

Articles

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The Operational Obligation under Article 2 of the European Convention on Human Rights and Challenges for Coherence – Views from the English Supreme Court and Strasbourg

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Abstract: The European Court of Human Rights and the English Supreme Court have expanded the scope of the positive obligation to protect the right to life under art 2 of the Convention. A question of particular concern for public authorities is the extent to which negligent conduct may fall within art 2. Strasbourg principles relating to standing for victims, as well heads of damage (just satisfaction), are more generous than the Fatal Accidents Act 1976 in the UK. The art 2 obligation also mandates consideration of matters which would not be regarded as justiciable under the English common law. This article provides a critique of recent developments in the case law under art 2, both at Strasbourg and in the English Supreme Court, and draws out the consequent challenges for coherence in English law.

I Introduction

Article 2 of the European Convention on Human Rights (ECHR) provides that ‘everyone’s right to life shall be protected by law’ and that ‘no one shall be deprived of his life intentionally’. The positive obligation under art 2, often described as the operational obligation, to take appropriate steps to safeguard life which first emerged in *Osman v United Kingdom* is maturing, having been the subject of recent litigation at the highest level in the United Kingdom and also in Strasbourg. *Osman* and subsequent authorities have recognised that there may be such an obligation where an individual is at risk from the criminal conduct of a third party or where the individual is in the care of the state and especially

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vulnerable to the risk of suicide. Liability may also follow from a failure properly to control inherently dangerous activities or failing to respond appropriately to natural disasters.

An obvious and very important question that arises regarding art 2 is in what circumstances does negligent conduct which is attributable to the state and which causes death constitute a violation of the positive obligation under art 2? For example, in what, if any, circumstances will the conduct of the medical profession, the ambulance service or even the armed forces engage art 2? This issue is assuming increasing importance in the UK in light of attempts by claimants to frame actions that are based upon negligent failures to protect life as culpable conduct under art 2. English common law has generally adopted a restrictive approach to public authority liability in negligence where the impugned conduct is a failure to act, in other words an omission. In the face of these restrictive common law rules, claimants are now utilising the action against public authorities under sec 7 of the Human Rights Act (HRA) in order to seek redress where the effect of common law and statute would be to deny a claim. In giving further effect to the ECHR, the HRA grants a right of action and the possibility of damages to some ricochet victims of art 2 violations (such as the parents of adult children) who would not have any claim for wrongful death under the Fatal Accidents Act 1976. In a series of recent cases, the Supreme Court has relaxed the requirements for engagement of art 2 under the HRA, thereby creating conditions for widespread circumvention of the scheme laid down in the Fatal Accidents Act 1976 and in circumstances beyond those that would be required according to ECHR jurisprudence.

At the same time, the Supreme Court has confirmed the firm rejection by common law rules of liability of public authorities, such as the police, where the conduct complained of is an omission. The issue of public authority liability, whether at common law or under the HRA may engage challenging policy considerations regarding the allocation of resources. The HRA and the common law now potentially provide a different answer to whether a public authority may be liable in relation to negligent conduct; this is not uncommon, the same set of facts may yield a number of causes of action. However, where the acceptance or rejection of liability involves the weighing of policy considerations, coherence is threatened where different answers are given depending upon how a claim is framed. The rule of law requires that individuals should be able to predict the consequences of their behaviour.

Furthermore, much recent academic discussion in the UK has focussed on the law-making relationship between the European Court of Human Rights in Strasbourg (ECtHR) and the UK Supreme Court. Section 2 HRA requires English courts 'to take account' of Convention case law; English courts are not bound by Strasbourg. English courts have grappled with the question of whether they

should be content to shadow Strasbourg by applying a ‘mirror’ principle to reflect previously decided Strasbourg case law or whether it is permissible to develop English law by jumping beyond the scenarios and principles that have been laid down by the ECtHR.

These issues have come to the fore in recent decisions of the English Supreme Court in *Rabone v Pennine Care NHS Trust*,¹ *Smith v Ministry of Defence*² and *Michael v Chief Constable of South Wales*.³ This article will provide an analysis of the ECHR dimension in each case and evaluate their potential impact for future development of the law. The extent to which English, and indeed other European courts, are prepared to go beyond Strasbourg has the potential to have wider impact on ECHR jurisprudence generally. The development of ECHR principles is to a great extent an exercise in comparative law, as the ECtHR develops its case law through the search for consensus among the member states. Thus, new approaches in the UK have the capacity to shape developments in ECHR jurisprudence, as well as the domestic laws of the member states of the Council of Europe. It is an axiom of the common law that the ‘death of a human being could not be complained of as an injury’.⁴ This principle, somewhat ameliorated by the Fatal Accidents Act 1976, was the driving force behind the litigation under the HRA in *Rabone v Pennine Care NHS Trust*, *Smith v Ministry of Defence* and *Michael v Chief Constable of South Wales*, in each case a claim being brought by the parent of an adult child. As Baroness Hale observed in *Rabone*, ‘we are here because the ordinary law of tort does not recognise or compensate the anguish suffered by parents who are deprived of the life of their adult child’. Perhaps one of the most graphic instances of the apparent callousness of the effect of the common law and statute is exemplified by the facts in *Hicks v Chief Constable of South Yorkshire Police*,⁵ where the parents of two daughters killed at the Hillsborough football stadium as a direct result of police negligence in mismanaging the flow of football supporters had no claim in their own right, other than for funeral expenses, in relation to the death of their adult daughters who had been asphyxiated as a result of being crushed by the crowd.

Thus, while criticised by some,⁶ *Rabone* is a very important case for two reasons. First, it developed the contours of the right to life recognised by art 2

1 [2012] United Kingdom Supreme Court (UKSC) 2, [2012] 2 Appeal Cases (AC) 72.

