

## Protection from what? The nullifying effect of section 139

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Seal v Chief Constable of South Wales Police  
House of Lords, 4 July 2007  
[2007] UKHL 31

*Where leave is required, the failure to obtain it will render proceedings null and void*

### Introduction

Philosophers, it is said, spend their time reflecting on questions such as whether a blind man, able to distinguish by touch between a cube and a sphere, would, if he were made to see, be capable of recognising them purely by sight<sup>2</sup>. Or how many grains one would have to remove before a heap of sand ceased to be such<sup>3</sup>. The House of Lords has recently had an opportunity to indulge in a similar exercise<sup>4</sup>. Their Lordships' reflections did, however, have a very real impact on one would-be litigant.

### The Facts

On 9 December 1997, Mr Seal was arrested for breach of the peace after an incident at his mother's house. The facts are contested, but it seems that he was taken out of the house and into the street, and that as a result of what happened there, he was removed to a place of safety under section 136 of the *Mental Health Act 1983* ('MHA 1983'). Mr Seal was detained, initially in the place of safety and then under section 2 of the Act. He was discharged just over a week later.

Mr Seal wished to argue that his detention had been unlawful and to claim damages against the police. At first, he was represented by solicitors, but when, finally, he issued proceedings, he was acting in person. That was on 8 December 2003, immediately before the six-year limitation period was due to expire. The Chief Constable served a defence, which addressed the substance of Mr Seal's claim but also relied on section 139 of MHA 1983. The Chief Constable argued that because Mr Seal had not obtained leave before issuing his claim, it should be struck out. That was what happened, and the strike-out was upheld, both by the High Court and by the Court of Appeal<sup>5</sup>. As the limitation period had by now expired, Mr Seal could not issue fresh proceedings for the same cause of action. It seems this represented a significant loss to Mr Seal, because he would have had a strong claim<sup>6</sup>.

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2 This problem was posed by William Molyneux to John Locke in 1688. See <http://plato.stanford.edu/entries/molyneux-problem/>

3 The so-called 'Sorites paradox'. See <http://plato.stanford.edu/entries/sorites-paradox/>

4 See, for example: Adrian Oliver, *Statute barred, Solicitors Journal*, 20 July 2007, p 942.

5 *Seal v Chief Constable of South Wales* [2005] EWCA Civ 586, [2005] 1 WLR 3183.

6 See, for example: Baroness Hale at [60].

## The Law

In MHA 1983, section 139 is headed ‘Protection for acts done in pursuance of this Act’. At the relevant time, the first two sub-sections stated:

- “(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.”

## The issue

There was only one issue before the House of Lords. It concerned the section 139(2) requirement for leave: what would become of any proceedings that were initiated without it? Would they be a nullity or should they simply be stayed until leave could be obtained?<sup>7</sup>

Baroness Hale sought to explain the context in which this issue arose. She noted that both the domestic courts and the European Court of Human Rights (‘ECtHR’) had taken particular care to ensure that prisoners were able to gain ready access to the courts,<sup>8</sup> and she said they

*“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.”*<sup>9</sup>

## The Decision

Their Lordships divided three-to-two on the issue, with the majority comprising Lord Bingham of Cornhill, Lord Carswell (who simply agreed with Lord Bingham)<sup>10</sup> and Lord Brown of Eaton-under-Heywood, and the minority, Lord Woolf and Baroness Hale of Richmond. In the course of their judgments, they considered the legislative background to section 139, some relevant authorities (including the *Griffiths* case) and three other propositions.

### (a) Legislative background

Lord Bingham, Baroness Hale and Lord Brown discussed the provisions that had preceded section 139.

- (i) The *Lunacy Acts Amendment Act 1889* gave immunity from civil or criminal liability to anyone acting in good faith or with reasonable care. Unless those things were lacking, any proceedings might be struck out, but they could at least be issued without leave. These provisions found their way into the *Lunacy Act 1890*.

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7 See: Lord Bingham at [2]; Lord Woolf at [23]; Baroness Hale at [37]; and Lord Brown at [65].

