[2010] EWHC 2091 (QB)

Case No: HX9X02338

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

05/08/2010

B e f o r e :

Mr Justice Mackay

Between:

VL (A Child Suing by her Litigation Friend the Official Solicitor)	**Claimant**
- and -	
Oxfordshire County Council	**Defendant**

Mr F Burton QC and Miss F. Newbury (instructed by Stewarts Law LLP) for the Claimant
Mr E Faulks QC and Mr A. Warnock (instructed by Barlow Lyde and Gilbert) for the Defendant
Hearing dates: 20-22 July 2010

HTML VERSION OF JUDGMENT

Mr Justice Mackay:

1. The claimant VL was born in May 1993 to a young woman of just 18, and a father of 21. On 22 July 1994 when her mother was pregnant with her second child (in due course born on 12 November 1994) the claimant suffered a serious injury which has left her with right sided hemiplegia and severe developmental delay. This was the result of her being violently shaken by her father on that date. She has suffered permanent brain damage as a result of that criminal assault.

2. An interim care order was made in respect of the claimant on 10 August 1994 the effect of which was that the defendant acquired parental responsibility over VL, with the mother retaining shared parental responsibility. The care order stayed in force, periodically renewed, until it was made final on 19 March 1996. It was eventually discharged on 24 March 2000. In the course of those care proceedings on 4 April 1995 Wall J (as he then was) found as a fact that it was the father who had caused her injury, a finding which he expressed in these words: "in a moment of temper and in a loss of control…this father shook this child and caused the injuries which she suffered. I am in no doubt whatsoever about that".

3. The defendant's strategy, at Wall J's direction, was to keep this family together. The strategy succeeded, largely as a result of assiduous and thoughtful work by the Social Worker involved, Mrs Thompson. Initially VL lived with her mother's parents, but she went back to live with her mother in August 1995. One of the problems was that for a long time the father and the mother did not or could not accept the judge's finding, albeit there was no appeal against it. It was therefore necessary to reintroduce the father to VL very carefully. He had to undergo extensive psychiatric therapy and treatment to acknowledge and deal with the problems he had about his anger and violent conduct and the reasons behind it. This was done by gradual stages, and initially he was allowed only limited contact under strict control and supervision. Finally he was able to rejoin the rest of the family at their home in December 1996. It is a pleasure to record, in an age when criticism of social workers is all too frequently expressed, that this was highly professional work and an impressive example of how to keep a family together in the most testing of circumstances.

4. This action arises out of an application on behalf of VL to obtain compensation for her criminal injuries. Her case is that the defendant was negligent in failing to make an application on her behalf to the Criminal Injuries Compensation Board ("CICB") before 1 April 1996, after which date the old Criminal Injuries Compensation Scheme was replaced by a new scheme administered by the Criminal Injuries Compensation Authority ("CICA"), one which was markedly less favourable from the point of view of applicants. The defendant denies that it owed a duty of care to make an application by that particular time or at all, or, if it did that it was in breach of it, or that causation of loss is proved.

Criminal Injuries Compensation

5. It is necessary for the purposes of this claim to summarise briefly the development of the system for such compensation for the victims of crimes of violence from its inception in 1964 to 1996.

6. The original scheme was the creature of Crown prerogative, albeit amenable to judicial review. Though the 1978 Pearson Commission recommended that it be placed on a statutory footing, and the Criminal Justice Act 1988 included provisions for effecting that, they were never brought into force. Instead in 1994 a ministerial edict created a new scheme which was tariff based. This was judicially reviewed and declared unlawful by the House of Lords. A new Act of Parliament, the Criminal Injuries Compensation Act 1995, was passed on 8 November of that year. This created a revised tariff based scheme with a maximum award ceiling of £500,000.

7. The "old" CICB scheme made awards which were calculated (broadly speaking) by reference to common law damages, and it was plainly seen by government as too expensive. The 1995 scheme came into force on 1 April 1996 and applied not, as might be expected, to claims in respect of injuries inflicted after that date but, in line no doubt with its predominant money-saving purpose, to all claims lodged after that date irrespective of the date of injury.

