CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

THIRD SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 45305/99
by William and Anita POWELL
against the United Kingdom

The European Court of Human Rights (Third Section), sitting on 4 May 2000 as a Chamber composed of

Mr J.-P. Costa, *President*,
Mr W. Fuhrmann,
Mr L. Loucaides,
Sir Nicolas Bratza,
Mrs H.S. Greve,
Mr K. Traja,
Mr M. Ugrekhelidze, *judges*,
and Mrs S. Dollé, *Section Registrar*,

Having regard to the above application introduced with the European Commission of Human Rights on 2 October 1998 and registered on 11 January 1999,

Having regard to Article 5 § 2 of Protocol No. 11 to the Convention, by which the competence to examine the application was transferred to the Court,

Having deliberated, decides as follows:

THE FACTS

The applicants are husband and wife and are both British citizens. The first applicant was born in 1953 and the second applicant in 1955. The applicants live in Swansea, United Kingdom. They are represented before the Court by Mrs N. Mole, a lawyer working with the Aire Centre, London.

A. Particular circumstances of the case

The facts of the case, as submitted by the applicants, may be summarised as follows.

The death of Robert Powell

On 5 December 1989 the applicants' 10-year-old son, Robert, was admitted to Morriston hospital after persistent spells of severe abdominal cramps and vomiting. The paediatrician in charge of his care, Dr Forbes, suspected that Robert suffered from adrenal insufficiency (Addison's disease), and made a written report to the child's general practitioners at Ystradgynlais Health Centre, stating that he required an ACTH Stimulation Test to confirm the diagnosis. The test was not carried out. Robert was discharged from the hospital on 9 December 1989. Neither the Health Authority nor Robert's general practitioners re-called Robert to hospital for the ACTH Stimulation Test following his discharge. Robert's parents were never informed that the doctors suspected Addison's disease.

After his discharge from hospital, Robert remained unwell throughout December 1989. He did not seem to recover or to regain his previously lost weight until New Year 1990. The applicants then considered that Robert had made a full recovery.

On 18 January 1990 Robert went to see Dr Forbes at Morriston Hospital for a follow-up examination. Following this appointment, Dr Forbes wrote to Robert's general practitioners at Ystradgynlais Health Centre instructing them to refer Robert immediately if he had a recurrence of vomiting and/or abdominal pain.

In early April 1990 Robert developed a sore throat, a pain in his jaw, and became generally unwell. Thereafter, as Robert's condition rapidly declined, the applicants sought medical treatment for their son on seven separate occasions from five doctors at the Health Centre. The doctors failed to communicate adequately with one another regarding Robert's medical history. Each time the applicants sought medical treatment, the applicants were sent home and/or advised that there was nothing to worry about and/or were given ineffective and/or inappropriate treatment.

On 2 April 1990 the first applicant brought Robert to see Dr E. Hughes at the Ystradgynlais Health Centre. Dr Hughes could not find anything wrong with Robert and advised the father not to worry.

On 6 April 1990 the first applicant brought Robert to see Dr Flower. Dr Flower could not find anything wrong with Robert and advised the father not to worry.

Robert's condition continued to deteriorate. His appetite was poor. He was weak and listless. On 10 April 1990 Robert vomited while eating a meal.

On 11 April 1990 the applicants again took Robert to the Ystradgynlais Health Centre. Robert was now so weak that he had to be carried to and from the car. While in the waiting room, Robert could not sit up. The first applicant gave Dr Williams a full history of Robert's illness as he knew it. This included the admission to the hospital the previous December, the vomiting in December, the vomiting on 10 April, Robert's current symptoms and the consultations with Drs Hughes and Flower. Dr Williams looked through Robert's medical records in the first applicant's presence. He prescribed Dioralyte for vomiting. Dr Williams told the first applicant that he felt Robert should be referred back to Dr Forbes. Dr Williams dictated a letter of referral later that day, but the letter was not typed for several days and was never sent because of Robert's intervening death.

On 15 April 1990 the first applicant took Robert to see Dr Boladz at Community Hospital. The Powells gave Dr Boladz the full history of Robert's illness as they knew it. The first applicant told him that Robert's condition had worsened since seeing Dr Williams, and that Robert was now so weak that he could not walk without assistance. Dr Boladz examined Robert, found he had a throat infection, and prescribed amoxycillin. He suggested that the Powells should take Robert for blood tests at the Health Centre. The first applicant remembers seeing Dr Boladz read a letter from Dr Forbes dated 18 January 1990.

On 16 April 1990 Robert vomited again. The Powells requested a home visit. When Dr K. Hughes arrived, the first applicant gave him a full history of Robert's illness as he knew it. Dr Hughes suggested that the Powells postpone the blood test recommended by Dr Boladz until 18 April 1990 because of a Bank Holiday. He said that if Robert vomited or deteriorated further he should be admitted to hospital.

On 17 April 1990, the applicants requested a second doctor's home visit after Robert collapsed on the bathroom floor, fell temporarily unconscious, and developed blue-tinted lips and dilated pupils. Dr Flower, who performed the home visit, insisted that there was no cause for concern and refused to admit the child to hospital. The Powells called Dr Flower to the home later that day because of Robert's deteriorating condition. Dr Flower seemed very annoyed when she arrived at having been called out again. On this occasion, she agreed to refer him to hospital, but refused to call an ambulance to take him.

The applicants rushed Robert to the hospital themselves. When Robert arrived at the hospital, there was immediately a panic over his condition. The second applicant nearly fainted, and she was assisted from the room. Robert was put on a life-support machine in intensive care. Thereafter, he experienced two cardiac arrests. Robert died that evening.

It was later determined that Robert had died of Addison's disease, a rare condition arising from adrenal insufficiency, which is potentially fatal if untreated, but which is susceptible to treatment if diagnosed in time.

The refusal to conduct an inquest

Shortly after Robert's death, the first applicant informed the West Glamorgan County Coroner's Office that he believed his son died as the result of medical malpractice. Despite his allegations no inquest was performed, and no mention was made of the allegations in the post-mortem report. When the first applicant subsequently asked the Coroner's Office to explain the decision not to hold an inquest, he was told that no inquest was held because Addison's disease is a natural cause of death.

Alleged falsification of medical records by Robert Powell's general practitioners

On 20 April and 23 April 1990, Dr Hughes visited the Powells at home, bringing with him Robert's complete medical records and his general practitioner records. On 23 April 1990 the first applicant arranged for the Reverend D.G. Thomas to witness independently the information in the records, and to make a note of their contents.

While examining the medical records, Reverend Thomas' attention was drawn to a document headed: "Clinical Summary Sheet (hereafter CSS/1)." Dr Forbes prepared this document during or soon after Robert's hospitalisation in December 1989. It was sent to Robert's general practitioner, Dr Boladz, at Ystradgynlais Health Centre. CSS/1 contained a note in typescript on its reverse side. The Reverend Thomas recalled that the note, which was headed "information," contained the following details:

(i) that the Deceased needed an ACTH test (test for Addison's disease)
(ii) that the Deceased's parents had been so informed
(iii) that the Deceased suffered from hormonal imbalance
(iv) that Addison's disease was being considered

The Powells were shocked to learn that doctors had suspected Addison's disease in December 1989, and that none of the six doctors who examined Robert had communicated this fact to them. On 30 April 1990 the applicants made a formal complaint to the Medical Services Committee at Powys Family Health Services Authority ("FHSA"), alleging that Robert's doctors (including Dr Boladz, Dr Flower, Dr K. Hughes, Dr E. Hughes and Dr Williams) failed to provide adequate professional medical services, the lack of which resulted in Robert's death. The complaint was referred to West Glamorgan FHSA because one of the named general practitioners was a member of Powys FHSA Medical Service Committee.