8 See, for example: *R v Secretary of State for the Home Department, ex parte Leech* [1994] QB 198; *R v Secretary of State for the Home Department, ex parte Simms* [2000]

2 AC 115; *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532; and *Golder v United Kingdom* (1975) 1 EHRR 524.

9 Baroness Hale at [38].  
10 At [63].

- (ii) The *Mental Treatment Act 1930* offered the same immunity as that contained in the 1889 Act,<sup>11</sup> but instead of providing a defence, it shifted the onus onto the plaintiff by requiring that he or she obtain leave before issuing proceedings<sup>12</sup>. For leave to be granted, the court would have to be satisfied that there were substantial grounds for the contention that the proposed defendant had acted in bad faith or without reasonable care<sup>13</sup>. This provision was preserved by section 141 of the *Mental Health Act 1959*.
- (iii) The *Mental Health (Amendment) Act 1982* preserved the existing immunity from suit and the requirement for leave<sup>14</sup>. With regard to criminal proceedings, however, it said that such leave must be obtained, not from the High Court, but from the Director of Public Prosecutions. In addition, it would no longer be necessary for an intending plaintiff to show that there were substantial grounds for believing that his or her opponent had acted in bad faith or without reasonable care<sup>15</sup>. (Ultimately, the test would be simply whether a case deserved further investigation by the court<sup>16</sup>.) Finally, neither the substantive defence nor the procedural protection would now apply to proceedings against the Secretary of State or the NHS<sup>17</sup>. It was these provisions that were consolidated as section 139(1) & (2) of MHA 1983.

Before the 1982 amendment and its 1983 consolidation, section 141 of the 1959 Act had been considered by two official inquiries<sup>18</sup>. According to Lord Bingham, these established that the requirement for leave

*“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.”*<sup>19</sup>

However, “it was also known that staff working with mental patients were anxious about their legal position and the protection available to them”<sup>20</sup>. To this, Baroness Hale replied:

*“[P]rotection from what? It cannot have been intended or expected that staff would be protected from all knowledge of possible claims. [...] 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.”*<sup>21</sup>

Their Lordships also considered a number of relevant decisions.

### (b) Authorities

Perhaps the clearest example of the protective effect of section 139 came in the *Griffiths* case<sup>22</sup>. There, a nurse was convicted of assaulting a patient but, it later emerged, no leave had been obtained for the relevant criminal proceedings. Were those proceedings therefore a nullity? Counsel for the prosecution

11 *Mental Treatment Act 1930*, s 16(1).

12 *Mental Treatment Act 1930*, s 16(2).

13 Lord Bingham at [9]; Baroness Hale at [46].

14 *The Mental Health (Amendment) Act 1982*, s 60.

15 Lord Bingham at [10]; Baroness Hale at [47].

16 *Winch v Jones* [1986] QB 296.

17 Why the statutory protection continued to be enjoyed by local authorities is considered in: David Hewitt, *Something less than ready access to the courts: section 139 and local authorities*, *Journal of Mental Health Law*, February

2000, pp 73–82.

18 *Department of Health and Social Security, 1976, A Review of the Mental Health Act 1959; Department of Health and Social Security, the Home Office, the Welsh Office and the Lord Chancellor's Department, 1978, Review of the Mental Health Act 1959, Cmnd 7320. See also: Dr Larry Gostin, A Human Condition, MIND.*

19 Lord Bingham at [11].

20 *Ibid.*

21 Baroness Hale at [49].

22 *R v Bracknell Justices, ex parte Griffiths* [1976] AC 314.

and the defence both thought so, and the *amicus* instructed by the DHSS did not demur. Intriguingly, he was Harry Woolf, who, when suitably ennobled, would rule that Mr Seal's claim was not in fact null and void<sup>23</sup>. The appeal court in *Griffiths* took the same view as the advocates and quashed the nurse's conviction<sup>24</sup>.

Lord Bingham said it was "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"<sup>25</sup>. Speaking of the understanding reached in the case, Lord Brown noted there had "been no suggestion amongst academic commentators that this concession might have been wrongly made or might not apply in a civil context."<sup>26</sup>

Those of their Lordships that were in the minority were wary of the *Griffiths* case. Lord Woolf, whose connection with the case was particularly intimate, did not consider it conclusive as to the outcome of Mr Seal's 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*"<sup>27</sup>. He was unable to add further elucidation, however, and concluded, perhaps ruefully, "At this distance of time I cannot explain my inactivity or counsels' concession"<sup>28</sup>.

