HOUSE OF LORDS SESSION 2006–07

[2007] UKHL 31

on appeal from: [2005] EWCA Civ 586

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Seal (FC) (Appellant)

v.

Chief Constable of South Wales Police (Respondent)

Appellate Committee

Lord Bingham of Cornhill
Lord Woolf
Baroness Hale of Richmond
Lord Carswell
Lord Brown of Eaton-under-Heywood

Counsel

Appellants:
Robert McCracken QC
Adam Solomon
(Instructed by Fisher Meredith)

Respondents:
Jeremy Johnson
Lucinda Boon
(Instructed by Dolmans)

Hearing dates:
23 and 24 May 2007

ON
WEDNESDAY 4 JULY 2007

HOUSE OF LORDS

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT IN THE CAUSE

Seal (FC) (Appellant) *v.* Chief Constable of South Wales Police (Respondent)

[2007] UKHL 31

LORD BINGHAM OF CORNHILL

My Lords,

1. Section 139 of the Mental Health Act 1983 is entitled "Protection for acts done in pursuance of this Act". At the time relevant to this appeal subsections (1) and (2) provided:

> "(1) No person shall be liable, whether on the ground of want of jurisdiction or on any other ground, to any civil or criminal proceedings to which he would have been liable apart from this section in respect of any act purporting to be done in pursuance of this Act or any regulations or rules made under this Act, or in, or in pursuance of anything done in, the discharge of functions conferred by any other enactment on the authority having jurisdiction under Part VII of this Act, unless the act was done in bad faith or without reasonable care.
>
> (2) No civil proceedings shall be brought against any person in any court in respect of any such act without the leave of the High Court; and no criminal proceedings shall be brought against any person in any court in respect of any such act except by or with the consent of the Director of Public Prosecutions."

2. The appeal raises an issue on the construction and application of subsection (2). What are the consequences if a claimant brings civil proceedings which require the grant of leave under the subsection, without obtaining such leave? The Chief Constable submits that the obtaining of leave in such circumstances is a jurisdictional condition,

such as to render null any proceedings brought without it. Mr Seal challenges this interpretation of the subsection: he contends that the lack of leave, even when required, is an irregularity which can be rectified, not a fatal flaw which invalidates the proceedings.

3. On 9 December 1997 an incident was reported to the police at the house of Mr Seal's mother in Merthyr Tydfil. They visited the address and arrested Mr Seal for causing a breach of the peace. The facts are contested. Mr Seal was taken outside the house. As a result of what happened in the street, the police removed Mr Seal to a place of safety under section 136(1) of the 1983 Act. He was detained initially under section 136(2) and then under section 2 and was released after just over a week.

4. On 5 August 2003 solicitors representing Mr Seal wrote to the Chief Constable complaining that there had been no justification for detaining Mr Seal and claiming damages. On 8 December 2003, on the eve of expiry of the six year limitation period, Mr Seal, now acting in person, issued proceedings against the Chief Constable in the Merthyr Tydfil County Court. He supplemented his claim form with particulars of claim on 4 April 2004. The Chief Constable served a defence, addressing the substance of Mr Seal's complaint, but also relying on section 139(1) and (2). The Chief Constable then applied to strike out the particulars of claim and dismiss the action on the ground that Mr Seal had not obtained leave as required by section 139(2) of the 1983 Act before issuing proceedings. To this application District Judge Singh acceded. The district judge's decision was upheld on appeal by His Honour Judge Graham Jones, save that the judge restored such part of Mr Seal's claim as complained of acts which did not fall within section 139(1). This variation is not itself contentious, and gives rise to no issue on this appeal. On further appeal by Mr Seal, the decisions made below on the effect of section 139(2) were upheld by the Court of Appeal (Clarke, Scott Baker LJJ and Ouseley J) in the decision now under appeal: [2005] EWCA Civ 586, [2005] 1 WLR 3183.

5. In construing any statutory provision the starting point must always be the language of the provision itself. On this the parties made competing submissions. Mr Jeremy Johnson, in an admirable argument for the Chief Constable, contended that Parliament had made its intention quite clear: any proceedings brought without leave were to be a nullity. This was the view cogently expressed by Scott Baker LJ in his leading judgment in the Court of Appeal, paragraphs 17, 34-35.

6. Mr Robert McCracken QC for Mr Seal challenged this reading. He relied strongly on *Rendall v Blair* (1890) 45 Ch D 139 and *In re Saunders (A Bankrupt)* [1997] Ch 60 in which the statutory conditions in question, although dealing with different subject matters, were not markedly weaker than in section 139(2), but a different result was reached. He pointed out that although section 2 of the Limitation Act 1980, following its predecessor sections in earlier Acts, provides that "An action founded on tort shall not be brought . . .", proceedings issued after expiry of the statutory limitation period have never been held to be a nullity. He also relied strongly on *R v Secretary of State for the Home Department, Ex p Jeyeanthan* [2000] 1 WLR 354, 358-362, where Lord Woolf MR made plain the court's general reluctance to hold that the effect of failure to comply with a procedural requirement is to render proceedings null.

7. I see considerable force in both these submissions. On the one hand, "No civil proceedings shall be brought . . ." in section 139(2) reads as a clear and emphatic prohibition. Although, speaking of section 17 of the Charitable Trusts Act 1853, Bowen LJ said in *Rendall v Blair*, at p 158, that "this section is not framed in the way in which sections are framed when it is intended that some preliminary steps should be taken before the action is maintainable at all", the House has been referred to no enactment in which clearer or more emphatic language is used than in section 139(2). The construction put on section 2 of the Limitation Act 1980 and its predecessors has been recognised to be "despite" the language used: *Walkley v Precision Forgings Ltd* [1979] 1 WLR 606, 618C; *Horton v Sadler* [2006] UKHL 27, [2007] 1 AC 307, para 7. On the other hand, the variation of language as between section 139(2) and section 17 of the Charitable Trusts Act 1853 (considered in *Rendall v Blair)* or section 285(3) of the Insolvency Act 1986 (considered in *In re Saunders*) is not so marked as, without more, to warrant a radically different conclusion, and the welcome tendency to prefer substance to form must generally discourage the invalidation of proceedings for want of compliance with a procedural requirement. While, therefore, I incline to favour the Chief Constable's reading of section 139(2), I do not think the answer to a question such as this should ordinarily turn on a detailed consideration of the language used by Parliament in one provision as compared with that used in another. The important question is whether, in requiring a particular condition to be satisfied before proceedings are brought, Parliament intended to confer a substantial protection on the putative defendant, such as to invalidate proceedings brought without meeting the condition, or to impose a procedural requirement giving rights to the defendant if a claimant should fail to comply with the requirement; but not nullifying the proceedings: see *R v Soneji* [2005]

UKHL 49, [2006] 1 AC 340, para 23. To answer this question a broader inquiry is called for.