On 5 July 1990 Dr Forbes wrote to Dr E. Hughes inviting the five general practitioners involved in Robert's treatment to meet him. This meeting between Dr Forbes and the five general practitioners took place at Morriston hospital. The doctors discussed their defences to the Powells' allegations of medical negligence.

On 22 November 1990 the Powells received copies of the general practitioners' notes from West Glamorgan FHSA. These were the general practitioners' notes as disclosed to FHSA and used as evidence at the Medical Services Committee Hearing on 13 December 1990. Upon receipt of these records, the Powells noted that they differed significantly from the documents shown to them shortly after Robert's death.

First, in place of CSS/1, a new clinical summary sheet had been substituted. This new clinical summary sheet was blank on its reverse side, and did not contain any reference to "Addison's disease." Indeed, in the copy records seen by the Medical Services Committee, there is no document which contained those important words.

Second, a different letter written by Dr Forbes was substituted. The substituted letter was typed on a different kind of paper from the original, and omitted any reference to Addison's disease. The substituted letter emphasised the possibility that Robert suffered from

gastritis. It was thus much less incriminating to the general practitioners than the original letter of 18 January 1990 which emphasised the importance of referring Robert back to the hospital if vomiting re-occurred.

Third, the general practitioners' notes contained a referral letter to Dr Forbes signed by Dr Williams, and dated 12 April 1990. The letter was deliberately misleading. It made no mention of vomiting, which Dr Williams told the Powells was the reason for immediate referral of Robert back to Dr Forbes. The letter omitted any reference to the prescription of Dioralyte for vomiting.

The Powells immediately appreciated that the notes had been deliberately falsified.

On 23 November 1990 the first applicant examined the original general practitioners' records at the West Glamorgan FHSA. The originals corresponded exactly with the photocopies he had received the day before.

On 30 November 1990 the first applicant received a second copy of the general practitioners' records which had been compared personally against the originals by Mrs Newton, the Deputy Director of Administration at the West Glamorgan FHSA. This set was identical to the first set.

Proceedings before the Medical Services Committee

On 13 December 1990 a hearing was conducted before the Medical Services Committee of the West Glamorgan FHSA.

At the hearing, the Powells alleged that Robert's medical records had been falsified. The Powells called the Reverend Thomas to corroborate their allegation that the clinical summary sheet currently in the medical record was not the document they had seen following Robert's death. In response to questions regarding the alleged falsification of records, Dr K. Hughes stated that the medical record had been in his possession at all times since Robert's death and had not been tampered with in any way.

Although NHS (National Health Service) Regulations provide that a complainant is entitled to put any questions relevant to the case to the respondent doctors, the Chairman of the Committee would not allow the first applicant to ask more than a few basic questions. Neither the Chairman nor members of the Committee asked the respondent doctors any pertinent questions regarding the alleged cover up.

The Medical Services Committee concluded that one of the doctors, Dr Flowers, should be given the minimum possible reprimand. She was "warned to conform with her terms of service." The remaining four practitioners were found not to be in breach of their terms of service. The Committee made no mention, in its finding of facts, about the allegations of post-death falsification of medical records. The Powells appealed against these findings to the Secretary of State for Wales pursuant to Regulation 11(1) of the NHS.

Appeal to the Welsh Office

1. Events preceding the appeal

The appeal was set to be heard on 4 November 1991. However, the proceedings were postponed when the Powells objected to the Welsh Office's appointment of a Chairman who was involved in defending the FHSA against the Powells' civil action.

On 7 February 1992 the West Glamorgan FHSA forwarded Robert's original general practitioners' records to his solicitor who, in turn, forwarded them to a forensic documents examiner.

On 10 March 1992 the forensic documents examiner sent the original records under recorded delivery to the Welsh Office.

On 11 March 1992 the Welsh Office received these documents and a record was kept of their receipt.

On 16 March 1992 the Welsh Office gave custody and control of the original general practitioners' records to the Chairman of the appeal.

2. Evidence of falsification of Robert Powell's medical records

On 17 March 1992 the appeal commenced. The applicants offered evidence to substantiate their allegation that medical records had been falsified.

Regarding the allegedly falsified letter of referral from Dr Williams, the Powells called Mrs Simms, an employee at the Ystradgynlais Health Centre. Mrs Simms testified that she typed the original letter from Dr Williams' dictation tape on 19 April 1990. She was then told to destroy the original letter and back-date the letter she was told to type in its place to 12 April 1990. Mrs Simms admitted at the hearing that she felt "uncomfortable" about typing a referral letter, knowing that the child was already dead.

The Powells submitted that Dr Williams falsified the referral letter because he knew he should have referred Robert to the Hospital immediately. In fact he did not do so and Robert died six days later. The Powells alleged that Dr Williams subsequently attempted to cover up this error by making it look as though he had made the referral.

The applicants presented evidence regarding the alleged substitution of CSS/1 including the testimony of Reverend Thomas.

The applicants submitted that at the 5 July 1990 meeting there was collusion between Dr Forbes and the general practitioners to alter medical records in order to present false evidence before the Medical Services Committee.

On the 19 March 1992 the appeal hearing was adjourned until September of the same year.

3. The "missing" documents

In September 1992, at the beginning of the reconvened hearing, a folder containing "missing" documents was discovered among the original general practitioners' records. This folder contained (1) a copy of a discharge notification from Robert's hospital stay in December 1989 which had been "block stamped" to indicate that it had previously been seen and noted by the doctors; (2) a missing referral letter from Dr Flower on the day Robert Powell died.

These documents had not been in the general practitioners' records on the numerous occasions when the first applicant inspected them. Moreover, Mrs Newton, Deputy Director of Administration of the West Glamorgan FHSA, confirmed under oath that the additional documents had not been part of the records while they were in her custody between November 1990 and February 1992. When the first applicant inquired about the whereabouts of the records between March and September 1992, the Welsh Office could not account for them.

The applicants' solicitor maintained that the discovery of these new documents prejudiced their case, and requested that the matter be referred to the Director of Public Prosecutions. The Chairman refused to make the referral. The solicitor advised the first applicant that he was unlikely to obtain justice from the hearing, which he referred to as a "kangaroo court." The solicitor gave notice that formal application would be made to withdraw the appeal, and left the hearing.

After withdrawing the appeal, the first applicant examined the records at the West Glamorgan FHSA. He found that the records had a tick on the top right hand corner and were numbered on the back. Those markings had not been on the documents when he had seen them before. When he asked the deputy director about the markings, he was told that neither she nor any member of the FHSA staff had made them.