The second of the three grounds upon which Lord Woolf sought to distinguish the decision in *Griffiths* was that it preceded a judgment in which, he said, Lord Hailsham "provided much needed illumination on the consequences of non compliance with a statutory provision"<sup>29</sup>. That judgment was in *London & Clydeside Estates Ltd v Aberdeen District Council* [1980] 1 WLR 182 and Lord Hailsham's illuminating decision might, perhaps, be summarised as follows:

- (i) Any statutory requirement that governs the performance of a legal authority must "be obeyed down to the minutest detail."
- (ii) Any disobedience to such a requirement must, however, be judged according to its impact "on the rights of the subject viewed in the light of a concrete state of facts and a continuing chain of events."
- (iii) There might be flagrant cases, in which disobedience could be used by an innocent party "as a shield or defence without having taken any positive action of his own."
- (iv) Conversely, disobedience "may be so nugatory or trivial" that the errant party should be allowed to proceed.
- (v) In the majority of cases, it would be wise for a disobedient party to throw himself upon the mercy of the court, and for the court to dispense its mercy generously, "so as not to deprive the subject of his due or themselves of their power to act"<sup>30</sup>.

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23 Lord Woolf at [30]–[31].

24 There was a similar outcome in *R v Angel* [1968] 1 WLR 669, *Secretary of State for Defence v Wain* [1970] AC 394 and *R v Pearce* (1980) 72 Cr App R 295.

25 Lord Bingham at [13].

26 Lord Brown at [71]. See, for example, Larry Gostin, *Mental Health Services – Law and Practice*, 1986, Shaw & Sons, at para 21.26.2.

27 Lord Woolf at [30].

28 Lord Woolf at [31].

29 Lord Woolf at [32].

30 *London & Clydeside Estates Ltd v Aberdeen District Council* [1980] 1 WLR 182, per Lord Hailsham of Marylebone LC at 189–90.

- (vi) The courts need not try “to fit the facts of a particular case [...] into rigid legal categories[,] or to stretch or cramp them on a bed of Procrustes invented by lawyers for the purposes of convenient exposition”<sup>31</sup>.

Lord Woolf concluded:

*“[I]n 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.”*<sup>32</sup>

This gloss was derived from Lord Woolf’s own judgment in *R v Secretary of State for the Home Department, ex parte Jeyeanthan* [2000] 1 WLR 354, a case in which, according to Lord Bingham, he “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”<sup>33</sup>. Lord Brown, however, did not think that section 139 was “remotely akin” to the procedural requirement under consideration in *Jeyeanthan*<sup>34</sup>.

The final ground upon which Lord Woolf sought to distinguish *Griffiths* was that it involved criminal proceedings whereas Mr Seal’s was a civil claim. He said that as far as the consequences of non-compliance were concerned, there was “a fundamental distinction” between the two, for in a criminal case, “there is no question of the defendant being deprived of his right [of] access to a court to protect his rights. On the contrary the statutory requirement is a protection against his being prosecuted”<sup>35</sup>.

For Baroness Hale, too, this distinction was significant. Even if the concession in *Griffiths* were correctly made, she said, it need not apply to both civil and criminal proceedings under MHA 1983:

*“Although both are mentioned in section 139(2) it does not follow that the consequences of non-observance are identical. [...] Prosecutions are brought, not to serve any private interest, but to protect the public interest. That is why those who exercise prosecutorial discretion [...] 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.”*<sup>36</sup>

Lord Brown, however, was not convinced by this argument. He would find that Mr Seal’s proceedings were a nullity, and he called Baroness Hale’s “an impossible conclusion”. He noted that the only distinction MHA 1983 draws between criminal and civil proceedings is as to who might grant leave, and he continued:

*“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.”*<sup>37</sup>

Even more importantly, Lord Brown said, civil proceedings brought without leave had always been considered a nullity and the alteration made by the current Mental Health Act “provides no logical basis for supposing [that they] should suddenly in 1983 change character”<sup>38</sup>.

