for that contention. If the essence of imprisonment is being made to stay in a particular place by another, that arguably applied to L's situation. His initial compliance had been secured via sedation and, had he wanted to leave the hospital, he would have been detained. To employ Lady Hale's nomenclature – which bears a striking resemblance to Lord Steyn's reasoning in *Bournewood* – "[t]he idea that [L] was a free agent, able to come and go as he pleased, is completely unreal". The fact that L was not aware of his detention is irrelevant: it is well-established that a person can be imprisoned without their being aware of it (*Meering v Grahame-White Aviation Co. Ltd.* (1919) 122 L.T. 44).

While the question of whether a deprivation of liberty can occur without imprisonment under the common law – and, relatedly, whether the "*Bournewood* saga" as Lady Hale described it would be decided differently today – has been left for another day, the Supreme Court's judgment serves as a timely reminder of the protection offered by the common law.

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A DUTY OF CARE TO BREACH MEDICAL CONFIDENTIALITY?

HUNTINGTON'S disease (HD) is a degenerative, fatal, neurological condition, caused by a genetic abnormality, with symptoms generally beginning in middle age. Anyone with the abnormality inevitably develops HD; each of their children has a 50% risk of inheriting the abnormality and thus developing it. HD is currently incurable, so a positive genetic test provides "the bleakest kind of self-knowledge: the knowledge of our destiny, not the kind of knowledge that you can do something about, but the curse of Tiresias" (M. Ridley, *Genome* (London, 1999), 64). The legal implications for clinicians, privy to such tragic knowledge, were explored in *ABC v St. George's Healthcare NHS Trust and others* [2020] EWHC 455 (QB).

The claimant's father (XX) had killed the claimant's mother and been detained at D's Springfield Psychiatric Hospital. He received care from a multidisciplinary team of D's staff led by Dr. O (consultant forensic psychiatrist), including family therapy sessions also attended by the claimant. From his symptoms, clinicians suspected that XX was suffering from HD, so referred him to the neurology department at St. George's Hospital, which saw him in June 2009 and agreed. XX declined confirmatory genetic testing, and insisted that he did not consent to his daughters being told about the HD diagnosis. Dr. O's team debated the matter and decided not to override XX's patient confidentiality (professional

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guidelines permitted breaching confidentiality only in exceptional circumstances, in the public interest, to prevent the risk of death or serious harm – see e.g. *W v Egdell* [1990] 1 Ch. 359), but sought advice on managing the situation from the consultant geneticist at St. George's.

Also in June 2009, the claimant became pregnant. A multi-disciplinary meeting took place at Springfield in September, involving the claimant. She did not disclose her pregnancy at the meeting, but told XX afterwards, so the news became known to D's team. In the light of the claimant's pregnancy, further urgent advice was sought from the consultant geneticist, and Dr. O continued to urge XX to disclose his diagnosis to his daughters. XX finally agreed to meet the geneticist in October (when the claimant was 19 weeks' pregnant) and consented to genetic testing, which confirmed the diagnosis of HD. XX was told the result in December, by which time the claimant was already a few days over 24 weeks' pregnant and thus past the last date for a lawful abortion. Her baby was born in April 2010. Later that year, Dr. O accidentally informed the claimant of XX's HD diagnosis. In 2013, the claimant also tested positive for the HD genetic abnormality (thus her child was at 50% risk), at which point she was expected to develop symptoms within a decade.

The claimant brought proceedings in negligence against D, alleging vicarious liability for breach of an alleged duty of care owed to her by Dr. O and team, in not disclosing XX's condition at a stage that would have allowed her to undergo genetic testing and terminate her pregnancy, which she alleged she would have done. The trial before Yip J. was in fact the third iteration of the litigation, as the defendants had previously applied to strike out the claim as disclosing no arguable duty of care. That application succeeded before Nicol J. ([2015] EWHC 1394 (QB)), but the Court of Appeal regarded the duty-of-care allegations as arguable ([2017] EWCA Civ 336) and ordered the case to proceed to trial.

Armed with the Court of Appeal's analysis, Yip J. re-examined the duty-of-care question. One might have imagined that this was a paradigm example of a "novel" factual situation requiring consideration of the public policy limb of *Caparo Industries plc. v Dickman* [1990] 2 A.C. 605, but then again, one might have thought the same about the first ever claim in negligence against an A&E receptionist, yet the Supreme Court in *Darnley v Croydon Health Services NHS Trust* [2018] UKSC 50 regarded that fact situation as within existing duty-of-care authority involving medical staff. Novelty is in the eye of the beholder. For this reason, the claimant tried two duty-of-care arguments based on existing precedent. The first was that she was owed a duty by virtue of a doctor/patient relationship with Dr. O's team, because of her participation in the family therapy. Although Yip J. agreed, this did not help the claimant since her allegation of negligence lay outside the scope of such duty, since it could not "properly be characterised as badly performed family therapy …. Participation in

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family therapy does not bring with it a right to receive confidential information about other participants".