8. The legislative history may be taken to begin with the Lunacy Acts Amendment Act 1889. Section 12(1) rendered any person acting in pursuance of the Act immune from civil or criminal liability in any proceedings "whether on the ground of want of jurisdiction, or on any other ground, if such person has acted in good faith and with reasonable care". Subsection (2) of the section gave teeth to this provision by enabling any person made the subject of proceedings as a result of anything done in pursuance of the Act to make summary application to a judge of the High Court who might (and in practice would be bound to) stay the proceedings if satisfied that there was no reasonable ground for alleging want of good faith or reasonable care. This provision was consolidated in the Lunacy Act 1890. It plainly afforded the defendant an important measure of substantial protection at trial. But if a defendant sought protection before trial the initiative rested with him: an action brought without reasonable ground for alleging want of good faith or reasonable care would proceed to trial unless he applied to stay it.

9. Section 16 of the Mental Treatment Act 1930 replaced and altered the 1890 provision. Subsection (1) preserved the immunity of those acting pursuant to the Act save where they had acted in bad faith or without reasonable care. But it was no longer provided that a defendant should seek a stay if an action were brought without reasonable ground for alleging want of good faith or reasonable care. Instead, subsection (2) introduced new conditions: that no proceedings, civil or criminal, might be brought against any person in any court in respect of anything done in pursuance of the Act without the leave of the High Court; and that such leave should not be given unless the court was satisfied that there was substantial ground for the contention that the person, against whom it was sought to bring the proceedings, had acted in bad faith or without reasonable care. Thus the obtaining of leave appeared to be a pre-condition of bringing proceedings. Section 16(1) and (2) of the 1930 Act were repealed and replaced in the Mental Health Act 1959, by section 141(1) and (2), which reproduced the effect of the subsections, subject to differences of wording. Thus it remained necessary to obtain the leave of the High Court before bringing civil or criminal proceedings in respect of anything done in pursuance of the Act, and the condition to be met to obtain leave remained the same.

10. Section 60 of the Mental Health (Amendment) Act 1982 made no amendment to section 141(1) of the 1959 Act. Thus the qualified immunity of those acting pursuant to the Act was preserved. But section 141(2) was amended in two respects. First, while leave to bring civil proceedings in relation to anything done pursuant to the Act had still to be obtained from the High Court, leave to bring criminal proceedings had now to be obtained from the Director of Public Prosecutions. Secondly, the ancillary requirement that leave should not be given unless the court was satisfied that there was substantial ground for the contention that the putative defendant had acted in bad faith or without reasonable care was omitted, in relation to both civil and criminal proceedings. Section 141(1) and (2), as amended in 1982, were consolidated as section 139(1) and (2) of the 1983 Act which the House is now asked to construe.

11. The 1982 amendment and the 1983 consolidation were preceded by two official reviews, the first ("A Review of the Mental Health Act 1959") published by the Department of Health and Social Security in 1976 and the second ("Review of the Mental Health Act 1959") published by that department, the Home Office, the Welsh Office and the Lord Chancellor's Department in 1978 (Cmnd 7320). Both those reviews considered the effect of section 141(1) and (2) in its pre-1982 form, as did a MIND report written by Dr Larry Gostin entitled "A Human Condition". From these documents a number of things are clear. It was well-known that the requirement of leave in section 141(2) was criticised as unduly restrictive, ill-directed (because not directed to litigants who had shown themselves to be vexatious) and unjustified by the very small number of applications for leave made each year. But it was also known that staff working with mental patients were anxious about their legal position and the protection available to them. The effect of the leading authority bearing on the meaning of section 141(1) and (2) was, as one would expect, appreciated. This is the background against which Parliament enacted the 1982 amendment and the 1983 consolidation.

12. The leading authority at this time was *R v Bracknell JJ, Ex p Griffiths* [1976] AC 314, a decision of the House on appeal from the Queen's Bench Divisional Court (Lord Widgery CJ, Melford Stevenson and Watkins JJ). Judgment was given in June 1975. The proceedings arose from the conviction of a mental nurse for assaulting a patient, and the issue was whether the act of the nurse had been pursuant to the Act, so as to entitle the nurse to the protection of section 141. Leave to bring criminal proceedings against the nurse, still required from the High Court, had not been given. In the Divisional Court Mr Gordon Slynn

QC for the nurse, contended that, since leave (if needed) had not been obtained, the proceedings were a nullity, a point expressly conceded by Mr Louis Blom-Cooper QC for the prosecutor (see pp 315-316), not challenged by Mr Harry Woolf, appearing as an amicus instructed by the Department of Health and Social Security (pp 316-317), and expressly accepted by Lord Widgery CJ giving the judgment of the court (p 320). In the House this concession was assumed to be correct, and in his leading opinion with which all members of the committee agreed Lord Edmund-Davies, having found the nurse to have been acting in pursuance of the Act, held the criminal proceedings to be a nullity and upheld the Divisional Court's quashing of the conviction (p 336).

13. Counsel for Mr Seal pointed out, quite correctly, that in *Ex p Griffiths* the question of leave first arose after a trial, culminating in a conviction, had been held, and that the opinions of the Divisional Court and the House were based on a point that was conceded and so was not the subject of adversarial argument. But these objections are of limited cogency. Had Mr Seal's contention been correct, the prosecutor could have resisted the quashing of the conviction, even if the alleged assault were held to be an act covered by section 141. Thus the question of leave was by no means irrelevant. It is also of significance that very eminent counsel and judges accepted it as so clear as to be unworthy of argument that proceedings brought without the required leave were a nullity.

14. *Ex p Griffiths* did not stand alone. In *R v Angel* [1968] 1 WLR 669 the defendant had been convicted of a sexual offence for which, by section 8 of the Sexual Offences Act 1967, "No proceedings shall be instituted except by or with the consent of the Director of Public Prosecutions . . .". It emerged after conviction and sentence that the requisite consent had not been obtained, and the whole proceedings were held to be a complete nullity. A similar decision was reached by the Courts-Martial Appeal Court and the House in *Secretary of State for Defence v Warn* [1970] AC 394. In *R v Pearce* (1980) 72 Cr App R 295 a lack of consent by the Attorney General, required by section 4(3) of the Criminal Law Act 1977, as amended, led to the quashing of the conviction.