8. Beyond issuing a White paper in 1993 central government gave no advance notice of these reforms, and specifically did nothing to inform those injured by crimes committed before 1 April 1996, and this was a scheme designed to be accessible to the layman, that they had to make their claims before that date if they wished to benefit from the old basis of calculation.

9. Therefore for the purposes of this claim the principal differences, between the old and new schemes were these:-

   (1) The "old" scheme, where entitlement was shown, could make an award of any amount consistent with common law damages awarded by the courts; the "new" scheme had a fixed tariff of awards for particular injuries and an overall cap of £500,000 for all claims;

   (2) The time limit within which claims had to be made under the old scheme was 3 years from injury, and under the new scheme 2 years, though in each case there was a discretion to extend that period;

   (3) Each scheme excluded claims which might benefit the perpetrator of the crime, but used different language to do so. The old scheme at rule 7 excluded claims unless the Board was satisfied there was "no possibility" that the perpetrator would benefit; the new scheme at paragraph 15 said that an officer would make an award only where he is "satisfied that there is no likelihood" that he would.

The claims made for the claimant

10. On 6 November 1995 Mrs Thompson, having written to the CICB on behalf of VL, received an application form and the explanatory notes that went with it describing the scheme. She said that she felt there was little doubt that the CICB would have accepted the care judge's finding and she did not feel it necessary to ask the family court if it was appropriate to make the application. She applied because, as she put it, "I would have taken on board it was something I had to consider". She did not, having received the form and guidance notes, initiate any claim by filling in the form and sending it off. But she plainly read the notes, as she was aware of the 3 year limit. She put it aside until the process of rehabilitating the father into the family had been completed, which she said would have been the appropriate time. It was such a difficult case and such a busy case; she described it, almost in the same words as the mother used. I have no doubt it was Mrs Thompson's most difficult case at the time. She was

only a part time worker with a very full caseload and this particular case consumed much of that time.

11. The mother's solicitor in the care proceedings was Mrs Tansey of Lightfoots who, on the evidence of the letters I have seen written by her, was a competent practitioner in this area of the law. On 12 December 1995 Mrs Tansey wrote her a long letter about the case, following a conference with counsel which the mother had attended; the letter included some advice about the desirability of making an application to the CICB. She wrote –

> "If such a claim is successful then it could be a sufficient amount of money to let you have a lot more help with [VL]. By the time it came through (which may take a good two or three years) then it may be the right time to reconsider the position about [the father] and the amount of contact he has [with VL]"

12. The mother's evidence was that though she herself knew that the injury was something that the father had been responsible for she could not remember whether at this time she still had doubts about it. She said she didn't really understand about the compensation scheme and she was not very enthusiastic. In my judgment she was reluctant to make the claim out of loyalty to him, aware that in order to make it she would have to state formally and unequivocally that he was guilty of a crime committed against their daughter. Her stance in evidence was that at this time she had "loads of court cases" and this additional claim was too much for her. I do not believe this was the full story. She did, however, accept that the father did not like the idea of her making the claim, to such an extent that when eventually she did do so she did not tell him. This was a very difficult time for her. The conference notes refer to "problems with client's excitability" and "problems in getting her instructions". This is entirely understandable in the circumstances

13. Mrs Tansey ceased to be the mother's solicitor in January 1996 and legal aid was transferred to Messrs Wilkins. In a handover letter Mrs Tansey wrote to the new solicitors giving certain details, including the fact that she had recommended a claim to the CICB and that "the regulations are changing in April and after that I think that they will be less favourable to VL". In his first letter two days later Mr Pryer simply passed on this advice to the mother as something on which he needed to seek her urgent instructions.