31 “In Greek legend Procrustes was a robber of Attica, who placed all who fell into his hands upon an iron bed. If they were longer than the bed he cut off the overhanging parts, if shorter he stretched them until they fitted it. [...] Hence, any attempt to reduce men to one standard, one way of thinking, or one way of acting, is called ‘placing them on Procrustes’ bed’” (Brewer’s Dictionary of Phrase & Fable, 2005, seventeenth edition, Weidenfeld & Nicolson).

32 Lord Woolf at [33].

33 Lord Bingham at [6]. See also: Lord Bingham at [7].

34 Lord Brown at [74].

35 Lord Woolf at [34].

36 Baroness Hale at [51]–[52].

37 Lord Brown at [72].

38 *Ibid.* See also: Lord Bingham at [16].

There was a further authority upon which the minority relied. The case of *Rendall v Blair* (1890) 45 Ch D 139 concerned section 17 of the *Charitable Trusts Act 1853*, which provided that the Charity Commissioners should be notified before any proceedings were commenced for obtaining relief against a charity; that they would then decide whether to authorise the proceedings; and that no proceedings “shall be entertained or proceeded with” without such an authorisation<sup>39</sup>.

In this case, both the majority and the minority were in agreement as to the import of these conditions. Baroness Hale said they were “no less peremptory”, and Lord Bingham that they were “not markedly weaker than”, section 139<sup>40</sup>. Baroness Hale noted that in *Rendell*, the Court of Appeal was able to find for the plaintiff, with Lord Bowen holding:

*“Unless the duty [to obtain leave] 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.”*<sup>41</sup>

Lord Brown, however, felt able to distinguish that decision from the case of Mr Seal. He said that the context and history of section 17 were markedly different from those of section 139, and that those differences “provide ample grounds for reaching different conclusions as to their effect”<sup>42</sup>.

Aside from the authorities, Lord Bingham also commented that the House had not been referred to any judicial opinion or scholarly commentary suggesting that failure to obtain leave was merely a procedural irregularity that might be cured, rather than a flaw that rendered the proceedings null. He concluded that when section 139 went through Parliament in 1982 and 1983, there was “a clear consensus of judicial, professional and academic opinion that lack of the required consent rendered proceedings null,” and that Parliament must be taken to have legislated on that basis<sup>43</sup>.

### (c) Other propositions

The House also considered several other propositions.

#### (a) Clear words are required

Those of their Lordships that found themselves in the minority laid great store by the finding of Viscount Simonds in *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1960] AC 260 that

*“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.”*<sup>44</sup>

For her part, Baroness Hale found more recent support for this principle in the *Simms* case and the *Daly* case,<sup>45</sup> and she explained the effect of these dicta upon her:

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39 The decision in that case was followed in *In re Saunders (A Bankrupt)* [1997] Ch 60.

40 Baroness Hale at [43]; Lord Bingham at [6].

41 *Rendell v Blair* (1890) 45 Ch D 139, per Bowen LJ at p 158.

42 Lord Brown at [76].

43 Lord Bingham at [15].

44 *Pyx Granite Co Ltd v Ministry of Housing and Local*

*Government* [1960] AC 260, 286. See, for example, Lord Woolf at [29]. A similar requirement was imposed in *Bradford Corporation v Myers* [1916] 1 AC 242 and *Magor and St Mellons RDC v Newport Corporation* [1952] AC 189.

45 *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115, per Lord Hoffmann at 131; *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532, per Lord Cooke of Thorndon at [30]–[31].

*“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.”*<sup>46</sup>

Baroness Hale concluded:

*“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.”*<sup>47</sup>

The requirement for clear words was never, however, in doubt. What distinguished the minority from the majority was that in the view of the latter, clear words was precisely what section 139 contained.

Lord Bingham said he wished to “echo and endorse” the words of Viscount Simonds in *Pyx*, but added that section 139 was “a clear and emphatic prohibition”. In fact, he said, “the House has been referred to no enactment in which clearer or more emphatic language is used”<sup>48</sup>. The provisions in that section did not contradict the judgment in *Pyx*, and to find against Mr Seal “is not to sanction a departure from what Viscount Simonds rightly considered to be a fundamental rule”<sup>49</sup>.