15. While, as already noted, the restriction on access to the court in section 141 was the subject of criticism before 1982, the House has been referred to no judicial opinion and no scholarly commentary suggesting that failure to obtain the required leave was a procedural irregularity which might be cured rather than a flaw which rendered the proceedings

null. When Parliament legislated in 1982-1983 there was, as it would seem, a clear consensus of judicial, professional and academic opinion that lack of the required consent rendered proceedings null, and Parliament must be taken to have legislated on that basis.

16. Counsel for Mr Seal attached significance to the substitution in 1982 of the Director of Public Prosecutions for the High Court as the authority required to give leave for the bringing of criminal proceedings under section 141(2) of the 1959 Act. I do not for my part think that this change was significant for any purpose relevant to this appeal. Given the Director's expertise in deciding whether to prosecute, applying the familiar tests of evidential sufficiency and the public interest, it was a natural development of the existing regime to assign the responsibility of granting leave under section 141(2) to him. Nothing in the 1982 Act threw doubt on the existing authority that prosecutions instituted without consent where consent is required are a nullity. Nothing in the Act suggested any intention to mitigate the legal consequence of proceeding without consent or to differentiate, in this respect, between criminal and civil proceedings.

17. Counsel for Mr Seal made much of the injustice to a litigant such as Mr Seal if he finds that his proceedings are invalidated by failure to comply with a statutory requirement of which he was ignorant at a time when a statutory time bar effectively precluded him from retrieving his position by complying with the requirement. It must be accepted that a strict rule such as that contended for by the Chief Constable may bear hardly on some litigants, of whom Mr Seal may be one. But the Chief Constable is entitled to reply that if Mr Seal had issued proceedings before the very end of the six-year limitation period his failure to obtain leave, while it might have caused him delay and vexation, would not have debarred him from prosecuting his claim. Thus the provision which effectively denies him the opportunity to proceed is not section 139 of the 1983 Act but section 2 of the Limitation Act 1980. She is also able to reply that Parliament must, in legislating as it did, have recognised the risk that hard cases, such as Mr Seal's, may occur, but have considered the occasional occurrence of such a case to be a price worth paying for the reassurance and protection given by sections 141 of the 1959 Act and 139 of the 1983 Act to those whose very important and often difficult task it is to care for the mentally ill.

18. I would respectfully echo and endorse the principle enunciated by Viscount Simonds in *Pyx Granite Co Ltd v Ministry of Housing and*

Local Government [1960] AC 260, 286, which implicitly underpinned the argument for Mr Seal:

> "It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words. That is . . . a 'fundamental rule' from which I would not for my part sanction any departure."

But the words first introduced in section 16(2) of the 1930 Act ("No proceedings, civil or criminal, shall be brought . . .") appear to be clear in their effect and have always been thought to be so. They were introduced with the obvious object of giving mental health professionals greater protection than they had enjoyed before. They were re-enacted with knowledge of the effect the courts had given to them. To uphold the decision of the three courts which have already considered the issue in this case and decided it in accordance with a clear consensus of professional opinion is not to sanction a departure from what Viscount Simonds rightly considered to be a fundamental rule.

19. Counsel for Mr Seal contended that he had in effect complied with the requirements of section 139(2), or should be deemed to have done so. This is, with respect, an impossible argument. Mr Seal made no application for anything. He issued proceedings claiming damages. And his proceedings were not issued in the High Court. It would frustrate the obvious purpose of the subsection to treat a claim for damages in the county court as an application for leave in the High Court.

20. It was submitted for Mr Seal in the House, although not below, that the effect of section 139(2) was to infringe his right of access to the court held by the European Court in *Golder v United Kingdom* (1975) 1 EHRR 524 to be implied in article 6 of the European Convention on Human Rights. This is not an argument I can accept. The European Court has accepted that the right of access to the court is not absolute, but may be subject to limitations: *Ashingdane v United Kingdom* (1985) 7 EHRR 528, para 57. The protection of those responsible for the care of mental patients from being harassed by litigation has been accepted as a legitimate objective: ibid, para 58; *M v United Kingdom* (1987) 52 DR 269, 270. What matters (*Ashingdane*, para 57) is that the limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent as to impair the very essence of the

right. But the threshold for obtaining leave under section 139(2) has been set at a very unexacting level: *Winch v Jones* [1986] QB 296. An applicant with an arguable case will be granted leave. Mr Seal's undoing lay not in his failure to obtain leave which he should have had but in his failure to proceed within the generous time limit allowed by the 1980 Act, which would not itself fall foul of article 6: *Stubbings v United Kingdom* (1996) 23 EHRR 213. It is not irrelevant that restrictions similar to those in sections 141(2) of the 1959 Act and 139(2) of the 1983 Act were and are to be found in corresponding Irish legislation, the Mental Treatment Act 1945, section 260, and the Mental Health Act 2001, section 73.

21. In my opinion the Court of Appeal reached the right decision for essentially the right reasons, and I wholly agree with the opinion of my noble and learned friend Lord Brown of Eaton-under-Heywood. I would accordingly dismiss the appeal. The costs order made below will not be disturbed. The appellant's costs in the House as an assisted person will be the subject of assessment in the usual way.

LORD WOOLF

My Lords,

22. I have read the speeches of Lord Bingham of Cornhill, Baroness Hale of Richmond and Lord Brown of Eaton-under-Heywood in draft. Baroness Hale's speech reflects my own views with great force and clarity. Were it not that in agreement with Baroness Hale, I regard an issue raised on this appeal as being extremely important, I would have been content to agree with the contents of her speech.

23. The issue that I regard as being of particular importance is the approach that should be adopted by the courts in determining what Parliament intends when legislation states in peremptory terms that there should be compliance with a procedural requirement before bringing proceedings. In other words does Parliament intend that proceedings brought in breach of the requirement should be a nullity?

24. The legislative requirement in question is contained in section 139(1) and (2) of the Mental Health Act 1983. That section provides so far as relevant;

> "(1) No person shall be liable, whether on the ground of want of jurisdiction or on any other ground, to any civil … proceedings to which he would have been liable apart from this section in respect of any act purporting to be done in pursuance of this Act … unless the act was done in bad faith or without reasonable care.
>
> (2) No civil proceedings shall be brought against any person in any court in respect of any such act without the leave of the High Court … "

25. Section 139 clearly expresses the requirement to obtain leave in mandatory terms but equally clearly it does not expressly state what is to be the consequence of not obtaining leave to bring the proceedings; that is left to be inferred. In particular, section 139 does not state expressly that any proceedings commenced without leave are to be a nullity. Despite this that is what the courts below concluded was what Parliament intended by section 139.