14. On 24 January he sent the mother an application form for a CICB claim, and the relevant guide, suggesting that she read the guide, complete as much of the form as she could in pencil and fix an appointment to see his partner Mr Haworth. It appears she did nothing with that form. On 1 May 1996, the new scheme having come into force on 1 April of that year, he sent a copy of the "new application form" (i.e. to the CICA), again with a request for her to fill in as much as she could and then meet his partner Mr Hawarth on 9 May. It appears that she signed it and dated it on 31 July 1996 some three months later.

15. She must have met with the solicitor and given him instructions enabling him to fill the form in but, at all events that form disappeared without trace, as the solicitor put it, either in the post or at the CICA. In January 1997 he wrote saying as much, but that he had kept a copy which he enclosed for her to countersign on the last page. She did so on 29 January 1997, simply re-signing the original form and adding the new date

16. On 19 March 1997 Mrs Thompson, unaware of what the mother had done, completed and signed the CICB form she had received in 1995. Underneath her signature she made it clear that there was a care order in force and the authority shared parental responsibility with the mother. She sent it to the CICB in Glasgow. On 24 March she visited the mother, discussed care issues, and had added at the end of the meeting that she was applying for compensation on VL's behalf. Her note reads "[the mother] said she had also applied, following advice from her solicitor, but has had no acknowledgment as yet". Mrs Thompson said that as the father was now resident in the household any grant would probably have to be managed through a trustee, and she anticipated this on the form she completed. The mother was resentful of this step in my judgment, although she had not been enthusiastic about her own claim, and had not been prompt in re-signing the copy of the form she had been sent in January.

17. Thereafter Mrs Thompson's claim, which seems to have been redirected to the CICA, was refused on 1 December 1997 under paragraph 15. On 4 February 1998 Mrs Thompson wrote indicating that they wished to apply for a review of the decision, which was unsuccessful, and an appeal was launched to the appeals panel on 21 May 1998. The appeal was placed in the

hands of Mrs Impey, a solicitor in the defendant's child care department, who instructed counsel and attended the hearing on 17 June 1999. Before that hearing she took advice from counsel on 13 June. Oxfordshire's stance was that, the issue being paragraph 15 of the scheme, it should be possible to devise an arrangement by which the child could receive the benefit of funds awarded to her but which prevented any benefit accruing to her father. The defendant was at that stage suggesting a discretionary trust and the appeal panel was dismissive of the suggestion, fearing that any money expended for special toys, clothes or holidays for VL would indirectly benefit the father by relieving him of a burden.

18. Undeterred, despite the panel saying they were concerned at the expense the defendant was incurring in pursuing this appeal, Mrs Impey stuck to her guns, persuaded the panel to adjourn the appeal, and instructed Chancery counsel with whom she had a conference. He subsequently drafted a deed of trust designed to overcome the difficulties.

19. The care order was discharged on 24 March and on 28 April the matter of the CICA appeal was then passed by Mrs Impey to the Official Solicitor to advance the claim. The Official Solicitor expressed a high degree of confidence in the outcome of the resumed appeal which proved justified. On 9 February 2001 an award of £500,000, the maximum available under the CICA scheme, was granted.

Awareness of the Criminal Injuries Compensation Schemes

20. Joyce Plotnikoff is both a qualified lawyer and social worker who has been an academic since the late 1980's. Her research indicated that children who were the victims of violent crimes were not having an appropriate level of applications for compensation made on their behalves, and in 1989 the CICB produced a leaflet explaining how claims for children could be brought.

21. She organised a conference in September 1990 at which, she recalled, most of the delegates were local authority representatives which was addressed by among others a lawyer in the office of the Official Solicitor. She suggested that local authorities might be laying themselves open to claims in negligence if they did not make claims for children for whom they were responsible. That was a view echoed by Dame Elizabeth Butler-Sloss speaking in a non judicial capacity at the annual Social Services Conference that year. In 1993 Ms Plotnikoff was asked by a number of County Councils to advise them on their responsibilities in this area.

