that appears to have reflected the human reality of Elsie's situation. Although I agree with Ms Greaney that the effect of section 1 of the Law Reform (Miscellaneous Provisions) Act 1934 is that all causes of action subsisting in favour of a deceased person's estate are vested in the estate (and not the "next of kin"), that provision would fall to be read compatibly with the Human Rights Act. If the Strasbourg jurisprudence confers standing for these purposes on the next of kin, I do not think that section 1 of the LR(MP)A 1934 is any obstacle. On the material I have, it appears to me to be at least arguable that Susan has standing as next of kin. It appears to me also that this is an area of developing jurisprudence in which it would be wrong in principle to strike out.

57. Mr Flinn had a number of what I might call 'fallback' positions as to Susan's *locus standi* based upon analogies with cases where the victim had been detained by the state. The principal cases relied upon were *Karpylenko v Ukraine* (15509/12) (11 May 2016) and *Farbtuhs v Latvia* (4672/02) (2 December 2004). I have not found it useful to have much regard to these cases. As Ms Greaney pointed out (and as already noted at paragraph 21 above), special considerations apply to those detained by the state. Elsie was not in this category. She was subject to a DOLS authorisation. But Susan could, quite freely, have taken her away from the Home and placed her into another. Elsie was not deprived of her liberty in the same sense or to the same extent as the cases relied upon by Mr Flinn.

58. As a final word on the topic, I feel I should mention one other matter, which is that the case-law on Articles 2 and 3 reflects the fact that the Convention is interpreted dynamically as a "living instrument". It responds to present-day conditions and so is in a constant state of development. That does not mean that claims based on Convention rights are immune from strike out or summary judgment. But, analogously with the principle set out in *Barrett v Enfield London Borough Council*, it means that a court should be hesitant to do so where the law is, or may be, in a state of flux. I think that that is an apt description of much of the Strasbourg jurisdiction on these two very important Articles.

Conclusion

59. For the reasons set out above, I will strike out and give summary judgment to the defendant on the Article 2 claim. But so far as the claim under Article 3 is concerned (and whether the claimant is characterised as an indirect victim claiming on behalf of herself or a direct victim claiming on behalf of Elsie) I refuse the application.