26. I cannot accept that this should be inferred to be Parliament's intention because as the facts of this case illustrate to do so may cause grave injustice, at least in a minority of cases, while to construe the provision as merely giving the court a discretion to strike out the proceedings cannot cause any injustice to those for whom the provision is meant to provide protection. This is because the person against whom the proceedings are brought at most would need to write a letter to the court drawing attention to the fact that the proceedings require leave and this had not been obtained. Such a letter would place that person in exactly the same position as if the claimant had, in accordance with the section, requested leave before commencing his action. If the proceedings are ones in which the court would give leave it should do so retrospectively if this would prevent injustice occurring, but, if it was a case in which leave should be refused the court could in addition to refusing leave strike out the proceedings.

27. I of course appreciate, as Parliament must be taken to have appreciated, that it will usually be section 139 together with the relevant provisions of the Limitation Acts that could cause the injustice in a case of this nature. Absent the expiry of a limitation period a claimant would

not suffer the disadvantage suffered by the Appellant claimant. Furthermore I accept it is always desirable for a claimant not to leave it until the limitation period has almost expired before bringing proceedings. However, the Appellant at the time he commenced proceedings was acting in person and he can complain justifiably that if his proceedings were not totally ineffective a judge could take into account all the circumstances of the case, including any culpable delay on his part before deciding whether to treat the proceedings as a nullity.

28. Furthermore there is a variety of circumstances in which treating proceedings automatically as a nullity can cause injustice which do not involve the expiry of a limitation period and, even in cases involving a limitation period, the limitation period can be exhausted without the claimant being at fault. For example the fact that the case falls within section 139 may only be discovered years after the proceedings were commenced.

29. What makes the appeal important is the principle that is involved. The principle arises because section 139 places a procedural restriction on access to the courts. The approach at common law to such restrictions was made abundantly clear by Viscount Simmonds in *Pyx Granite Co. Ltd v Ministry of Housing and Local Government* [1960] AC 260 at p. 286 where he said;

> "It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words. That is … a 'fundamental rule' from which I would not for my part sanction any departure"

30. In *R v Bracknell JJ, Ex p Griffiths* [1976] AC 314, Lord Edmund Davies who gave the main judgment cited Viscount Simmonds' statement in *Pyx Granite* and referred, at p 334, to *Bradford Corp v Myers* [1916] 1 AC 242 and *Magor and St Mellons RDC v Newport Corp* [1952] AC 189, which he said had been correctly relied on as requiring the "courts [to] construe very narrowly any substantive or procedural barriers against having recourse to courts for the rectifying of wrongs". Despite this the House of Lords accepted that the effect of section 141(2) of the earlier Mental Health Act 1959 was to render criminal proceedings a nullity. However in my view this decision is far from conclusive as to the outcome of this appeal since the question of whether non compliance meant the criminal proceedings were a nullity

was not in issue before the House of Lords, this having been conceded by eminent leading counsel for both parties in the court below, without objection by myself as amicus.

31. At this distance of time I cannot explain my inactivity or counsels' concession. However, I would suggest this possible failure of counsel is hardly a justification for departing from the principle Lord Edmund Davies identified. The fact remains that the present issue was not debated in *Griffiths* and that case is properly only regarded as binding authority as to the scope and not the effect of Section 141.

32. There are two other reasons why *Griffiths* has to be approached with caution in relation to the present appeal. The first reason is that the decision was given prior to *London & Clydeside Estates Ltd v Aberdeen District Council* [1980] 1 WLR 182. In that case Lord Hailsham of Marylebone LC in an administrative law context, in a celebrated passage of his speech provided much needed illumination on the consequences of non compliance with a statutory provision. Lord Hailsham said, at pp 189-190

> "When Parliament lays down a statutory requirement for the exercise of legal authority it expects its authority to be obeyed down to the minutest detail. But what the courts have to decide in a particular case is the legal consequence of non-compliance on the rights of the subject viewed in the light of a concrete state of facts and a continuing chain of events. It may be that what the courts are faced with is not so much a stark choice of alternatives but a spectrum of possibilities in which one compartment or description fades gradually into another. At one end of this spectrum there may be cases in which a fundamental obligation may have been so outrageously and flagrantly ignored or defied that the subject may safely ignore what has been done and treat it as having no legal consequences upon himself. In such a case if the defaulting authority seeks to rely on its action it may be that the subject is entitled to use the defect in procedure simply as a shield or defence without having taken any positive action of his own. At the other end of the spectrum the defect in procedure may be so nugatory or trivial that the authority can safely proceed without remedial action, confident that, if the subject is so misguided as to rely on the fault, the courts will decline to listen to his complaint. But in a very great number of

> cases, it may be in a majority of them, it may be necessary for a subject, in order to safeguard himself, to go to the court for declaration of his rights, the grant of which may well be discretionary, and by the like token it may be wise for an authority (as it certainly would have been here) to do everything in its power to remedy the fault in its procedure so as not to deprive the subject of his due or themselves of their power to act. In such cases, though language like 'mandatory,' 'directory,' 'void,' 'voidable,' 'nullity' and so forth may be helpful in argument, it may be misleading in effect if relied on to show that the courts, in deciding the consequences of a defect in the exercise of power, are necessarily bound to fit the facts of a particular case and a developing chain of events into rigid legal categories or to stretch or cramp them on a bed of Procrustes invented by lawyers for the purposes of convenient exposition. As I have said, the case does not really arise here, since we are in the presence of total non-compliance with a requirement which I have held to be mandatory. Nevertheless I do not wish to be understood in the field of administrative law and in the domain where the courts apply a supervisory jurisdiction over the acts of subordinate authority purporting to exercise statutory powers, to encourage the use of rigid legal classifications. The jurisdiction is inherently discretionary and the court is frequently in the presence of differences of degree which merge almost imperceptibly into differences of kind."