The criminal investigation

In March 1994, following the withdrawal of the appeal to the Welsh Office, the Powells' solicitor invited the Director of Public Prosecutions to investigate the conduct of each of the general practitioners to determine whether there was evidence sufficient to support a prosecution for attempting to pervert the course of justice, forgery, perjury, and/or manslaughter. The Director of Public Prosecutions referred the matter to the Dyfed-Powys Police.

The Police enquiry continued for no less than two years, during which time the first applicant was advised to postpone any civil action against the general practitioners. In the course of the investigations, the first applicant was interviewed five times. The police did not, however, interview all of the doctors. Significantly, they did not interview Dr Forbes, who initially suspected Addison's disease when Robert was admitted to hospital in December 1989. In addition, the police informed the first applicant that they could not access the hospital's computerised medical records. On 5 January 1996 the Crown Prosecution Service ("CPS") informed the first applicant that there was insufficient evidence to proceed with his complaint.

In response to the first applicant's written inquiries questioning the thoroughness of the investigation, he received a letter from the CPS confirming that it did not intend to prosecute. Thereafter, the first applicant instructed his solicitors to put his civil case down for trial.

In April 1996, over two years after the Powells referred the matter to the CPS, and three months after the CPS informed the Powells that they did not intend to proceed with the matter, the CPS suggested that the Dyfed-Powys Police should obtain an expert medical opinion as to whether Robert had died as a result of "gross medical negligence." Thereafter, an expert medical witness prepared a report analysing the treatment given Robert by Dr Forbes. Although the medical expert concluded that Dr Forbes had been negligent, the CPS considered that there was still insufficient evidence to prosecute.

The Dyfed-Powys Police did not appear to investigate the Powells' allegations of falsification of medical records, and instead concentrated on the possibility of prosecution for gross medical negligence.

The applicants have subsequently learned that the general practitioners involved have served as Police Surgeons for the Dyfed-Powys Police for the last twenty years.

Non-statutory inquiry into the whereabouts of Robert's medical records during the period March to September 1992 and parliamentary questions

Following the withdrawal of his appeal to the Welsh Office, the first applicant contacted Jonathan Evans MP and Rhodri Morgan MP, and explained the history of Robert's illness and death, the alleged cover up, the Medical Services Committee hearing, and the appeal to the Welsh Office. Jonathan Evans complained to the Parliamentary Commissioner for Administration about the alleged falsification of medical records and the whereabouts of Robert's medical records during the Welsh Office appeal. In response to Mr Evans' complaint, Mr Redwood at the Welsh Office agreed to set up a non-statutory inquiry into the matter. The proposed inquiry was cancelled, however, because the general practitioners refused to attend.

On 18 May 1995 Rhodri Morgan MP posed the following parliamentary question to the Secretary of State for Wales with respect to the whereabouts of Robert's medical records between March and September 1992:

> "What departmental records exist of retrieval and replacement between 19 March and 7 September 1992 of files held in his departmental vaults containing the original general practitioner records and hospital records of Robert Powell (deceased) . . . pertaining to the Appeal by Mr. William Powell . . . father of the deceased child under the NHS complaints procedure in relation to the primary health care? [24784]"

Mr Redwood responded that the Welsh Office never had care of Robert's general practitioners' records.

It was later established that the Parliamentary Answers disclosed the very reverse of the truth. On 16 October 1995 the first applicant received a letter from William Hague MP, Secretary of State for Wales. Mr Hague informed the first applicant that the records had been

received by the Department on 11 March 1992 and expressed his intention to set up an independent examination of the management of these papers during the period of the two hearings. He appointed Elizabeth Elias to investigate.

Elizabeth Elias interviewed the Powells, the Reverend Thomas, the applicants' solicitor and undisclosed Welsh Office officials. Ms Elias did not interview any of the doctors. Ms Elias's report on her investigation was inconclusive; she stated that she had been unable to establish the whereabouts of Robert's medical records during the adjournment of the appeal.

Effects of post-death misconduct on the applicants' mental health

The vital importance to parents of knowing all the circumstances surrounding their child's death is illustrated by the effect that the obfuscation of information has had on the applicants. Since Robert's death, over seven years ago, the first applicant has not been able to return to work. For years after the death, the first applicant read through the medical records and wrote letters every day. He was unable to concentrate on anything except the case. His relationship with his other family members deteriorated. The first applicant has been diagnosed with Post Traumatic Stress Disorder directly connected to the falsification of the medical records.

A psychiatrist's report prepared for the civil trial states (at paragraph 54) :

"Should the outcome [of the civil litigation] suggest to [the first applicant] that justice has been done, at least in his eyes, then his symptoms will gradually recede and he may make a good recovery and return to normal functioning."

The psychiatrist quoted the first applicant as stating:

"I'd like to prove that my wife and I were good parents who took our son to people who we trusted. I have a terrible feeling of emptiness. ... They haven't let me grieve. I won't grieve until this is sorted out."

In the aftermath of Robert's death, the second applicant developed Panic Disorder according to the Diagnostic and Statistical Manual of Mental Disorder 3rd Edition Revised 1987 [DSM III]. This disorder is characterised by the presence of panic attacks occurring without warning at a frequency of at least four times in a four week period.

The psychiatrist who evaluated the second applicant for the civil trial concluded:

"My view, therefore, is that this lady does suffer from chronic Panic Disorder. The reasons for this are multifactorial. The facts that her mother suffered from a similar disorder suggests the possibility of a constitutional predisposition to such an illness. There is little doubt however that the predominant precipitant was the events that followed her child's death."

The second applicant has been taking benzodiazepine tranquillisers for this disorder since September 1990. Her doctor advises her that it is likely that she will require this medication for the rest of her life.

Proceedings in the High Court of Justice

1. Causes of Action

By a writ issued 13 April 1993, the applicants instituted civil proceedings against the doctors for (1) negligence and (2) post-death misconduct in falsifying Robert's medical records, following his death, to cover up evidence of wrongdoing. The Powells claimed damages on their own behalf and on behalf of the estate of Robert Powell:

(i) pursuant to the Law Reform (Miscellaneous Provisions) Act 1934 on behalf of the deceased's estate, for the deceased's pain and suffering before his death and funeral expenses;
(ii) pursuant to the Fatal Accidents Act 1976 for bereavement;
(iii) for personal injuries suffered by the applicants, namely psychiatric injury as a result of witnessing the pain, suffering, and death of the deceased;
(iv) for psychiatric injuries suffered by the applicants by reason of the discovery of the dishonest attempts of the respondents to conceal the true facts surrounding Robert's death.

Regarding the falsification of medical records, the applicants alleged the following causes of action:

(i) negligence towards the applicants as patients, or alternatively as parents of the deceased;
(ii) fraudulent misstatement;
(iii) unlawful interference with a right;
(iv) unlawful act of conspiracy.

Although all defendants originally denied negligence, the Health Authority subsequently admitted liability on the basis of the failure to diagnose and treat Addison's disease. The Health Authority agreed to pay the applicants £80,000, as well as £20,000 costs. The action against the individual doctors in respect of the medical negligence claims was consequently discontinued.

2. Application to strike out

By summons dated 29 May 1996, the general practitioner defendants applied to strike out those parts of the Statement of Claims relating to the post-death events on the basis that they failed to disclose a reasonable cause of action. In considering the defendants' application to strike out the claims, Mr Justice Butterfield proceeded according to RSC Order 18, r. 19(1) on the basis that all pleaded allegations made by the plaintiffs were correct. On 24 June 1996 Mr Justice Butterfield struck out the applicants' claims regarding post-death misconduct on the ground that the duty alleged by the plaintiffs did not exist in law.