(b) *The ECHR requires the right of access to a court*

Article 6 of the European Convention on Human Rights (‘ECHR’) implies that everyone has the right of access to a court,<sup>50</sup> and in *Seal*, both the majority and the minority referred to the *Ashingdane* case<sup>51</sup>. Baroness Hale cited the following portion of the judgment of the ECtHR in that case:

*“Certainly the right of access to the courts is not absolute but may be subject to limitations; these are permitted by implication [...] 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.”*<sup>52</sup>

Lord Bingham did not think that this requirement was breached by section 139. Citing *Ashingdane* himself, he said that it was a legitimate objective of legislation to protect those responsible for the care of mental patients from being harassed by litigation;<sup>53</sup> and citing domestic authority,<sup>54</sup> he added that the threshold for obtaining leave under section 139 “has been set at a very unexact level. An applicant with an arguable case will be granted leave”<sup>55</sup>.

Baroness Hale did not agree. She said that in order to comply with Article 6, a restriction on a fundamental right must first bear a rational connection with the legitimate aim pursued<sup>56</sup> and also be proportionate to that aim<sup>57</sup>. There was obviously such a rational connection where court-access was denied to people “who have previously abused that right”, 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

46 Baroness Hale at [41].

47 Baroness Hale at [54]. See also: Lord Woolf at [35].

48 Lord Bingham at [7].

49 Lord Bingham at [18].

50 See, for example: *Golder v United Kingdom*, *supra*.

51 *Ashingdane v United Kingdom* (1985) 7 EHRR 528.

52 *Ashingdane v United Kingdom*, *supra*, para 57; cited by

Baroness Hale at [56] [emphasis supplied by Baroness Hale].

53 *Ashingdane v United Kingdom*, *supra*, para 58. See also: *M v United Kingdom* (1987) 52 DR 269, 270.

54 *Winch v Jones*, *supra*.

55 Lord Bingham at [20].

56 Baroness Hale at [57]–[58].

57 Baroness Hale at [59]–[61].

vexatious litigant”<sup>58</sup>. For that reason, Baroness Hale thought that section 139 went too far. In another sense, however, she felt that it might not go far enough. She noted that it only relates to acts done in pursuance of MHA 1983, and, she added:

*“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.”*<sup>59</sup>

Baroness Hale suggested that Mr Seal’s was a case in point:

*“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.”*<sup>60</sup>

With regard to her second point, Baroness Hale said that although, in some cases, the effect of section 139 might be proportionate, in others it would not:

*“If section 139(2) has the effect that proceedings are always a complete 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.”*<sup>61</sup>

Lord Brown attacked the suggestion that section 139 was disproportionate, which, he said, “seems to me fanciful”<sup>62</sup>.

(c) *A price worth paying*

The minority argued that it would be unjust to invalidate Mr Seal’s proceedings merely because he had failed to comply with a statutory requirement of which he was ignorant and at a time when a statutory time-bar prevented him from retrieving his position<sup>63</sup>.

Baroness Hale argued that if it were discovered in time, a failure to obtain leave could be put right with ease and without prejudice to the defendant; and that if it were not discovered in time, and judgment were entered for the claimant, no injustice would be done to the defendant (presumably because the judgment demonstrates that if it had been sought, leave would have been granted). A serious injustice would, however, be done to the successful claimant if his or her judgment were set aside, the more so if any fresh proceedings would by then have become statute-barred. Baroness Hale concluded:

*“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.”*<sup>64</sup>

Lord Bingham was less sympathetic. As he pointed out, if Mr Seal had issued proceedings at any time before the very end of the six-year limitation period, his failure to obtain leave 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”<sup>65</sup>.

In fact, Lord Bingham went further, finding very clear utility in Mr Seal’s predicament. Parliament must, he said, “have recognised the risk that hard cases, such as Mr Seal’s, may occur, but have considered the

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58 Baroness Hale at [57].