33. In *R v Secretary of State for the Home Department, Ex p Jeyeanthan* [2000] I WLR 354 I sought to give guidance based on Lord Hailsham's approach which both parties to this appeal accepted was authoritive. I suggested in the majority of cases the court would have the task of determining what would be the just decision to take in all the circumstances, Parliament having not made clear what were to be the consequences of non-compliance with the statutory requirement. This approach in fact accords with the reasoning in the much earlier case of *Rendall v Blair* (1890) 45 ChD139 which illustrates the importance of distinguishing between the need to comply with a statutory requirement and the consequences of a provision like section 139 being breached. The decision in that case was followed in a judgment of Lindsay J in *In re Saunders (A Bankrupt)* [1997] Ch 60.

34. The second reason why *Griffiths* is not determinative of this appeal is because it involved criminal and not civil proceedings. It

involved the non compliance with a statutory provision that provided a protection against prosecution for a potential defendant to criminal proceedings. There is a fundamental distinction between civil and criminal proceedings when it comes to exercising a discretion to allow a procedural contravention to be remedied. In a criminal case there is no question of the defendant being deprived of his right to access to a court to protect his rights. On the contrary the statutory requirement is a protection against his being prosecuted. If the court has a discretion to dispense with the requirement, it would be a rare situation in which a court would deprive a defendant of a protection that Parliament had intended him to have before he was convicted. To treat the proceedings as a nullity would merely reflect the reality of the situation. It cannot properly be assumed to be the position that the same words are intended to have the identical consequences in a criminal and civil context.

35. My conclusion is therefore that for the reasons my noble and learned friend, Baroness Hale and I have set out, Parliament certainly did not make it clear that civil proceedings commenced without leave contrary to section 139 were to be a nullity. This being the case as a matter of fundamental principle, the Appellant's access to the courts cannot be denied without a judge determining whether this is the appropriate consequences in all the circumstances. For this purpose the judge to whom I refer is a High Court judge since it is only a High Court judge who has power to give leave.

36. I would therefore allow the appeal.

BARONESS HALE OF RICHMOND

My Lords,

37. I agree with my noble and learned friend Lord Woolf, that this appeal should be allowed. There is one short question before us: what did Parliament intend should be the consequence if proceedings in respect of an act purporting to be done under the Mental Health Act 1983 are begun without first obtaining the leave of a High Court judge? Are those proceedings a complete nullity or may they simply be stayed unless and until the leave required by section 139(2) of the 1983 Act is granted? Usually it will not matter. But in this case a litigant in person, probably in ignorance of section 139(2), began his proceedings just before the limitation period expired. If the proceedings are a nullity, he

will lose that part of his claim which is based upon the purported use of Mental Health Act powers by the police; if they are not a nullity, he may still apply to a High Court judge for leave to pursue that part of his claim.

38. The question is one of statutory construction. Despite the antiquity of this provision, which dates back to the Mental Treatment Act 1930, the question has never arisen directly before. But it concerns a fundamental constitutional right – the right of access to the courts. It also concerns the exercise of that right by a peculiarly vulnerable group of people – people who are or have been the subject of compulsory detention under the Mental Health Act 1983. The courts here – and in Strasbourg – have taken particular care to safeguard the right of prisoners to have access to the courts while acknowledging that imprisonment inevitably imposes some constraints: see particularly *Golder v United Kingdom* (1975) 1 EHRR 524 in Strasbourg and *R v Secretary of State for the Home Department, Ex p Leech* [1994] QB 198; *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115; and *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 AC 532 in the United Kingdom. The courts should be no less vigilant to safeguard the rights of mental patients, most of whom have done no wrong and very few of whom are suffering from mental disorders which make them more likely than others to bring vexatious claims.

39. The principles to be deduced from those three UK cases are clear. They are conveniently summed up in the opinion of Lord Cooke of Thorndon in *Daly*, at paras 30 to 31:

> "The truth is, I think, that some rights are inherent and fundamental to democratic civilised society. . . . To essay any list of these fundamental, perhaps ultimately universal, rights is far beyond anything required for the purpose of deciding the present case. It is enough to take the three identified by Lord Bingham: in his words, access to a court; access to legal advice; and the right to communicate confidentially with a legal adviser under the seal of legal professional privilege. As he says authoritatively from the Woolsack, such rights may be curtailed only by clear and express words, and then only to the extent reasonably necessary to meet the ends which justify the curtailment."

40. *Daly* was a case about the Home Office policy rather than about the interpretation of legislation. But *Simms* was a case about legislation. In a famous passage, Lord Hoffmann emphasised the importance of the principle of legality, at [2000] 2 AC 115,131:

> "Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. . . . But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual."

41. I approach the task of construing section 139(2), therefore, on the basis that Parliament, by enacting the procedural requirement to obtain leave, did not intend the result to be that a claimant might be deprived of access to the courts, unless there is express language or necessary implication to the contrary. If there is no express language, there will be no necessary implication unless the legislative purpose cannot be achieved in any other way. Procedural requirements are there to serve the ends of justice, not to defeat them. It does not serve the ends of justice for a claimant to be deprived of a meritorious claim because of a procedural failure which does no substantial injustice to the defendant.

42. The express words are:

> "No civil proceedings shall be brought . . . in respect of any such act without the leave of the High Court; . . "

These words say nothing about what is to be the consequence if, through ignorance or error, proceedings are in fact started without leave. The result contended for by the defendant may have been what Parliament intended. But there are other possible results which were known to Parliament when this provision was first enacted.

43. One possibility is exemplified by *Rendall v Blair* (1890) 45 Ch D 139, where the Court of Appeal had to construe section 17 of the Charitable Trusts Act 1853. This provided that before any proceeding for obtaining any relief against a charity were commenced, "there shall be transmitted" notice in writing to the Charity Commissioners, who would then decide whether to authorise the proceedings; and no such proceedings "shall be entertained or proceeded with" by the court except in accordance with their authorisation. Those words are no less peremptory than those of section 139(2); but the Court of Appeal unanimously held that, in the words of no less a judge than Bowen LJ, at p 158:

> "Unless the duty is complied with by the litigant, the Court must hold its hand. But it does not oblige the Court to close the gates of mercy upon the applicant, but enables it to stay proceedings until that consent, which as a matter of duty ought to be obtained in the first instance, is obtained at last."

44. Another possibility, even more considerate to a claimant, is exemplified by the Limitation Acts. Section 2 of the Limitation Act 1980, adopting the wording of earlier statutes, states quite clearly that "An action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued." Yet such an action is perfectly valid unless and until the defendant chooses to take the point. The court will not take it of its own motion. But there is an intermediate course between complete invalidity and giving the choice to the defendant: either the court of its own motion or the defendant may take the point.