(a) Duty of candour

Judge Butterfield held that doctors have no duty of candour to the parents of a deceased child about the circumstances surrounding the death. The court held that, under Bolam v Frien Hospital [1957] 1 W.L.R. 582, the standard required to discharge

the duty of care is "that of the ordinary skilled man exercising and professing to have that special skill." The court then cited Sidaway v the Governors of Bethlehem Royal Hospital [1985] 1 A.C. 871 for the principle that a doctor owes a duty of care to his patient only in his capacity as healer in the context of the clinical management of that patient.

Mr Justice Butterfield therefore reasoned that:

> "[a]fter the death of the patient, no duty of care can arise with regard to the provision of information to the parents of the deceased. Whatever ethical or moral obligations there may be on a doctor in such circumstances, there is no legal obligation, since the provision of information can have no clinical relevance to any future treatment."

Mr Justice Butterfield concluded:

> "I must apply the law as it is. In my judgement, no duty such as that contended for by the plaintiffs exists in law. Were I to hold to the contrary, it would amount, on my part, to judicial legislation."

(b) Fraudulent misstatement

Mr Justice Butterfield held that the plaintiffs' claim disclosed no reasonable cause of action in so far as it was based on fraudulent misrepresentation. The court held that the essence of the tort of fraudulent misrepresentation is the use of false words and statements uttered with the knowledge either that they were likely to cause injury or with reckless disregard as to whether they would cause injury. In this case, the court held, the plaintiffs expressly asserted that they knew the representations made by the defendants were false.

(c) Unlawful interference

Neither did the court find an actionable right to compensation for personal injury by virtue of unreasonable and unlawful interference with a right. The court rejected the applicants' submission that the defendants interfered with their right to complain in respect of the general practitioners' breach of their terms and conditions of service. Mr Justice Butterfield reasoned that all the authorities touching on the question of interference with rights dealt with interference with economic interests or contractual obligations.

(d) Conspiracy

Finally, the court found no actionable right in conspiracy. Mr Justice Butterfield acknowledged that the post-death misconduct might raise allegations of criminal conspiracy to pervert the course of justice, the criminal act of forgery, theft of documents and perjury. To be actionable as a conspiracy in tort, however, the unlawful acts must themselves give rise to actionable civil wrongs. As the acts complained of were not themselves torts, the court held that there could be no conspiracy to commit them.

Proceedings before the Court of Appeal

The applicants appealed from the Order of Mr. Justice Butterfield to the Court of Appeal. On 1 July 1997 the Court of Appeal dismissed the appeal, and refused leave to appeal to the House of Lords.

Lord Justice Stuart Smith gave judgment in respect of the tort of negligence in the following terms:

> ". . .[t]he only patient who was seeking medical advice and treatment was Robert. It was to him that the Defendants owed a duty of care. The discharge of that duty in the case of a young child will often involve giving advice and instruction to the parents so that they can administer appropriate medication, observe relevant symptoms and seek further assistance if need be. In giving such advice, the doctor owes a duty to be careful. But the duty is owed to the child, not to the parents. ...
>
> I do not think that a doctor who has been treating a patient who has died, who tells relatives what has happened, thereby undertakes the doctor-patient relationship towards the relatives. It is a situation that calls for sensitivity, tact and discretion. But the mere fact that the communicator is a doctor, does not, without more, mean that he undertakes the doctor-patient relationship."

The court also examined the other elements of the tort of negligence, concluding that the facts disclosed neither proximity nor foreseeability. Lord Justice Stuart reasoned that the lack of a doctor-patient relationship between plaintiffs and defendants meant there was no proximity, and that a reasonable man could not foresee that substitution of medical records would worsen the applicants' condition.

The court concurred with Mr Justice Butterfield's determination that the facts did not disclose an action on any other ground.

Petition for leave to appeal to the House of Lords

In their application for leave to appeal to the House of Lords, the applicants submitted that the Court of Appeal was wrong in law to conclude that:

> (i) the communication of the circumstances of the death of a minor to the parents is outside the doctor-patient relationship;
> (ii) the doctor-patient relationship is limited to the healing/treating function only;
> (iii) a doctor who chooses to answer an inquiry from grieving parents as to the circumstances of the death of their child assumes no duty of care in respect of answers given, whether or not such a role falls outside the doctor-patient relationship;
> (iv) there was no reasonably foreseeable risk of psychiatric harm being caused to vulnerable and bereaved parents as a result of their discovering an attempted cover-up; and
> (v) there is no duty of candour, or any duty, to the parents in respect of communicating the circumstances of the death of the child.

The applicants submitted that the House of Lords should consider the following question of law:

Does a medical practitioner owe a common law duty of care to the parents of his deceased minor patient

(i) in answering their questions as to the treatment the minor received?
(ii) in the preservation of the deceased's medical records?
(iii) in the disclosure of the deceased minor's medical records to the patients upon their request?

On 2 April 1998 the House of Lords refused leave to appeal. The applicants were thus left with no other remedy under English law to challenge the falsification of Robert's medical records.

B. Relevant domestic law and practice

Procedure for complaint to the Medical Services Committee

In accordance with the provisions of the NHS (Service Committees and Tribunal) Regulations 1974, NHS patients are entitled to have complaints about medical negligence investigated by the Medical Services Committee. The complaint against a general practitioner must be lodged within thirteen weeks following an alleged breach of his terms of service.

The complainant is entitled to appear before the committee, and to give and to call such evidence as the Committee may consider relevant. The complainant is entitled to put any questions relevant to the case to the respondent doctors or to any witness called by them, either directly, or if the Committee so directs, through the Chairman of the Committee.

The criminal law

English law recognises the following as criminal offences: (1) Attempt to Pervert the Course of Justice, (2) Forgery and (3) Perjury.

Attempt to pervert the course of justice

This offence is a common law offence triable only on indictment and punishable at the discretion of the court. The offence penalises any conduct which has a tendency wrongly to interfere, directly or indirectly, with the initiation, progress or outcome of any criminal or civil proceedings, accompanied by an intention to do so (Selvage [1982] 1 All ER 96 [1982] 1 WLR 811 CA).

The accused's conduct will have a tendency to pervert the course of justice if he has done enough for there to be a possibility, without further action on his part, that a perversion of the course of justice may result; it is irrelevant that the possibility does not materialise (Murray [1982] 2 All ER 225 [1982] 1 WLR 475, CA). Fabrication of false evidence for the purpose of misleading a judicial body constitutes attempting to pervert the course of justice (Vreones [1891] 1 QB 360, 60 LJMC 62).

Forgery

The law relating to forgery is governed by the Forgery and Counterfeiting Act 1981. The offence of forgery is defined by section 1 of the Act, which states that a person is guilty of forgery if he makes a false instrument, with the intention that he or another shall use it to induce somebody to accept it as genuine and, by reason of so accepting it, to do or not to do some act to his own or any other person's prejudice. The *actus reus* of this offence is "making a false instrument," and according to section 9(2) this includes altering an instrument so as to make it false in any respect.