59 Ibid.

60 Baroness Hale at [58].

61 Baroness Hale at [59].

62 Lord Brown at [75].

63 See, for example: Lord Woolf at [27].

64 Baroness Hale at [53].

65 Lord Bingham at [17].

occasional occurrence of such a case to be a price worth paying for the reassurance and protection given by” section 139<sup>66</sup>. Lord Brown added that in circumstances such as those of Mr Seal,

*“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”.*<sup>67</sup>

Putting the counter-argument, Lord Woolf said he could not accept that nullity “should be inferred to be Parliament’s intention”, because, as the facts of this case illustrated, “to do so may cause grave injustice”. To allow the likes of Mr Seal to prevail, however,

*“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.”*<sup>68</sup>

## Comment

In the case of the unfortunate Mr Seal, the judgments of the majority and the minority diverge only in their conclusion. There was virtual unanimity as to the relevant authorities and what they required. But it is surely the reasoning of the majority, hard-nosed though it might seem to be, that is most compelling.

In effect, Lord Woolf argued for a return to the position that obtained under the *Lunacy Acts Amendment Act 1889*: the failure of a claimant to obtain leave would be merely something to be taken into account if his or her opponent raised it in the course of the proceedings. And yet, if there’s one thing we can be sure of it’s that our legislators long ago fell out of love with the 1889 position. We know this because, in the legislation it passed subsequently, Parliament made sure to reverse that position. It is the procedure introduced by the *Mental Treatment Act 1930*, with its requirement for ‘up-front’ leave, that has been perpetuated by subsequent statutes and that finds itself reflected in section 139 of the current Act.

Baroness Hale, who was also in the minority, took a similar line, and she suggested that it was clear from section 139 that if anyone, such as the claimant, took the point, leave must be obtained. But the section does not say precisely that. It says that *no proceedings shall be brought* without leave. That is a rather different thing.

As Lord Bingham observed, section 139 takes the form of an emphatic prohibition on proceedings for which no leave has been obtained. It is perhaps surprising, therefore, that their Lordships chose to concentrate on the final phase of such proceedings, and that none of them thought to look at the circumstances in which those proceedings were allowed to come into being. It might prove instructive to consider a further question: at the point of issue, what is the responsibility of the court where no leave has been obtained? Shouldn’t it simply refuse to issue the proceedings? Isn’t that the logical consequence

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66 *Ibid.*

68 Lord Woolf at [26].

67 Lord Brown at [75]. The case he cited was *D v East Berkshire Community Health NHS Trust* [2005] UKHL 23, [2005] 2 AC 373.

of the very clear words *no proceedings shall be brought*? Seen in that light, the philosophical question that faced their Lordships appears a little clearer. If the proceedings should never have been issued, can there be any substantive objection to their being deemed to be at an end?

In stressing the hardship that would be caused to Mr Seal if his proceedings were deemed a nullity, Baroness Hale raised arguments that go more to the *requirement* for leave than to its application in this case. That is not, however, sufficient reason to find for Mr Seal. It is surely permissible to criticise the requirement for leave, but, while it remains, to accept both that it should be properly enforced and that its enforcement will occasionally bear down hard on a dilatory claimant. In fact, it seems that Lord Brown was willing to contemplate that very possibility<sup>69</sup>.

The amendments that the *Mental Health Act 2007* will make to MHA 1983 do not extend to section 139. The *Draft Mental Health Bill 2004* did, in fact, make proposals in that regard<sup>70</sup>. They would have:

- (a) removed the requirement for leave, whether of the High Court or the DPP, before MHA 1983 proceedings were issued;
- (b) changed the emphasis, so that good faith or reasonable care would be a defence, not something whose want a claimant would have to prove;
- (c) given NHS bodies (but not the Secretary of State) the same defence provided for local authorities; but
- (d) prevented the defence being used, not just in judicial review proceedings, but also in civil proceedings for negligence or for battery.

It is unfortunate, perhaps, that those proposals came to nothing, for they might have done a great deal to alleviate the concerns raised by Mr Seal's case, and possibly to prevent similar cases arising in future.

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<sup>69</sup> Lord Brown at [74].

<sup>70</sup> Department of Health, 2004, *Draft Mental Health Bill*, Cm 6305-I, cl 298. See also, Department of Health, 2004, *Draft Mental Health Bill: Explanatory Notes*, Cm 6305-II, paras 492–494.