22. There is no doubt that Oxfordshire was aware of its responsibilities in this area by the time with which I am concerned in this case. By 1992 Peter Clark, Principal Solicitor leading the child care team, drafted an appendix which was included in Oxfordshire's area child protection committee procedures manual giving basic information about the CICB scheme. It was a sensible and clear summary of the position, emphasising the local authority's responsibility in this area, giving a brief guide as to how to make claims and concluding "the LA can be sued for not making an application on behalf of a child who was in care." It also stated that it was not Oxfordshire's practice to recoup the costs it incurred in so doing from any award. In this respect I suspect Oxfordshire was ahead of the standards of many other authorities. He said he saw the purpose of this document as something which was important to "raise the awareness" of those in his department. Either by virtue of this document or discussions with her colleagues Mrs Thompson was certainly aware of her responsibility, which is why she applied for the form when she did. It is important, when one is spending some days focusing on but one small aspect of the many duties of the child care department of the local authority to remind one self how passing rare an event such a claim of this type was. Mrs Thompson had been in social work of this kind since the first criminal injuries scheme came into being. When she decided at the end of 1995 to make a claim for VL this was, to my surprise and hers, the first such claim she had made. That may have been through lack of awareness generally. But in the years that have passed since the CICA scheme has been in force the number of claims made by Oxfordshire is really very modest; none in some years and low single figures in others.

23. The structure of the child care department in legal terms was such that it employed five lawyers one of whom was Mrs Impey, a Senior Assistant Solicitor (child care) who was effectively line manager for these lawyers, and who reported to Mr Clark above her. She was, as I accept from her evidence, entirely unaware of the changes effected in criminal injuries compensation by the 1995 Act. Mr Clark was not wholly unaware that changes were in the air.

He had heard about the attempt by the Home Secretary to introduce the first changes and how they had come to grief. He and everybody else in the Oxfordshire child care team were unaware of the significance of the cut off date of 1 April 1996. He accepted that the reason why the claim was not presented before that crucial date was that no one ever considered it necessary to do so. Mrs Impey, who knew even less about the changes than did Mr Clark, said that if she had known about the changes she would have taken advice as to which of the two schemes would have been the most suitable for VL's claim. It is therefore necessary to consider the existence and scope of any duty of care owed by Oxfordshire in this area of its operations and, if it arises, whether there was a breach of that duty by the defendant.

"Keeping reasonably abreast"

24. It is plain that if there was a breach it was by one or more members of the child care legal team. Mrs Thompson was a busy social worker and could not be expected to keep herself abreast of all legal changes that might impact on her work. That is what the legal team was there for. Mr Clark gave evidence as to how his department approached the question of keeping abreast of legal developments.

25. One of the solicitors was designated as the recipient of all official or legal documentation received either from government departments or professional bodies such as the Association of County Councils (ACC). Oxfordshire also subscribed to a service provided by Parliamentary agents who forwarded statutory instruments relevant to public law care work.

26. Mr Clark exhibited to his witness statement a list of statutory instruments, ACC letters and press releases, circulars from the Department of Environment, the Department of Health, Home Office and Department of Transport, Times Law Reports and local government association circulars. For the years 1995 and 1996 the list of the titles alone covers over 80 pages.

27. As these materials came in Mr Barling, the relevant solicitor would identify the relevant directorates and solicitors within the directorate who should receive copies and they would be sent out through the internal post.

28. Mr Clark himself produced case law briefings for his team highlighting documents of relevance to their work. He derived his information for these from Family Law, Family Law Reports, Halsbury's Laws, Times Law Reports and All England Law Reports. There was extensive external training for staff. Nowhere in the documents he has retrieved for this purpose is there any circular or advice from central government or the ACC or any similar body about the significance of 1 April 1996 in compensation claims.

29. Mrs Impey says she made it her business to keep up to date with developments in the law and procedure. Notwithstanding this she was unaware of the new scheme and its possible adverse implications. She went on a large number of courses on all aspects of child care law and practice, as is shown by the records produced. She went on one training course in the autumn of 1995, she remembered, which was on the subject of criminal injuries compensation claims for children in care. She remembered doing this because she had an appeal coming up and wanted to know more about it. She has, unsurprisingly, no recollection of that conference bringing to her attention any need to submit claims by a certain date. That is perhaps not surprising if her interest in the subject matter of the conference was focused on a claim that was already in being before the CICB.