Perjury

Section 1(1) of the Perjury Act 1911 provides that perjury, which is triable only on indictment, is committed by a person who, lawfully sworn as a witness or interpreter in a judicial proceeding, wilfully makes a statement material in that proceeding which he knows to be false or does not believe to be true. A person is lawfully sworn within the meaning of the Act if he gives his evidence on oath, affirmation or solemn declaration. The term "judicial proceeding" includes a proceeding before any court, tribunal or person having by law power to hear, receive, and examine evidence on oath.

Civil procedure

Grounds for striking out

A statement of claim may be struck out for any of the reasons set out in RSC (Rules of the Supreme Court) Order 18, r. 19(1). This provides:

The court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement of any writ in the action, or anything in any pleading or in the endorsement, on the ground that:

(a) it disclosed no reasonable cause of action or defence, as the case may be; or
(b) it is scandalous, frivolous or vexatious; or
(c) it may prejudice, embarrass or delay the fair trial of the action; or
(d) it is otherwise an abuse of the process of the Court;

The court may order the action to be stayed or dismissed or judgement to be entered, as the case may be.

Striking out under RSC Ord. 18, r. 19 is only for plain and obvious cases (per Lord Templeman in Williams & Humbert v W.H. Trade Marks (Jersey) Ltd. [1986] AC 368 HL). Cases requiring prolonged and serious argument are therefore unsuitable for striking out.

Where the application is brought on the ground that the pleading discloses no cause of action or defence, the issue is one of law to be argued on the face of the pleadings. RSC Ord. 18 r. 19(2) provides that no evidence shall be admissible on an application under paragraph 1(a). This means that the judge must accept the pleaded facts as true for the purposes of evaluating an application to strike out.

Paragraph 1(a) only applies to claims which are 'obviously unsustainable' (see, for example, Nagel v Fielden [1966] 2 QB 633 at 648, 651 CA, per Dankwerts and Salmon LJJ). The fact that a case is weak and unlikely to succeed is not a ground for striking it out.

The civil law

1. Duty of candour

Under English law, a duty of care arises under the principles enunciated by Lord Bridge of Harwich in Caparo Industries plc v Dickman [1980] 2AC 605 at 616E-618F, namely where the following three elements are present:

(i) the foreseeability of damage arising from the relevant act or omission;
(ii) a sufficient relationship of proximity between the parties
(iii) as a matter of legal policy, it is fair, just and reasonable that a duty of care should exist.

The duty of care imposed on the medical profession is well established. According to the principle in Bolam v Frien Hospital [1957] 1 W.L.R. 582, the standard required to discharge the duty of care is "that of the ordinary skilled man exercising and professing to have that special skill."

The Court re-examined the Bolam standard in Sidaway v the Governors of Bethlehem Royal Hospital [1985] 1 A.C. 871, in which Lord Diplock stated that the Bolam test:

"[lays] down a principle of English law that is comprehensive and applicable to every aspect of the duty of care owed by a doctor to his patient in the exercise of his healing functions as respects that patient."

English law does not recognise a duty of care for doctors:

(i) where a psychiatrist examines a child and interviews a parent for the purposes of discharging a local authority's care responsibilities (X v Bedfordshire CC, M v Newham [1995] 2AC 633);
(ii) where a doctor employed by an insurance company examines a plaintiff or a claimant;
(iii) where a doctor goes to the assistance of a stranger injured in an accident (Capital and Counties v Hants CC [1997] 2AER 865 at p. 883f).

Whilst it was arguable that doctors had a duty not to falsify medical records under the common law (Sir Donaldson MR's "duty of candour"), before Powell v Boladz there was no binding decision of the courts as to the existence of such a duty. As the law stands now, however, doctors have no duty to give the parents of a child who died as a result of their negligence a truthful account of the circumstances of the death, nor even to refrain from deliberately falsifying records.

2. Fraudulent misstatement

According to the doctrine established by Pasley v Freeman (1789) 3 TR 51 and Langridge v Levy (1837) 2 M&W 519, a person who makes a false statement intended to be acted upon must make good the damage naturally resulting from its being acted upon.

Under Wilkinson v Downton [1897] 2QB 57, making a statement known to be false with the intention that it should be believed and with the intention of causing injury, which in fact results, is actionable. Where the defendant's act is plainly calculated to produce some effect of the kind which was produced, an intention to produce it ought to be imputed to the defendant.

3. Conspiracy

To be actionable as a conspiracy, the unlawful act relied upon must be actionable at the suit of the plaintiff. It is not sufficient that it amounts to a crime or breach of contract with a third party (see Clerk & Lindsell on Torts 17th Ed. Para. 23-80; Marinan v Vibart [1963] 1QB 234 & 528; Hargreaves v Bretherton [1959] 1QB 45). To prove conspiracy, one need not prove that the predominant purpose was to injure, but one needs to prove that the conspiracy was "aimed or directed at the plaintiff and it can reasonably be foreseen that it may injure him, and does in fact injure him."

COMPLAINTS

The applicants complain about the falsification of records itself. The applicants submit that where a child has died as a result of negligence on the part of agents of the State, there is an obligation on the State derived from Articles 2, 8 and 10 of the Convention not only to investigate the circumstances of the death, but also to provide accurate information to the legally recognised next of kin about the circumstances in which the child died. As a minimum, there is an obligation on all State agents involved in the death not to mislead the parents of a deceased child about the circumstances. Falsification of official records by an agent of the State whose negligence resulted in the death of a child amounts to a breach of the procedural obligations inherent in Article 2 and the positive obligations inherent in Articles 8 and 10.

The applicants submit that Articles 2, 8, and 10 of the Convention guarantee that bereaved parents of a child who has died because of the negligence of a State agent will be provided with a truthful and accurate account of the circumstances surrounding the death. At the very least, these provisions prohibit the deliberate provision of false information and falsification of official records. Whether the vehicle for the recognition of this right is the procedural obligation in Article 2 or the positive obligations in Articles 8 and 10, the content of the right remains the same. The actions of the doctors in the instant case breach that right, and the applicants have been provided with no remedy for this breach.

The applicants further complain that the refusal of the domestic courts to hold the doctors accountable for the falsification of official records amounts to an unjustifiable restriction on access to court in breach of Article 6 of the Convention, and a denial of an effective remedy in breach of Article 13.

THE LAW

1. The applicants maintain that the circumstances surrounding the alleged falsification of their son's medical records and the authorities' failure to investigate this matter properly give rise to a breach of Article 2 § 1 of the Convention, which provides as relevant:

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

In the applicant's submission the first paragraph of Article 2 places on the State a positive duty to protect life. With reference to the Court's Osman v. the United Kingdom judgment (*Reports of Judgments and Decisions* 1998-VII), the applicants assert that this duty requires the agents of the State to do "all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge" (*ibidem*. p. 3159-60, § 116). Since their son's death was caused by the negligence of State agents, it must be concluded that there was a breach of the State's obligation to protect life.