45. It is fair to conclude that Parliament did not intend to adopt the Limitation Act model and place the whole burden upon the defendant. As my noble and learned friend, Lord Bingham of Cornhill, has explained, section 16 of the Mental Treatment Act 1930 replaced a provision which was first enacted in section 12 of the Lunacy Acts Amendment Act 1889 and consolidated in section 330 of the Lunacy Act 1890. Section 12(1) provided a substantive defence to both civil and criminal proceedings for people operating the Act's compulsory procedures if they had acted "in good faith and with reasonable care". The equivalent defence still exists, in section 139(1) of the 1983 Act, protecting such people "unless the act was done in bad faith or without reasonable care".

46. Section 12(2) of the 1889 Act provided a procedural protection. Civil or criminal proceedings might be stayed if there was no reasonable ground for alleging a want of good faith or reasonable care on the part of the defendant. The burden was placed on the defendant, both of raising the point and of showing a lack of reasonable grounds. Section 16(2) of the 1930 Act was clearly intended to strengthen the procedural protection given to defendants: no civil or criminal proceedings were to be brought without leave of the High Court, and leave could only be granted if the claimant could satisfy the court that there was substantial ground for the contention that the defendant had acted in bad faith or without reasonable care. That provision was carried through into section 141(2) of the Mental Health Act 1959. The burden was placed on the claimant, both of obtaining leave and of showing substantial grounds.

47. Section 141 was in turn replaced by section 139 of the Mental Health Act 1983, which consolidated the remaining provisions of the 1959 Act with amendments made in the Mental Health (Amendment) Act 1982. These watered down the protections of section 141 of the 1959 Act in three significant respects. First, it was no longer necessary to get the leave of the High Court to bring criminal proceedings in respect of acts purporting to be done under the Mental Health Act. Instead, the second limb of section 139(2) provides:

> "and no criminal proceedings shall be brought . . . except by or with the consent of the Director of Public Prosecutions."

Secondly, leave could now be granted without showing substantial grounds for the contention that the defendant had acted in bad faith or without reasonable care. The test subsequently laid down by the Court of Appeal in *Winch v Jones* [1986] QB 296 was simply whether the case deserved further investigation by the court: the claimant was not required to prove a prima facie case. Thirdly, neither the substantive defence nor the procedural protection now applies to proceedings against the Secretary of State or the NHS authorities.

48. The 1982 amendments were the product of an inter-departmental review of the 1959 Act. This was prompted and informed by the views both of users of the mental health services, represented by organisations such as MIND, and of the professional bodies, principally the Royal College of Psychiatrists. Following its Consultative Document, *A Review of the Mental Health Act 1959*, published in 1976, the

Government published a white paper, *Review of the Mental Health Act 1959*, Cmnd 7320, in 1978. Both contain chapters on safeguards for staff. The white paper sums up the competing concerns thus, at para 7.2:

> "The Consultative Document discussed various criticisms of the section, notably that it is an unwarranted restriction on access to the courts in that it is not founded on any evidence that psychiatric patients are likely to be vexatious litigants. Indeed, MIND argue that experience over the years shows that psychiatric patients seldom resort to legal action. On the other hand, the Government is aware of staff anxiety about their legal position."

Staff anxiety seemed to have increased over recent years. But much of this was because of uncertainties about their legal position when treating, controlling or searching patients – matters which were not expressly dealt with in the 1959 Act or in official guidance. Proposals to clarify their position or give guidance would help to reassure staff. Nevertheless, at para 7.4, the white paper concluded:

> "The Government recognises the need to retain some 'long stop' provision . . . to reassure staff that they will not be involved unnecessarily in ill-founded court cases – to have to appear in court can be a difficult and stressful experience – but absolute protection against the very few litigious patients cannot be achieved without an unacceptable loss of rights for all patients. The Government therefore proposes some changes to simplify and clarify the present position."

Thus, while the Government acknowledged that there were very few litigious patients against whom the staff required protection, it was understandably anxious that staff should not be subjected to baseless claims. There was a concern that staff would otherwise be deterred from doing their job properly and acting in the best interests of the patients themselves.

49. Nowhere, however, is there any discussion of the consequence if proceedings are brought without first obtaining leave. The purpose was and remains the protection of staff. But protection from what? It cannot have been intended or expected that staff would be protected from all

knowledge of possible claims. The 1930 Act had expressly required that notice of an application for leave be given to the proposed defendant. Good practice and common courtesy, then as now, would require that they be informed of what was afoot and have the opportunity if they so desired to resist the grant of leave. What staff are protected from is having to defend a baseless action. Such protection is not undermined if an action is, whether through ignorance or inadvertence, begun without leave and the defendant takes the point or the court takes it of its own motion. The burden is still on the claimant to establish that the case should go further.

50. Nor was there any discussion of the point in the case of *R v Bracknell JJ, Ex p Griffiths* [1976] AC 314. That case decided that the acts of staff controlling compulsory patients were acts "in pursuance of" the Mental Health Act to which the protection of section 141 of the 1959 Act applied. A Broadmoor nurse had been convicted of assaulting a patient at the end of visiting time. The conviction was quashed on the ground that the prosecution had been launched without first obtaining the leave of the High Court under section 141(2). It was conceded that, if leave was required, the proceedings were a nullity.

51. Even if that concession were correctly made by the very distinguished counsel who made it, it does not follow that it applies to the leave requirement in both civil and criminal proceedings under the 1983 Act. The 1983 Act drew a deliberate distinction between civil and criminal proceedings. Although both are mentioned in section 139(2) it does not follow that the consequences of non-observance are identical.

52. The mere fact of conviction does not prove that a prosecution should have been brought. Prosecutions are brought, not to serve any private interest, but to protect the public interest. That is why those who exercise prosecutorial discretion, whether the Attorney General, the Director of Public Prosecutions or the Crown Prosecution Service, take a wider range of factors into account in deciding whether or not to prosecute than the High Court will consider when deciding whether or not to grant leave to bring a civil action. The High Court is concerned only to protect a defendant from unmeritorious claims. It is not concerned to protect a defendant from meritorious claims.

53. If spotted in time, the failure to obtain leave for civil proceedings can readily be put right and without prejudice to the legitimate interests of the defendant. If it is not spotted in time, and the action succeeds, no

injustice will be done to the unsuccessful defendant if the judgment is allowed to stand; but a serious injustice will be done to the successful claimant if it has to be set aside, for by then it is not at all unlikely that the action will be statute barred. The fact that leave is required at all may not emerge until a relatively late stage in the proceedings. That a claimant who has suffered a wrong should be deprived of his remedy merely because of a procedural failure which no-one noticed at the time is an affront to justice.