30. It seems likely that this conference was addressed by Mr David Hall a barrister practising in Leeds who was interested in this area of the law. He cannot now recollect what topics in particular were covered by his address but thought it unlikely given what he knew was happening to the CICB that he would not have given his talk "without referring to the current state of the law at the time and the changes that were taking place in the scheme". He was well aware that the new scheme was going to be significantly less generous.

31. Mr Spurgeon was director of the CICB and became Chief Executive of the CICA. He was involved in the drafting of the 1996 CICA scheme. At around this time he accepted invitations to give several briefings and lectures on these issues to various groups. He cannot now remember whether one of these was the lecture on 3 October 1995 to which Mrs Impey probably went but it was just the sort of event at which he did speak at that time. If he had spoken the normal content of his contribution would be to explain how the tariff based scheme

would have operated, how if differed from the prior common law damages based scheme and he would have stressed the proposed cap on payouts under the new scheme and the broad implications for the seriously injured applicants. I think it highly probable that he did speak at the conference which Mrs Impey attended. He did not in his evidence say expressly that he covered the date of the changeover, though it seems likely he did, or the fact that the change would be retrospective in effect, which is perhaps a little less likely in my view.

The Statutory Framework

32. The duties imposed on and the powers available to the defendant in its dealings with the claimant are to be found in the Children Act 1989. I will not set out all of the provisions in full; some can be summarised.

33. Section 31 gives the power to a court to make a care order in favour of a local authority where the child is suffering or likely to suffer significant harm. Section 38 enables the court to make an interim care order where there is an on going application for a Section 31 order. Section 33(3) provides that while a care order is in force the local authority has parental responsibility for the child but that does not extinguish or reduce the parental authority held by others. In this case the parental authority lay with the mother who was not at the relevant time married to the father. One section requires to be set out.

Section 3

(1) In this Act "parental responsibility" means all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property.

(2) It also includes the rights, powers and duties which a guardian of the child's estate (appointed before the commencement of Section 5 to act generally) would have had in relation to the child and his property.

(3) The rights referred to in subsection (2) include, in particular, the right of the guardian to receive or recover in his own name for the benefit of the child property of whatever description and wherever situated which the child is entitled to recover.

(4) The fact that a person has, or does not have, parental responsibility shall not affect –

(a) Any obligation which he may have in relation to the child…

34. In addition there are other sections which I do not consider need to be set out or summarised. The general purpose and effect of the legislation is that the court's paramount consideration shall be the welfare of the child.

The Claim in Negligence

35. It is agreed that this is a "novel claim" in the sense that no precedent for it can be found. The claim is based on common law negligence and it is not suggested that any provision in the Children Act gives a right to a private law claim. I therefore find myself in the well-trodden territory that started, for present purposes, with the case of *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 and which continues through a line of authority helpfully analysed by Laws LJ in *Connor v Surrey County Council* [2010] EWCA Civ 286 at paragraphs 75-103. I will not attempt any rival analysis of my own but rather will consider the arguments of the parties in this case about the existence and scope of the duty of care, whether there is a breach and if so whether there is causation and damage. Obviously the existence and scope of the duty is the first question to address.

36. Mr Burton QC for the claimant does not dispute that this is a novel claim and therefore that the statement of principle found in *X* at 739A in the speech of Lord Browne-Wilkinson applies. That reads:-

> "If the plaintiff's complaint alleges carelessness, not in the taking of a discretionary decision to do some act, but in the practical manner in which that act has been performed (e.g. the running of the school) the question whether or not there is a common law duty of care falls to be decided by applying the usual principles i.e. those laid down in *Caparo Industries PLC v Dickman* [1990] 2 AC 605*, 617-618.* Was the damage to the plaintiff reasonably foreseeable? Was the relationship between the Plaintiff and the Defendant proximate? Is it just and reasonable to impose a duty of care?"