The applicants further contend that Article 2 requires that whenever a State agent is responsible for a death, there must be some form of effective official investigation to ensure public accountability and to inform the deceased's next of kin about how and why the death occurred. Accordingly, deliberate and dishonest provision of false information – extending to falsification of official records – is in breach of the procedural obligations under Article 2. The duty to investigate would be rendered worthless if State agents could, without violating Article 2, lie about the circumstances of a death and falsify official records. The applicants maintain that for procedural obligations to be practical and effective, they must include a duty to provide an honest account of the circumstances surrounding the death.

The applicants allege that, in the instant case, State agents falsified their son's medical records to protect themselves from civil and criminal liability. The failure of the authorities to provide them with an honest account of the death is a procedural violation forming part and parcel of the State's duty to investigate.

The Court observes that the applicants do not in any manner allege or imply that their son was intentionally killed by the doctors responsible for his care and treatment at the material time. They aver, on the other hand, that the responsible doctors knew or can be considered in the circumstances to have known that their son's life was at immediate risk but failed dismally to take the necessary measures to treat him. In the Court's opinion, the reasoning employed by the applicants in support of their argument that the doctors' inadequate response to their son's condition at the time amounted to a breach of the State's duty to protect the right to life cannot be sustained. The reasoning they advance is derived from the above-mentioned Osman judgment. However, the Court was addressing in that case the circumstances in which a duty may devolve on law enforcement agencies to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of a third party. The issue before the Court in the instant case is an entirely different one in terms of both the context and scope of the obligation.

Admittedly the first sentence of Article 2 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see the L.C.B. v. the United Kingdom judgment of 9 June

1998, *Reports* 1998-III, p. 1403, § 36). The Court accepts that it cannot be excluded that the acts and omissions of the authorities in the field of health care policy may in certain circumstances engage their responsibility under the positive limb of Article 2. However, where a Contracting State has made adequate provision for securing high professional standards among health professionals and the protection of the lives of patients, it cannot accept that matters such as error of judgment on the part of a health professional or negligent co-ordination among health professionals in the treatment of a particular patient are sufficient of themselves to call a Contracting State to account from the standpoint of its positive obligations under Article 2 of the Convention to protect life.

In the Court's opinion, the events leading to the tragic death of the applicants' son and the responsibility of the health professionals involved are matters which must be addressed from the angle of the adequacy of the mechanisms in place for shedding light on the course of those events, allowing the facts of the case to be exposed to public scrutiny – not least for the benefit of the applicants.

The Court has attached particular weight to the procedural requirement implicit in Article 2 of the Convention. It recalls that the obligation to protect the right to life under Article 2, read in conjunction with the State's general duty under Article 1 to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, *inter alia*, agents of the State (see the Kaya v. Turkey judgment of 19 February 1998, *Reports* 1998-I, pp. 322, 324, §§ 78, 86). This obligation is not confined to cases where it has been established that the killing was caused by an agent of the State. Nor is it decisive whether members of the deceased's family or others have lodged a formal complaint about the killing with the relevant investigatory authority. The mere knowledge of the killing on the part of the authorities gives rise *ipso facto* to an obligation under Article 2 of the Convention to carry out an effective investigation into the circumstances surrounding the death (see the Ergi v. Turkey judgment of 28 July 1998, *Reports* 1998-IV, p. 1778, § 82).

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

The Court stresses that its examination of the applicants' complaint must necessarily be limited to the events leading to the death of their son, to the exclusion of their allegations that, following his death, the doctors responsible for his care and treatment fabricated his medical records to exonerate them of any blame. In the Court's opinion, that latter issue falls to be determined from the angle of their complaint under Article 6 that they were unable to secure a ruling on the doctor's post-death responsibility. However, the alleged post-death offences committed by the doctors did not alter the course of events which led to the death of the applicants' son.

The Court observes that it was conclusively established that the applicants' son died of Addison's disease. The applicants do not contest this. They maintain that his life may have been saved had his condition been treated as soon as Dr Forbes first suspected in December 1989 that his symptoms could be consistent with Addison's disease. The proceedings which they initiated before the Medical Services Committee of the West Glamorgan Family Health Authority were intended to establish that their son died as a result of medical negligence. The scope of the proceedings was then broadened to include their complaint that there had been a cover-up in regard to the precise circumstances surrounding their son's death. The Medical Services Committee found that one of the five doctors concerned had failed to comply with the terms of her service in treating their son. The applicants subsequently appealed to the Welsh Office, contending that there had been a conspiracy among the doctors involved to falsify their son's medical records so as to shield them from liability for their clinical errors. However, the applicants' solicitor withdrew the appeal in the belief that they were unlikely to obtain justice.

Given the applicants' decision to abandon their appeal to the Welsh Office, the Court cannot speculate on whether the appeal would have provided the applicants with a full account of the doctors' handling of their son's condition, whether the doctors' response was inadequate in the light of the information available to them and whether steps could have been taken to avoid his death. It confines itself to noting that by withdrawing their appeal the applicants closed one of the options which may have uncovered the extent of the lack of co-ordination among the doctors concerned at the relevant time.

Of greater significance for the Court is the fact that the applicants settled their civil action in negligence against the responsible health authority and did not pursue individual claims against the doctors. In the Court's opinion, the applicants by their decision closed another and crucially important avenue for shedding light on the extent of the doctors' responsibility for their son's death. Had the civil action proceeded the applicants would have been entitled to have a full adversarial hearing on their allegations of negligence, to subject the doctors concerned to cross-examination under oath and obtain discovery of all documents relevant to their claim. The Court also considers that the applicants could have made their grievance about the falsification of their son's medical records a live issue before the court. Indeed, there is no reason to doubt that it would not have dominated the pleadings, having regard to its centrality to the negligence allegation and its relevance to the level of damages which the court may have awarded.

Having regard to the above considerations the Court finds that it is not open to the applicants to complain under Article 2 of the Convention that there was no effective investigation into their son's death. In its opinion, where a relative of a deceased person accepts compensation in settlement of a civil claim based on medical negligence he or she is in principle no longer able to claim to be a victim in respect of the circumstances surrounding the treatment administered to the deceased person or with regard to the investigation carried out into his or her death.

The Court concludes therefore that the applicants cannot in the circumstances claim to be victims within the meaning of Article 34 of the Convention. Their complaint under this head is therefore to be rejected as being incompatible *ratione personae,* pursuant to Article 35 §§ 3 and 4 of the Convention.

2. The applicants allege that the State agents involved had a positive obligation to communicate to them the circumstances surrounding their son's death, and a negative obligation to refrain from misleading them about the circumstances of his death and from falsifying the relevant records. They invoke Article 8 of the Convention, which provides:

> "1. Everyone has the right to respect for his private and family life.(...)
>
> 2. There shall be no interference by a public authority with the exercise of this right except as such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the well-being of the country, for the protection of health or morals, or for the protection of the rights and freedoms of others."

With reference to, *inter alia,* the Court's Gaskin v. the United Kingdom judgment of 7 July 1989 (Series A no. 160) and its Guerra and Others v. Italy judgment of 19 February 1998, *Reports* 1998-I), the applicants recall that Article 8 of the Convention has been interpreted so as to impose obligations on the State to provide information to an individual whose private and/or family life has been directly affected by the acts of its agents.

