



NHS Trust ordered to pay damages for breach of Article 2 in failing to prevent detained patient from committing suicide

Some of you may recall the decision of the House of Lords in *Savage* (Claimant) v *South Essex Partnership NHS Foundation Trust* (Defendant) in December 2008 when, in the context of a possible failure to prevent a suicide, the nature and scope of the Defendant Trust's obligation under Article 2 (right to life) of the European Convention of Human Rights was considered.

Our briefing note dated 10 December 2008 covered it in detail. In dealing with this issue, the Court was not looking at the kind of duty of care which might be owed in a tortious context – it was looking at a broader responsibility owed by state bodies to patients in their care. The Court laid down a two stage test:

- 1 the Defendant must have been aware, or ought to have been aware, that there was a “real and immediate” risk to the life of the deceased; and
- 2 the Defendant must have failed to do all that could reasonably be expected of it to avoid or prevent that risk.

The threshold for this test is a high one – higher, for example, than the *Bolam* test which is applied in clinical negligence cases.

Having determined this preliminary issue, the case was referred to trial in March this year by Mr Justice Mackay in the High Court. In the first case of its kind, the Court found South Essex Partnership NHS Foundation Trust (the “Trust”) to have breached Article 2 and ordered it to pay damages for “just satisfaction”.

The facts

Carol Savage had a history of mental illness dating back to the late 1970's. She was detained under section 3 of the Mental Health Act 1983 between October 2001 and April 2002 at Runwell Hospital (managed by the Trust). She was assessed as being at risk of suicide or self harm. On 23 November 2001, she absconded and was found on the A130 main road some distance away, walking between the cars. She told staff when she was taken back the hospital that she wanted to die, although later said she was alright. She was diagnosed with paranoid schizophrenia.

Mrs Savage's husband took her back to Runwell Hospital on 16 March 2004 after a period of living in the community. Her illness had taken the form of delusions, she was hearing voices and was agitated and concerned that harm might come to her daughter, the Claimant in this case. She was admitted to hospital, initially on an informal basis but was then detained under section 2 and then section 3. On 19 March 2004, Mrs Savage was still very restless and agitated. She was refusing oral medication and was attempting to leave the ward. She smashed a glass window and had to be restrained by two members of staff.

A decision was taken to transfer her to a private hospital with a secure ward for just under a month, where she was assessed as being at a medium risk of absconion but a low risk of self harm or suicide. She was then moved to the Belhus Unit at Basildon Hospital, which is managed by the Trust, on 13 April 2004. Her discharge summary from the

private hospital recorded that she had acted bizarrely – seemingly responding to hallucinations which were telling her to jump out the window. On 14 April, she was seen by an SHO whom she told that she had been admitted because people wanted to kill her. When she was asked if she felt like self harming, she said that it would be better if she took tablets and disappeared.

At the end of April, she was judged fit to go on home leave for the weekend. When she returned to Runwell Hospital, she was seen by an SHO and was still complaining of people trying to kill her. A diagnosis of paranoid schizophrenia was again suggested and the plan was for Mrs Savage to be put on 30 minute observations. Mr Justice Mackay ruled that there was no record of this arrangement ever being put into place. On 30 April 2004, Mrs Savage was seen by the Consultant Psychiatrist (and Responsible Medical Officer). He found her to be anxious and agitated and agreed section 17 leave for a maximum of six hours per day in the care of her husband or mother – the occasions of leave to be agreed by the nursing staff in consultation with the medical team.

At the ward round with the Consultant Psychiatrist on 11 May, Mrs Savage appeared low in mood and it was decided she would only be allowed leave if her mood lifted. Her mood continued to be low, she remained uncommunicative and afraid someone would harm her or her daughter. On 16 May 2004 she was observed leaving the ward with her suitcase but agreed to come back when staff stopped her. She said she thought she was unwanted on the ward and was hearing voices saying violent things and threatening to beat her up. On 18 May 2004, she was escorted back to the ward after having packed her case and attempting to leave again. A nurse amended the risk assessment form to level two, which should have precipitated a risk plan. According to Mr Justice Mackay, however, one was never drawn up. On 27 May, her care co-ordinator purported to complete a risk assessment which was described by the judge as “incomplete, inaccurate and worse than useless in my view”. Later that day she was observed leaving the ward – she did not know where she was going and was reluctant to come back but expressed fears concerning her family.