37. In applying that test plainly the statutory framework within which the defendant was acting is of the highest importance. As was said by Lord Steyn in *Gorringe v Calderdale* [2004] 1 WLR 1057 at 105 E this is -

> "…a subject on which an intense focus on the particular facts and on a particular statutory background, seen in the context of the contours of our social welfare state, is necessary. On the one hand the courts must not contribute to the creation of a society bent on litigation, which is premised on the illusion that for every misfortune there is a remedy. On the other hand, there are cases where the courts must recognise on principled grounds the compelling demands of corrective justice or what has been called "the rule of public policy which has first claim on the loyalty of the law: that wrongs should be remedied".

Later in the same case Lord Hoffman at 1065B thought it would be "to say the least unusual", where the statute does not create a private right of action, if the mere existence of the statutory duty could generate a common law duty of care.

38. Many of the cases to which I was referred (*D v East Berkshire [2005]2 AC 373* would be a good example) show that the statutory framework may militate against the imposition of a common law duty of care, in the sense that the duty would cut across the exercise of the power or discharge of the duty. In none does the existence of duty or power (unless it qualifies as being actionable in itself in a private law claim) create such a duty without more. Mr Burton accepts that this case falls to be considered by asking whether an incremental extension of the reach of the common law duty is "fair just and reasonable" in the particular circumstances of this case.

39. Mr Burton relies on these particular features. First the local authority had parental responsibility to promote the welfare of the child which extended to taking steps to mitigate the consequences of the disastrous injury which had precipitated the care order proceedings. Second the defendant had assumed responsibility for making CICB claims for children in its care by promulgating the 1992 document. Third it is plain from her evidence that Mrs Impey would have construed her duties as requiring her to make an application, even if the mother objected, if that was in the child's best interests. Fourth Mrs Thompson obtained the form and intended to apply, thinking that was within the remit of her job. Fifth she did send the form off. Sixth at no time did the defendant advise the mother to make her own claim. Seventh if Mrs Impey had made the claim or advised the claim be made to the CICB she would have seen it as her duty to fight it to a conclusion, as she did with the claim that was eventually made. Eighth the defendant extended the life of the care order so as to enhance the prospects of a successful appeal against the refusal of the claim. All these points are soundly based on the evidence in the case, I accept.

40. Mr Burton was inclined to concede that if the defendant had merely decided against making any application, as a bona fide decision based on social work grounds, his argument would be difficult. But once you do it, as he put it, you have to do it competently which meant applying in time and applying to the scheme that gave the greatest benefit to this child.

41. He concedes that the fact that this is a pure economic loss claim, which he agrees it is, weighs heavily at this "fair just and reasonable" stage of the consideration. He concedes that the existence of a duty should not be declared if it conflicts with the defendant's exercise of its statutory powers, or its duties, or makes demands on its resources.

42. Mr Faulks QC for the defendant says that merely acknowledging as the defendant did that it had the power and, as it saw the matter, in certain circumstances the obligation to make such applications on behalf of the child does nothing to create the common law duty of care. He points to what was said in *X and Y v London Borough of Hounslow* [2009] EWCA Civ 286 at 24 by Sir Anthony Clarke MR, as he then was at paragraph 24 where he said -

> "We note in passing that in *O'Rourke* [1997 AC 188] the House of Lords rejected the submission that it made a difference that the local authority had acknowledged the duty by at first securing accommodation. Lord Hoffmann, with whom all the other members of the appellate committee agreed, said at page 196:
> "The concept of a duty in private law which arises only when it is being acknowledged to exist is anomalous. It means that a housing authority which accepts that it has a duty to house the applicant but does so inadequately will be liable in damages but an

authority which perversely refuses to accept that it has any such duty will not. This seems to me to be wrong."