The applicants maintain that in the same way that an adoptee such as Mr Gaskin must have access to his personal records to make sense of his present life, the parents of a deceased child must have the right to see the latter's medical records to reconcile themselves with the tragic event. They submit that without an honest and detailed account of how their son died, they are tormented by ignorance as to whether they or others could have prevented the death. The alteration of a deceased child's medical records by a trusted doctor closes the only avenue through which parents can understand the reasons for the child's death, and condemns them to life-long ignorance about the true reasons for the tragic event. In their submission, where a State agent causes injury to bereaved parents by inflicting on them an intentionally false account of the events leading up to their child's death, that injury must be understood to be an interference with the right of the parents to respect for their private and family life. The applicants submit that the discovery that doctors falsified Robert's medical records caused serious injury to their health and well-being.

The Court recalls that the applicants were given sight of their deceased child's medical records shortly after his death. In the applicants' submission, certain elements in the records were subsequently falsified as a result of a decision taken at a meeting between Dr Forbes and the general practitioners whereas other elements came to light prior to their appeal to the Welsh Office. In the opinion of the Court, the issue raised by the applicants goes to the heart of the mechanisms which were available to them under domestic law to verify their claims that the doctors engaged in a cover-up operation in order to shield themselves from liability for their son's death.

Even assuming that Article 8 § 1 of the Convention is applicable to the facts at issue and can be considered to denote a positive obligation on the authorities to make a full, frank and complete disclosure of the medical records of a deceased child to the latter's parents, it nevertheless remains the case that the applicants denied themselves the possibility of confirming their concerns about the integrity of the medical records at issue by withdrawing their appeal to the Welsh Office and then by settling their civil action in negligence against

the health authority. It recalls its earlier observations that the civil action in particular would have offered the applicants a realistic chance of subjecting the doctors' account of the history of their son's treatment to cross-examination under oath and of requesting discovery of all the original records compiled at the material time. It cannot be excluded that the acceptance by the court of the applicants' claims that there had been a deliberate attempt on the part of the doctors to frustrate the search for the truth would have sounded in an award of aggravated damages. Indeed, this eventuality could have been canvassed in their statement of claim.

For the above reasons the Court concludes that, as with their complaint under Article 2, the applicants can no longer claim to be victims under this head within the meaning of Article 34 of the Convention. On that account their complaint under Article 8 is similarly to be rejected as being incompatible *ratione personae,* pursuant to Article 35 §§ 3 and 4 of the Convention.

3. The applicants further submit that by altering their son's medical records, the authorities interfered with their "right to receive and impart information" as protected by Article 10 of the Convention. The applicants allege that the respondent Government failed in their positive obligation to respect the applicants' right to receive and impart information. Article 10 § 1 of the Convention provides:

> "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."

The applicants complain that their access to their son's medical records was obstructed by acts of falsification committed by State agents and that the respondent Government was complicit in the obstruction of access to the medical records since it failed to respond in any material way to the acts of falsification. The applicants have sought audience for their grievance through the civil courts, the Medical Services Committee, the Welsh Office, a non-statutory inquiry conducted by the Home Office, various Members of Parliament, the local police and the Crown Prosecution Service. None of these persons or bodies has acted to ensure that parents whose child dies as the result of the State's negligence will have access to truthful information about the death.

The Court considers that it does not have to pronounce on the question of the applicability of Article 10 to the circumstances at issue. It considers that the issue raised by the applicants is in reality a restatement of their arguments under Article 8 of the Convention. The Court considers that the reasons it has given to reject their complaint under the latter provision are equally valid for declaring their complaint under this head inadmissible in application of Articles 34 and 35 §§ 3 and 4 of the Convention.

4. The applicants maintain that they have been denied access to a court for the determination of their civil rights contrary to Article 6 § 1 of the Convention, which provides:

> "In the determination of his civil rights and obligations ... , everyone is entitled to a fair ... hearing ..."

The applicants consider that Article 6 § 1 of the Convention is applicable to the facts at issue. They refer to the Court's judgments in Fayed v. the United Kingdom (21 September 1994, Series A no. 294-B) and Osman v. the United Kingdom (cited above) in support of

their contention. They assert that the Court in the latter judgment accepted that the applicability of Article 6 (1) is no longer entirely dependent on the full recognition of a substantive right by the domestic courts and that Article 6 § 1 is applicable where there are at least arguable grounds which point to the recognition of the right at issue under domestic law. Moreover, the fact that the right in question was a Convention right – namely the enforcement of the procedural obligations inherent in Article 2 and/or the positive obligations inherent in Article 8 and 10 – strongly supports the argument that the applicants' claims involve the determination of a "civil right" for the purposes of Article 6.

The applicants maintain that the domestic courts have imposed a restriction on the their right of access to a court for the determination of their civil rights by holding that any legal remedy against the State agents responsible for falsifying the official records of a child who died was extinguished at the moment of their son's death. This point was undecided before the Court of Appeal's decision in the present case.

The applicants submit that an absolute rule which prevents the domestic courts from adjudicating upon a civil claim which arises from falsification by State agents of official records relating to a child's death is, almost by definition, a disproportionate restriction on the right of access to court. In their submission, proportionality requires that cases of exceptional gravity, where the evidence of wrongdoing is strong and the harm suffered is grave, should be capable of being submitted for adjudication by a court. A rule which prevents such an adjudication, irrespective of the merits of the case, is inconsistent with the principle of proportionality where the subject matter of the complaint involves a serious breach of Convention rights. The Court of Appeal's decision in effect imposed a blanket immunity for doctors who falsify medical records.

Furthermore, the restriction on access to court in the instant case was not carefully or narrowly focused. It was complete and failed to distinguish between cases where the merits were strong and those where they were weak. Nor did it distinguish between cases in which the falsification resulted in grave damage and those in which the damage was inconsequential.

The applicants claim that the judgment of the Court of Appeal has given rise to a perception amongst the medical profession and the general public that there is no responsibility in law to tell the truth to the parents of a dead child concerning the circumstances of the treatment given to the child. The applicants submit that the absence of a civil remedy for the damage they suffered sends the message that doctors are free to lie with impunity about the circumstances surrounding a negligently cause death.

The applicants therefore invite the Court to find that their inability to have the merits of their case heard in a court of law is disproportionate to any legitimate aim pursued.

The Court recalls that Article 6 § 1 secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way the Article embodies the "right to a court", of which the right of access, that is the right to institute proceedings before courts in civil matters constitutes one aspect only (see the Golder v. the United Kingdom judgment of 21 February 1975, Series A no.18, p. 18, § 36).

This right to a court "extends only to *'contestations'* (disputes) over (civil) 'rights and obligations' which can be said, at least on arguable grounds, to be recognised under domestic law; Article 6 § 1 does not in itself guarantee any particular content for (civil) 'rights and obligations' in the substantive law of the Contracting States" (see, *inter alia*, the James and Others v. the United Kingdom judgment of 21 February 1986, Series A no. 98, pp. 46-47, § 81, and the Powell and Rayner v. the United Kingdom judgment of 21 February 1990, Series A no. 172, p.16, § 36).