On 16 June 2004, she attempted to abscond again but was intercepted by staff and encouraged to return. The Consultant Psychiatrist then went on holiday (he never saw Mrs Savage again) and his SHO cautiously withheld leave. On 29 June 2004, the SHO saw Mrs Savage again – she was rubbing her hands and pacing up and down. She was refused weekend leave but granted home leave for 30 June 2004, which was her wedding anniversary. She was again granted day leave on 3 July 2004. Around this time, Mrs Savage’s husband produced a piece of A4 paper which, on both sides, she had repeatedly written out “no harm will come to my family”.

On 5 July 2004, Mrs Savage was seen on the veranda by a senior support worker. Mrs Savage offered to take a hysterical patient for a walk to calm her down but the patient declined and Mrs Savage left the veranda area. The support worker described Mrs Savage as being chatty in a way that was out of character and nice. She believed it was 4.15pm when she law saw her. At about 5.00pm that day, Mrs Savage jumped in front of a train at Wickford Railway station and was killed.

Mrs Savage’s daughter sought compensation arguing that the Trust had not provided enough care to protect her mother and was therefore liable for breaching her mother’s Article 2 right to life. The case was based on the premise that the Trust had failed to appreciate the risk this patient presented and failed to make sure adequate measures were in place to protect her life.

Criticism by the Court

There was a “real and immediate” risk to the life of the deceased:

Mr Justice Mackay criticised the assumption of the Trust that Mrs Savage was absconding with the intention of returning home on the basis that she had a packed case with her. He considered that there was “little or no risk of [suicide] whilst she was on the ward, or at home with her family. But once she was out in the world on her own, such was her psychotic state of mind it truly was the case that anything could happen at any moment and the risk of suicide

must be assessed as both real and immediate". On the facts as he found them to be, he considered there to be a clear link between the absconion risk and the fact she was psychotic, and a real and immediate risk of suicide.

The Defendant was aware, or ought to have been aware, that there was a "real and immediate" risk to the life of the deceased

Mr Justice Mackay found that the Trust knew, or ought to have had knowledge on the evidence available to it, that Mrs Savage posed a real and immediate risk of suicide. He thought that this evidence was as follows:

- 1 She had been assessed as a suicide risk in October 2001 and had made a significant attempt to kill herself (by this it is assumed he is referring to the incident where she was found walking between the cars on the A130). She had also absconded several times during the course of this treatment. Only one nurse knew about this history.
- 2 On 19 March 2004, she had broken a window, requiring restraints.
- 3 In April 2004, she had twice tried to climb out of a window in apparent response to hallucinations.
- 4 There was no proper risk assessment or consideration of appropriate level of observations after admission to Runwell Hospital, or any review of these after her two expressions of suicidal ideation and four attempts at absconding. Neither were the consequences of any future successful attempt to abscond considered and the assumption that all she was intending to do was to go home was superficial and could not be made with any confidence.
- 5 At all times in the last two months of her detention she was known to be, in psychological terms, in the state above, as was plain from a proper reading of the nursing notes. There was no basis for any conclusion that her condition was improving in any meaningful sense.

The Defendant failed to do all that could reasonably be expected of it to avoid or prevent that risk

Mr Justice Mackay found that, "there was no documented risk assessment for Mrs Savage worthy of the name from the time she came to Chalkwell Ward [Runwell Hospital], nor any risk management or care plan". Despite the fact Mrs Savage absconded six times, levels three and four of the observations policy (the highest levels) were never engaged. She had been put on 30 minute observations on her return to Runwell Hospital on 29 April 2004 but there was no record of this being implemented and it was assumed by all concerned that she was to remain on general observations. The level of observations were not reviewed after each episode of absconion.

He found that, "in [his] judgment, all that was required to give her a real prospect or substantial chance of survival was the imposition of a raised level of observations, which would not have been an unreasonable or unduly onerous step to require of the defendant in the light of the evidence in this case".

Damages

Lord Justice Mackay judged the figure for "just satisfaction" purposes at £10,000. In reaching this conclusion, he bore in mind that the Claimant openly stated that she was not bringing the action for financial reward, as well as the fact that a full inquest had properly investigated the death. He described it as a "symbolic acknowledgement that the Defendant ought properly to give her some compensation to reflect her loss".