Mr Faulks points to the difficulty in defining the duty here with any precision. What the Claimant is effectively contending for is a *Bolam* type obligation analogous to that imposed on any professional such as a doctor or lawyer. There is clear authority, to be found he says in *Barrett v Enfield* [2001] 2AC 550 at 587C-588F, that it would be wholly inappropriate for a child to be permitted to sue her parents for careless decisions made in respect of her upbringing which had damaged her economic welfare. He also challenges Mr Burton's assertions that the duty here lay on the child care team employed by the defendants composed as it was of social workers advised by qualified lawyers. In my judgment the "team duty" approach is not an unreasonable one for Mr Burton to advise me to take, other things being equal, as it identifies the only sector of the defendant's operations which was concerned with the welfare of the claimant in this case, which was a specialist and therefore expert department.

43. The defendant says it obtains assistance from Sedley LJ's approach in *Gwilliam v West Hertfordshire NHS Trust* [2003] QB 443 at 54. There the issue was whether the hospital which organised a fair to raise funds, in which an independent contractor provided an attraction for visitors, owed a duty to take reasonable care to ensure that the claimant would be reasonably safe while visiting the fair, the scope of which was said to extend so as to require it to take steps to check that the contractor had effective public liability insurance in place. He plainly regarded that as a step too far, describing it (at paragraph 59) as "a jump across a factual and logical gap" and therefore not an appropriate incremental extension. His decision was expressly approved in the later case of *Glaister v Appleby-In-Westmorland Town council* [2009] EWCA Civ 1325

Conclusions on Duty of Care

44. I am in no doubt that this defendant had the power to make a CICB claim on the claimant's behalf if it thought it advisable. Even if the mother objected it could do so, though it would have needed to go to the court for its directions so long as the care order was an interim one.

45. That power does not in my view mean it was under a duty in tort to maximise the economic position of a child in care by allocating time and resources to a pursuit of all available financial claims in a situation where a parent retains a share of parental rights. The primary focus of the defendant was on the physical welfare and safety of the child and the rebuilding of the family unit.

46. The assumption of responsibility relied on, in the form of the 1992 document, is a factor to which I must give considerable weight, but is not one which is of itself determinative of a duty actionable in private law, whatever the document says.

47. In a case with something over ten thousand documents there is a surprising absence of evidence of the practices and attitudes of other comparable councils. The evidence of Miss Plotnikoff was that she advised one council and drew upon the "policies" of eight other councils who, she established in 1993, had such policies in place for making CICB claims. There is, significantly in my view, no evidence before me from any body such as the Association of County Councils as to any central view or advice given, notwithstanding the fact that that body plainly played a central coordinating role in disseminating information of a legal type to its members.

48. But most of all, looking as I must closely at all the facts of the case, I am struck by the delicacy of the relationship between the defendant, through the person of Mrs Thompson, and the mother of this claimant between August 1994 and April 1996, the latest time when a CICB claim could have been lodged. From the documents I can see that there were thirteen court hearings in this period and at least seven child protection case conferences, all preceded by reports of progress and followed by minutes of decisions taken. Written agreements were being negotiated with the parents as to the accommodation of the claimant, initially with the grandparents and then the mother, and the terms of contact with the father. Both the mother and Mrs Thompson described this as a busy process and Mrs Thompson considered it her most difficult case. The mother, though intelligent enough to acknowledge the success of the social work intervention, plainly, as any mother would, harboured deep down some resentment at the intrusions in her life and that of her family, as she admitted in her candid

evidence. It took over a year from Mrs Thompson's receipt of the CICB form until the father could be reintroduced fully into the family. I consider that careful thought had to be given, and probably was given, as to whether the introduction of a claim signed by the mother naming the father as a criminal would have been viewed as something consistent with that whole process of rehabilitation.

49. It is fair to say, but unsurprising, that Mrs Thompson herself did not spell this out in her evidence in exactly the way I have just done, since these events are now nearly 15 years old. But it is plain she had not simply forgotten about making the claim; she produced entries from her diary which look like reminders relating to it in December 1996 and January 1997. Of course she was too late by then to bring a CICB claim, but the point is she was aware it was there. She said in evidence she put it aside until the father was rehabilitated – "that was the appropriate time" – and the diary dates which straddle his return to the home fit with that. That was her reason as I find, and it was a sensible one. If it has meant that the reuniting of this family took precedence over the maximising of VL's financial position that is a result most people I believe could live with. In my view it would not be fair just or reasonable by imposing the duty alleged in this claim to promote the claimant's financial security over the unity of the family, or even run the risk of doing so.