54. My Lords, I would not interpret section 139(2) so as to achieve such an obviously unjust result unless driven by the statutory language so to do. The statutory language makes it clear that if anyone, including the claimant, appreciates the point, then leave must be obtained. It does not make it clear that if no-one, including the court or the defendant, does so, the proceedings are a nullity. Halfway houses are usually to be preferred to absolute extremes.

55. The principles of the common law would lead me to this conclusion irrespective of the European Convention on Human Rights. Access to the courts is one of the most fundamental principles of the rule of law upon which our democracy is based. But access to the courts is also protected by article 6 of the Convention. Restrictions on that access are permitted, as long as they serve a legitimate aim and are proportionate to it. Protecting defendants against unmeritorious claims is a legitimate aim. Proportionality is another matter.

56. In *Ashingdane v United Kingdom* (1985) 7 EHRR 528, the European Court of Human Rights said this, at para 57:

> "Certainly, the right of access to the courts is not absolute but may be subject to limitations; these are permitted by implication, since the right of access, 'by its very nature calls for regulation by the State, regulation which may vary in time and place according to the needs and resources of the community and of individuals'. . . .
>
> Nonetheless, the limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. *Furthermore, a limitation will not be compatible with Article 6(1) if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality*

> *between the means employed and the aim sought to be achieved*." (emphasis supplied)

57. To be proportionate, a restriction on fundamental rights has first to bear a rational connection with the legitimate aim pursued. To restrict the right of access to the courts of people who have previously abused that right obviously bears a rational connection with the aim of protecting defendants against vexatious claims. But it is not obviously rational to brand every person who is or has been subject to the compulsory powers in the Mental Health Act as a potential vexatious litigant. There are some compulsory patients who suffer from paranoid delusions; there are some who suffer from psychopathic disorders who may be more inclined than others to make trouble. But the blanket restriction in section 139(2) takes no account of these subtleties. It assumes that everyone who has ever been subject to Mental Health Act compulsion is automatically suspect. This is not only empirically unproven. It certainly cannot be taken for granted when Mental Health Act powers may be exercised by people with no mental health expertise whatsoever. On the one hand, therefore, section 139(2) goes too far. On the other hand, however, it may not go far enough, because it is limited to acts done in pursuance of the Mental Health Act itself. If certain mental patients are ex hypothesi vexatious litigants, then people who exercise authority over them otherwise than under the Mental Health Act may also deserve protection.

58. This case is an excellent illustration. The police case is that Mr Seal was first arrested inside his mother's home for a breach of the peace. Having been taken outside he was then detained under section 136(1) of the 1983 Act:

> "If a constable finds in a place to which the public have access a person who appears to him to be suffering from mental disorder and to be in immediate need of care or control, the constable may, if he thinks it necessary to do so in the interests of that person or for the protection of other persons, remove that person to a place of safety . . . "

Police officers lead difficult and dangerous lives. They have to make snap decisions in complex situations where there is no time for quiet contemplation. They deserve the support of the public, the courts and the law. But it has not been shown why they should need more protection and more support when they remove people to a place of

safety under section 136 of the Mental Health Act 1983 than they have when they conduct an ordinary arrest.

59. Even where a rational connection between the end and the means can be shown, the means still have to be proportionate to the ends. There will be cases in which the operation of section 139(2) is proportionate. There will be other cases, quite possibly including this, in which it is not. Blanket provisions, which catch a great many cases in which the restriction is not justified in order to catch the few where it may be, require particularly careful scrutiny. If section 139(2) has the effect that proceedings are always a compete nullity, thus depriving a claimant of a good claim, that is an effect out of all proportion to the aim which it is attempting to pursue. Interpreting the subsection so as to allow the court to cure the defect once detected is a proportionate response.

60. The police may well have an answer to Mr Seal's claim. But their case is not without difficulty. If he was "removed" under section 136 of the Mental Health Act from his mother's home, he cannot have been "found in a place to which the public have access". If he was arrested in her home for a breach of the peace, and then "removed" under section 136 after they had taken him outside, can it be said that they "found" him there? (To say otherwise would deprive section 136 of much of its usefulness when an arrested person is later discovered to have a mental disorder.) These are questions which deserve to be addressed at the trial of the claim. By no stretch of the imagination is this vexatious. It may not be worth a great deal of money but that is not the point.

61. Section 139(2) covers a great many people who are neither vexatious litigants nor, by reason of their mental disorder, more likely than the general population to launch vexatious actions. I do not believe that Parliament ever intended that it should operate so as to bar the claims of people who began proceedings in time but did not obtain the High Court's leave in time. Defendants deserve protection from vexatious claims. They do not deserve protection from meritorious claims. But if that was Parliament's intention, it is an irrational and disproportionate interference in the Convention right to access to justice. There is no problem in reading down section 139(2) to cure that because there is nothing there to prevent it. However, the best solution would be to remove the procedural requirement altogether, as proposed in Clause 298 of the Draft Mental Health Bill proposed by the Department of Health in 2004 (2004, Cm 6305–1). The Mental Health Bill currently before Parliament, provides such an opportunity.

62. For these reasons, in addition to those given by Lord Woolf, I would allow this appeal.

LORD CARSWELL

My Lords,

63. I have had the advantage of reading in draft the opinion prepared by my noble and learned friend Lord Bingham of Cornhill. For the reasons which he has given, with which I agree, I would dismiss the appeal.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

64. Section 139(2) of the Mental Health Act 1983 provides that: "No civil proceedings shall be brought against any person in any court in respect of [any act purporting to be done in pursuance of the Act] without the leave of the High Court . . .".

65. But what if such proceedings *are* brought without leave? What if, as here, a county court claim form is issued? Are the proceedings of no effect—a nullity—or are they effective, not least to stop time running under the Limitation Act 1980? Each court thus far has held such proceedings to be a nullity. The claimant appeals once more to your Lordships' House.

66. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Bingham of Cornhill and, to the opposite effect, that of my noble and learned friend Baroness Hale of Richmond and I should say at the outset that I am in full agreement with the former rather than the latter. Because, however, your Lordships are divided on the issue, it seems appropriate to add one or two thoughts of my own.

67. No purpose would be served by my re-stating here either the facts of the case or the detailed legislative context in which the present issue arises. It may, however, be helpful to summarise in broad terms the three successive legislative regimes under which those vulnerable to complaints being made against them by past or present mental health patients have received down the years a measure of protection from civil and criminal proceedings.