What does this judgment mean for NHS trusts?

A better understanding of risk assessments is required

There have been many cases where after a patient has absconded, a death has occurred. The issue that will come before the Coroner in such circumstances is whether the actual risk assessment undertaken for the patient who has absconded and died, was appropriate. In some instances, the risk assessment applied to the patient on the ward may be inappropriate for a patient once they have absconded. Continuing to adopt the same assessment of risk presenting

on a ward once a patient has absconded, can put the Trust and their staff into "tiger country" and may result in a lack of escalation in the efforts made to:

- 1 keep the patient on the ward; and
- 2 engage assistance to find and return a patient who has absconded.

There should be policies and practices in place that ensure that a full assessment of risk includes how the patient's risk should be treated if they leave the hospital. This is crucial in both informing those caring for the patient about why it is so important the patient remains in hospital, and triggering an appropriate response, whether from the Trust staff or third party agencies such as the Police, if the patient is at large.

Litigation

Inevitably, this judgment will mark the start of increased litigation for mental health trusts.

Although the "real and immediate risk" test poses a very high threshold, the test for causation is a very much looser one and will permit many claims to proceed where they could not be established in clinical negligence claims. The latter claim is based on the English "but for" test. In other words, had the Trust acted appropriately there would probably have been no death.

Mr Justice Mackay clarified that, in an Article 2 claim, however, the claimant merely has to show that she "lost a substantial chance" that the deceased would not have committed suicide.

In this case, Mr Justice Mackay found that "at the least there was a real prospect of a substantial chance that, had she been made subject to level two observations at 15 or even 30 minute intervals, she would not have slipped away unnoticed in the way that she did on 5 July".

Who will bring a claim

Clinical negligence claims relating to deaths may only be brought by those who qualify as a "dependant" under the Fatal Accidents Act 1976.

In relation to Article 2 claims, a claimant must be a "victim" under Article 34 of the ECHR. The latter provision is unhelpful and so one must look to the case law of the European Court in order to deduce who might be a victim. The case law establishes that siblings, parents, children and a nephew of the deceased may all be "victims" for this purpose. Mr Justice Mackay had no hesitation in finding Mrs Savage's daughter to be a victim. Although at present the people who have been found to be "victims" do not differ greatly from the established "dependants", as the former term is not defined by statute, there is the potential for it to be expanded upon.

What could a claim cover?

A claim under Article 2 could also be brought in relation to patients being treated in the community or who are informal patients. Although the potential for this was not addressed by Mr Justice Mackay, there is no reason, in theory, why this should not be the case. However, it is likely to be much harder to establish the grounds of the test.

Theoretically, Article 2 claims may even be extended beyond mental health cases. The "real and immediate risk" threshold will be more difficult to cross where a patient is mentally well but that is not to say claimant lawyers will not seek to expand the test.

Balance

Trusts should bear this case in mind, particularly when considering risk assessments. A balancing act will always need to be struck – keeping a patient secluded or restrained in order to totally eliminate risk will not be therapeutic for the patient. Trusts will only be penalised where they have failed to do what would "reasonably be expected" of them.

Case law

Savage v South Essex Partnership NHS Foundation Trust



Stephen King
Partner
for Mills & Reeve LLP
01603 693257
Stephen.king@mills-reeve.com



Jill Mason
Partner
for Mills & Reeve LLP
0121 456 8367
jill.mason@mills-reeve.com



Alison Fielder
Solicitor
for Mills & Reeve LLP
+44(0)121 456 8454
alison.fielder@mills-reeve.com

www.mills-reeve.com T +44(0)844 561 0011

Mills & Reeve LLP is a limited liability partnership regulated by the Solicitors Regulation Authority and registered in England and Wales with registered number OC326165. Its registered office is at Fountain House, 130 Fenchurch Street, London, EC3M 5DJ, which is the London office of Mills & Reeve LLP. A list of members may be inspected at any of the LLP's offices. The term "partner" is used to refer to a member of Mills & Reeve LLP.

The contents of this document are copyright © Mills & Reeve LLP. All rights reserved. This document contains general advice and comments only and therefore specific legal advice should be taken before reliance is placed upon it in any particular circumstances. Where hyperlinks are provided to third party websites, Mills & Reeve LLP is not responsible for the content of such sites.

infectious
ambition