The Court further recalls that whether a person has an actionable domestic claim may depend not only on the substantive content, properly speaking, of the relevant civil right as defined under national law, but also on the existence of procedural bars preventing or limiting the possibilities of bringing potential claims to court. In the latter kind of case Article 6 § 1 may have a degree of applicability. Certainly the Convention enforcement bodies may not create by way of interpretation of Article 6 § 1 a substantive civil right which has no legal basis in the State concerned. However, it would not be consistent with the rule of law in a democratic society or with the basic principle underlying Article 6 § 1 – namely that civil claims must be capable of being submitted to a judge for adjudication – if, for example, a State could, without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities from civil liability on large groups or categories of persons (see the above-mentioned Fayed v. the United Kingdom judgment of 21 September 1994, p. 49, § 65).

The Court does not accept the applicants' submission that its judgment in the above-mentioned Osman case represented a radical departure from its earlier approach to the applicability of Article 6 § 1. For the Court, it still remains the case that an applicant must be able to demonstrate an arguable claim under domestic law that there has been a breach of a civil right actionable in law. It is still impermissible for the Court to arrogate to itself the task of creating in favour of an individual a substantive right where none is recognised under domestic law. It recalls in this connection that it observed in its Osman judgment that the respondent Government conceded that the exclusionary rule at issue in that case did not automatically doom to failure a civil action from the outset, but in principle allowed a domestic court to make a considered assessment on the basis of the arguments before it as to whether a particular case is or is not suitable for the application of the rule. On that understanding the majority of the Court found that the Osmans must be taken to have had a right, derived from the law of negligence, to seek an adjudication on the admissibility and merits of an arguable claim that they were in a relationship of proximity to the police, that the harm caused was foreseeable and that in the circumstances it was fair, just and reasonable not to apply the exclusionary rule to defeat their civil claim. The assertion of that claim was in itself sufficient to ensure the applicability of Article 6 § 1 of the Convention (*ibidem*, §§ 138-139).

In the instant case the applicants contended before the domestic courts that they had a right to compensation on account of the damage they personally suffered as a result of the alleged cover-up by the doctors. They based their claims under four heads: duty of candour, fraudulent misrepresentation, unlawful interference with a right and conspiracy. Mr Justice Butterfield concluded that none of these heads gave the applicants a cause of action. His decision to strike out their statement of claim was affirmed on appeal.

It is to be observed that at no stage did the domestic courts rely on a doctrine of immunity to shield the doctors from the consequences of a civil action against them or invoke public policy considerations to defeat their claim from being examined on the merits. The applicants' case is to be distinguished in this respect from the approach taken by the domestic courts to the Osmans' negligence action against the police. The Court observed in its judgment in that case that the domestic courts, notwithstanding that the applicants satisfied the conditions of proximity and foreeseeability, proceeded on the basis that it was impossible to prise open an immunity which the police enjoy from civil suit in respect of their acts and omissions in the investigation and suppression of crime (*ibidem*, § 50). It is to be noted further that in the instant case the Court of Appeal found that the Powells had not established that they were in a relationship of proximity with the defendant doctors or that the harm which they had suffered was reasonably foreseeable in the circumstances. For that reason, it was unnecessary for the court to address whether it was fair, just and reasonable in the circumstances to allow an action in negligence to lie against the defendant doctors.

For the above reasons the Court is led to conclude that the applicants cannot be said to have an arguable claim for the purposes of the applicability of Article 6 § 1 of the Convention.

The Court does not accept the applicants' submission that the end-result of the decision of the domestic courts is to bestow an immunity on doctors who deliberately mislead the relatives of a deceased patient about the circumstances in which the latter died. As noted previously, doctors and health authorities are liable to account for their acts and omissions in the context of a civil action in negligence. It must not be overlooked either that deliberate falsification of evidence is punishable under criminal law, as are attempts to pervert the course of justice. Although the applicants are critical of the investigation carried out by the police in their allegations, the Court must have regard to the fact that the evidence which they adduced in support of their claim of a cover-up rested essentially on the recollection of the Reverend Thomas as to the content of documents CSS/1 and F1. The doctors strenuously denied the allegations made against them and insisted throughout that documents CSS/2 and F2 formed part of the original medical records and that the referral letter dated 12 April 1991 was not among the records seen by the applicants shortly after their son's death.

Having regard to the above considerations, it follows that this part of the application must be rejected as being manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention.

5. The applicants maintain that they had no effective remedy in respect of their complaints under Articles 2, 8 and 10 of the Convention, in breach of Article 13 of the Convention which provides:

> "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

The applicants maintain that, for an remedy to be effective under Article 13, the court or tribunal must allow the applicant the possibility of canvassing the substance of the Convention argument. They submit that the remedies available to them under domestic law were not sufficient either on their own or cumulatively to guarantee them an effective

remedy. They state that the Medical Services Committee is an internal professional disciplinary body created by the National Health Service to hear complaints from patients about alleged acts of medical negligence. As the hearing before the Medical Services Committee took place before all of the falsifications occurred, the applicants did not have the opportunity to present their allegations of post-death misconduct in this setting. Moreover, the Chairman of the Medical Services Committee refused to entertain the first applicant's questions regarding the alleged cover up, and made no mention of the falsification of records in his findings. Furthermore, they were not able to take effective advantage of their appeal to the Welsh Office. The applicants note that documents on which they relied as evidence were materially altered while in the possession of the Welsh Office. They recall that not only themselves and their solicitor, but also the Deputy Administrator of the FHSA, testified to the fact their son's medical records were altered during the period between hearings. They stress that even in light of such clear evidence of falsification, the Chairman refused to investigate. They submit that the Welsh Office made false statements about the whereabouts of the medical records in response to a Parliamentary Question. In addition the civil action did not give the applicants the chance to present the merits of their allegations about the doctors' post-death misconduct. As to the police enquiry, it continued for more than two years, during which time the police did not interview all of the doctors. The Dyfed-Powys Police did not appear to investigate the applicants' allegations of falsification of medical records, and instead concentrated on the possibility of prosecution for gross medical negligence.

The applicants allege that the only potentially effective remedy available to them was the action in negligence to determine their civil rights. Because the Court of Appeal ruled that this action should be struck out without an examination of the merits, they had no access to court for the determination of their civil claim against the doctors. They were thus precluded from accessing the only effective remedy which would have been available to them.

The Court recalls that it has found that the applicants, by settling their negligence action against the defendant health authority and doctors, denied themselves the possibility of an adversarial hearing on the circumstances of their son's death. It is not persuaded by the applicants' argument that the negligence action, had they persisted with it, would not have allowed the alleged post-death conduct of the doctors to have come to the fore. The Court has already stated that it cannot speculate on how the proceedings before the Welsh Office would have evolved had the applicants maintained their appeal. It must also have regard to the fact that a criminal investigation was opened into their allegations that the doctors who treated their son were guilty of criminal misconduct. Having regard to the evidence on which the applicants relied to corroborate their allegations, the Court cannot conclude that the decision not to bring charges against the doctors was in any way arbitrary or symptomatic of an inadequate investigation.

For the Court, the essence of the applicants' complaint is that they were unable to sue the doctors in a separate civil action for damages arising out of the doctors' alleged post-death misconduct with respect to their son's medical records. However, the Court has already established that the applicants had no arguable basis in domestic law for invoking such a right. In these circumstances they cannot be said either to have an arguable claim for the purposes of Article 13 of the Convention.

It follows that this complaint must also be rejected as being manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.

S. Dollé
Registrar

J.-P. Costa
President