1889-1930

68. Prospective defendants were given the right to make summary application to a High Court judge for a stay of proceedings if the judge was satisfied that they had acted "in good faith and with reasonable care".

1930-1982

69. The prospective defendant's protection was strengthened: no proceedings, civil or criminal, could be brought without leave of the High Court judge and such leave was not to be given unless the judge was satisfied that there were substantial grounds for alleging a want of good faith or reasonable care.

1982 to date

70. Proceedings still cannot be brought without leave but leave to bring criminal proceedings has now to be obtained from the DPP rather than a High Court judge. In deciding whether or not to grant leave the High Court judge (in civil proceedings) and the DPP (in criminal proceedings) no longer has to be satisfied that there are substantial grounds for contending that the prospective defendant has acted in bad faith or without reasonable care. The Court of Appeal in *Winch v Jones* [1986] QB 296 subsequently decided that the test now is simply whether the case deserves further investigation by the court.

71. Since 1930, therefore, it has been impermissible to bring Mental Health Act proceedings ("proceedings" as I shall call them) without leave (although since 1982 such leave has been easier to obtain), and throughout this whole period it has been accepted by all that without

such leave any proceedings brought would be a nullity. This was conceded at the highest level in the criminal context in *R v Bracknell JJ, Ex p Griffiths* [1976] AC 314 (consistently with other authoritative decisions both before and after *Ex p Griffiths* itself—see para 14 of Lord Bingham's opinion). Furthermore (as again Lord Bingham points out at para 15) there has been no suggestion amongst academic commentators that this concession might have been wrongly made or might not apply in a civil context. Take, for example, Dr Larry Gostin's work, *Mental Health Services – Law and Practice* 1986 and supplements at para 21.26.2 under the heading *Proceedings instituted without leave are a nullity*:

> "Proceedings instituted without the required leave or consent are a nullity. Further, a person who acts in pursuance of the statute cannot waive (either expressly or by implication) the protection afforded by section 139. The provision does not create a personal immunity which is capable of being waived, but imposes a fetter on the court's jurisdiction which is not so capable."

72. I understand the minority of your Lordships to conclude that in 1983 Parliament might (indeed, if the concession in *Ex p Griffiths* was correctly made, must) have decided that different consequences should attach to civil proceedings brought without leave from criminal proceedings. For my part, however, I find this an impossible conclusion. The only distinction drawn in 1983 between the two sorts of proceedings was as to who should decide on the grant (or refusal) of leave. Of course prosecutions are brought to serve the public interest rather than any private interest and clearly for that reason a wider range of factors will be taken into account in deciding whether leave should be granted for criminal rather than civil proceedings. But there is no reason to doubt that High Court judges followed that same approach when exercising their power up until 1983. And, more importantly, the change provides no logical basis for supposing that *civil* proceedings brought without leave (which ex hypothesi would previously have been a nullity) should suddenly in 1983 change character.

73. It seems to me quite evident from the legislative history of this provision that from 1930 onwards Parliament intended to make leave a precondition of any effective proceedings. Unlike the position prior to 1930, the prospective defendant was not to be required to take any action whatever with regard to a proposed claim unless and until it was sanctioned by a High Court judge. Absent such leave, albeit he might

be notified of a claimant's proposal to proceed against him, he was not to be troubled by such proceedings. The very inflexibility of the provision was an integral part of the protection it afforded. If, however, the appellant's approach were to be adopted, inevitably (unless by chance the court took the point of its own motion) the defendant himself would be drawn into the litigation.

74. I cannot see the "procedural requirement" here in question as remotely akin to that under consideration by the Court of Appeal in *R v Secretary of State for the Home Department Ex p Jeyeanthan* [2000] 1 WLR 354—essentially a failure to use the prescribed form of application for leave to appeal with the consequential omission of a declaration of truth. I repeat, the requirement for leave here was to safeguard prospective defendants from being faced with proceedings (which might not be sufficiently meritorious to deserve leave) unless and until a High Court judge thought it appropriate that they be issued. And that is not a protection that can be secured save by a clear and inflexible rule such as section 139(2) (and its legislative predecessors) have always hitherto been understood to provide. Just such a rule applies in respect of those adjudged vexatious litigants under section 42 of the Supreme Court Act 1981 and Parliament clearly intended to achieve the same result under the Mental Health Act legislation. Whether or not such protection is necessary or desirable is, of course, open to question and has, indeed, been extensively debated over recent years. But your Lordships' task is not to decide whether it is desirable but whether presently the legislation confers it.

75. There is little more to be said. To suggest that the approach hitherto adopted to section 139(2) involves a violation of article 6 of the European Convention on Human Rights seems to me fanciful. Such an approach cannot sensibly be seen (as Baroness Hale suggests) "to brand every person who is or has been subject to the compulsory powers in the Mental Health Act as a potential vexatious litigant". Nor can it be seen to have "an effect out of all proportion to the aim which it is attempting to pursue." Of course, in a rare case (perhaps such as this one) a combination of circumstances—ignorance of the law (ie of section 139(2)), the delay in the issue of proceedings until the very end of the six year limitation period, and the inflexibility of section 2 of the Limitation Act 1980 itself (assuming the defendant chooses to take the Limitation Act defence) will operate to deprive the prospective claimant of his claim. But that, of course, is equally so in the case of a litigant in person ignorant of the six year limitation period itself. In each case the loss of the claim is the price paid for certainty—just as there is a price to be paid for the established principle (and the assurance it provides)

protecting various classes of prospective defendant against claims in negligence—see, for example, the decision of the House in *D v East Berkshire Community Health NHS Trust* [2005] UKHL 23; [2005] 2 AC 373. None of these cases can properly be characterised as a denial of access to the courts contrary to article 6 and it seems to me unsurprising that the point was not even taken in the courts below.

76. In short, I agree with all that Lord Bingham says and, with one exception, all that was said in the able judgments of the Court of Appeal. I disagree only with that Court's suggestion that the statutory condition in question in *Rendall v Blair* (1890) 45 Ch D 139 was weaker than that in question here. But the statutory context of the condition there and, more importantly, its legislative history, were markedly different from that of section 139(2) and these differences provide ample grounds for reaching different conclusions as to their effect. Were that not so, indeed, I would hold that the view expressed by the Court of Appeal in *Rendall v Blair* (not, in fact, necessary for the decision in that case) was wrong.

77. For these reasons together with those given by Lord Bingham I too would dismiss the appeal and make the order which he proposes.