The claimant's second argument invoked the familiar duty-of-care "trump card" that D's clinicians "not only assumed responsibility for providing the family therapy but also assumed responsibility for deciding whether she should be told of her father's diagnosis ... by embarking on the investigation as to how to confront the 'difficult issue' ... and having discussions about whether the claimant should be told". In exemplary analysis, the judge rejected this argument, addressing an issue that is downplayed by the new orthodoxy of *Michael v Chief Constable of South Wales* [2015] UKSC 2 and *Robinson v Chief Constable of West Yorkshire* [2018] UKSC 4, namely that where assumption of responsibility is pleaded (as, e.g., an exception to the default setting of no liability for pure omissions) in novel circumstances not involving the application of an established duty to a different factual situation, it must also be subjected to the *Caparo* policy scrutiny (as was clear before *Michael* and *Robinson* – see e.g. *Swinney v Chief Constable of Northumbria (No. 1)* [1997] Q.B. 464).

So should the duty of care be extended to this novel situation? Here the judge emphasised the importance of incrementalism and that the facts involved an unusually proximate relationship between the claimant and D, and one by one rejected D's policy arguments against recognising a duty. It would not put doctors in an impossible situation of conflict, since "it has long been recognised that the duty of confidence is not absolute"; nor would it negatively impact on the relationship of trust and confidence between doctor and patient, since a duty of care "would simply recognise and enforce the need for the balancing exercise already identified in the professional guidance". Floodgates and resource implications arguments were also rejected, since "the need for close proximity before a doctor is found to owe a duty to any person outside the immediate doctor-patient relationship acts as sufficient restraint on uncontrolled extension of the duty of care". Overall, it was "fair, just and reasonable to impose on D a legal duty to the claimant to balance her interest in being informed of her genetic risk against her father's interest in preserving confidentiality in relation to his diagnosis and the public interest in maintaining medical confidentiality generally", extending not only to conducting the necessary balancing exercise but also to acting in accordance with its outcome.

Alas for the claimant, the judge went on to hold that the duty had not been breached. Despite some minor criticisms, Dr. O behaved reasonably and logically in an agonisingly difficult situation: he followed professional guidelines and the advice of the geneticists, took account of competing views within his team, and appropriately balanced the claimant's pregnancy against fears for XX's wellbeing if confidentiality was breached. This detailed conclusion was bolstered by the fact that, when the claimant's

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sister became pregnant in 2010, the claimant did not disclose XX's diagnosis to her. Acknowledging that she placed very little weight on the point, Yip J. remarked that it would nonetheless be "unduly harsh to hold D liable in negligence for reaching the same decision as the claimant did in relation to her sister". The judge also found that, even if she had established breach, the claimant failed on the balance of probabilities to establish factual causation, given the extremely tight timetable, how long it takes to go through genetic counselling and testing, how distressing a late termination is and, again, the claimant's response to her sister's pregnancy.

As an application of the law of negligence, this outcome is impeccable. But it is hard not to think that the law as an institution might have compounded the claimant's tragedy, not to wonder whether legal advice to embark on private law litigation in this situation was helpful. Establishing a novel duty of care is of great excitement for negligence lawyers, but a hollow victory for claimants who then fail to prove that it was breached (such as *Swinney v Chief Constable of Northumbria (No. 2)* (1999) Times, 25 May). Adversarial litigation dominated the claimant's remaining symptom-free years (of course we cannot speculate whether focusing on it might, of itself, have been of help to her). She will now bear the costs of a trial that lasted six full days, with multiple counsel and at least eight expert witnesses. And even the claimant's own expert witnesses admitted that the ethical dilemma faced by Dr. O and his team was agonisingly difficult, yet for years he stood accused of behaving as no reasonable consultant psychiatrist would have done. It may well be that the guidelines on medical confidentiality should be revised to give family members of those diagnosed with congenital conditions the right to know their fate. But an action in negligence for wrongful birth based on the current guidelines, was, tragically, not the right solution.

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VICARIOUS LIABILITY IN THE TWENTIFIRST CENTURY

IN *Lloyd v Grace Smith* [1912] A.C. 716, in the words of Lord Macnaghten (p. 727), "in the office of Grace, Smith & Co., a firm of solicitors in Liverpool of long-standing and good repute, Emily Lloyd, a widow woman in humble circumstances, was robbed of her property". In *Barclays Bank v Various Claimants* [2020] UKSC 13 the allegation was that 126 young women, some as young as 16, in the consulting rooms of a doctor to whom they had been sent by the highly reputable Barclays Bank, were robbed of their innocence. Mrs. Lloyd had sought the advice

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