50. While therefore the categories of negligence are never closed and the law of tort is a living thing I consider that to impose a duty of care of the type and scope contended for in this case would be neither fair just or reasonable in the circumstances.

Breach of Duty

51. Lest I am later held to be wrong in my conclusion above I ought to consider whether the child care team of the defendant was in breach of that duty as a result of its admitted failure to be aware of the cut off date of 1 April 1996 for CICB claims.

52. I have set out above the efforts that this team took to keep aware of changes in the law relating to the discharge of its child care functions. The standard of care required is the *Bolam* test as was stated by Lord Slynn in *Barrett* at 572H. The focus is necessarily therefore on the legal members of that team and in this case Mrs Impey and Mr Clark.

53. There was as I have said above on the evidence before me no effort by central government to notify those wanting to have access to the scheme of the very significant changes taking place. The statute which brought it into force did not tell the reader, even if he read it in its entirety, what the scheme was or when it would come into force. Nor did it make clear that when it did come into force it would deprive those who had existing rights under the old scheme of a large part of their remedy, certainly in a case such as this claimant's. There was a critical article in the Lawyer magazine on 8 January 1995 which highlighted these features of the new scheme. As to this Mr Clark, whose responsibility it was for keeping his team up to date on changes in the relevant law, said they did subscribe to this at some stage but used it mainly to keep track of salaries being offered to solicitors. There were a small number of newspaper articles such as the Independent on Sunday on 18 February 1996 and the City Page of the Guardian on 11 November 1995.

54. Were this the case of a lawyer holding himself out as practising in personal injury law contending that he was not negligent for failing to be aware of these changes the result might well have been a different one. But I do not consider that a failure on behalf of any of this particular team viewed individually or collectively to be aware of the draconian effect of the 1 April 1996 deadline constituted a professional failure to achieve the standard to be expected of a reasonable competent person acting in the field in which they were acting. I would therefore have found, if there was a duty here, that there was no breach.

Causation

55. Mr Faulks' argument is that if the true position had been known either there would have been no claim made under the CICB scheme or if one had been made the claimant would have failed to establish her eligibility under rule 7.

56. Mrs Impey said that if she had known of the change in the scheme she would have taken advice and I accept that. She was conscious of the need to and did use outside legal advice when in doubt. I am satisfied as a matter of probability that if she had done so she would have

been advised that a claim of this magnitude should have been presented to the CICB and not under the new scheme.

57. If it had I am sure it would have been pursued with the same level of good judgment and determination that she showed when the application was in fact made. The difference in the wording between clause 7 of the CICB rules and paragraph 15 of the new scheme is in my judgment more apparent than real. Had a properly thought out trust arrangement been presented to the CICB, such as was eventually presented by the Official Solicitor, I am satisfied that a decision to decline to make any award would have been extremely unlikely and, if made, would have been successfully judicially reviewed as an irrational response to the claim. The evidence of Mr Wray supports this, showing as it does that five successful claims had been made by his office to the CICB on behalf of criminally injured children who were living with the perpetrator of the crime, and none of these approached the seriousness of the claimant's case. If I am wrong therefore about duty and breach I am satisfied that the breach caused loss to the claimant in the full amount by which a CICB award would probably have exceeded the award eventually made. I regard that CICB claim as bound to succeed and therefore under the principles in *Kitchen v Royal Air Force [1958]1 WLR 563* at 574-5 the plaintiff would be entitled to recover the full amount of the difference. That figure is not agreed and I am not asked to decide it, although for the purposes of this hearing it is accepted that it would have been a higher figure.

58. However for reasons stated above this claim fails and must be dismissed.