2 [2013] UKSC 41, [2014] AC 52.

3 [2015] UKSC 2, [2015] 2 Weekly Law Reports (WLR) 343.

4 *Baker v Bolton* (1808) 1 Camp 493 per Lord Ellenborough.

5 [1992] 2 All England Law Reports (All ER) 65.

6 *A Tettenborn*, *Wrongful Death, Human Rights, and the Fatal Accidents Act* (2012) 128 Law Quarterly Review (LQR) 327.

ECHR and given further effect in English law by the Human Rights Act 1998 (HRA). Jurisprudence from the ECtHR under art 2 ECHR does recognise the ricochet harm that close relatives of a victim may suffer as a result of the death of their loved one. Melanie Rabone suffered from severe psychiatric illness and committed suicide having been allowed home for the weekend. Her parents were desperately concerned for her safety and her suicide was the very thing they most feared. By bringing proceedings under the HRA, Melanie Rabone's parents' recovered for their own distress attendant upon their daughter's death. Thus, where an art 2 violation is concerned the nature of the remedy available to those close to the deceased is widened beyond the scope of the Fatal Accidents Act 1976, which allows parents to claim bereavement damages only on the death of a child who was an unmarried minor, and the class of potential claimants is correspondingly larger. Additionally, while the ceiling on claims for bereavement damages under the Fatal Accidents Act is £ 12,980, Strasbourg has awarded up to € 65,000 to ricochet victims for art 2 violations. Furthermore, it is clear that the claim is an independent claim. However, as we shall discuss, it is unclear whether factual situations such as that presented in *Hicks* will be affected by these developments. Strasbourg jurisprudence would appear to exclude the facts in cases such as *Hicks* from the purview of the operational obligation; the Supreme Court, however, by a narrow majority in *Smith* has potentially opened up the ambit of art 2 so that negligence by the police force in a Hillsborough type situation might come within the operational obligation.

Michael is different from *Hicks* in that the facts do fit within the *Osman* type paradigm as the initial threat to life comes from the deliberate criminal acts of a third party, rather than the negligent conduct of a public authority which itself creates a dangerous situation. It is, however, the first time that the Supreme Court has admitted that a set of facts may meet the *Osman* threshold criteria for engagement of art 2 and arguably on facts (yet to be established at trial) that may not be as strong as other claims which have failed.⁷

The second reason for the significance of *Rabone* is that it clarified the relationship between Strasbourg and the Supreme Court in terms of the so-called 'mirror' principle deriving from the speech of Lord Bingham in *R (Ullah) v Special Adjudicator*.⁸ *Rabone* represented a departure from the approach taken by the

⁷ *Van Colle v Chief Constable of the Hertfordshire Police* [2006] 3 All ER 963.

⁸ [2004] United Kingdom House of Lords (UKHL) 26, [2004] 2 AC 323. See generally, *J Lewis*, The European Ceiling on Human Rights [2007] Public Law (PL) 720; *J Wright*, Interpreting Section 2 of the Human Rights Act: Towards an Indigenous Jurisprudence of Human Rights [2009] PL 595; *Lord Irvine of Lairg*, A British Interpretation of Convention Rights [2012] PL 237; *P Sales*, Strasbourg

Supreme Court in *Ambrose v Harris*,⁹ where the majority felt constrained from developing English law on account of the fact that Strasbourg had not yet spoken with a sufficient degree of clarity on the issue at hand (art 6 rights in respect of a suspect not yet arrested or detained at a police station). Drawing upon established principles, but without an all-fours factual analogy, the Supreme Court in *Rabone* extended the positive operational obligation under art 2 to a patient who had not been formally detained under the Mental Health Act. It is confirmation that, in ‘taking account’ of Strasbourg jurisprudence as required by sec 2 HRA, English courts are not limited in their development of the law to the factual situations within the scope of principle that Strasbourg has already enunciated. Any constraints that *Ullah* was perceived to have drawn have been rejected and we see the Supreme Court continuing to craft an indigenous jurisprudence of human rights. In terms of the substantive content of art 2, the Supreme Court has ensured that English law gives adequate and appropriate protection to the right to life of those who are vulnerable and in the care of the state.

In *Smith v Ministry of Defence*, a majority in the Supreme Court was prepared to countenance the further development of art 2 obligations, but this time in the context of military operations in Iraq, and again in the absence of any Strasbourg authority directly on point. This article will analyse *Rabone*, *Smith* and *Michael* together with the Strasbourg case law that has influenced these developments and consider the implications for future claims under the HRA. As will be seen there is an emerging prospect of the assimilation of ‘ordinary’ negligence by state authorities within art 2, a development which is not in this commentator’s view warranted by the Strasbourg case law. For English common lawyers there is also something of a paradox at the heart of the common law and HRA jurisprudence emerging from these cases. On one hand, in the common law negligence action the courts frequently express concerns that public authorities should not be distracted from their role as deliverer of services or rendered defensive by a fear of compensation claims and there has been a discernible hardening of resolve to ensure tort principles remain firm in the case of claims premised upon omissions to act. On the other hand, *Rabone*, *Smith* and *Michael* evidence a willingness on the part of the UK’s most senior court to ease the boundaries of liability under the HRA, even where claims may involve consideration of matters that would not be considered justiciable at common law. Overall, the result of this bifurcated approach may be a lack of coherence across English law. The following discussion will draw out these themes.

Jurisprudence and the Human Rights Act: A Response to Lord Irvine [2012] PL 253; and *R Clayton*, *Smoke and Mirrors: The Human Rights Act and the Impact of Strasbourg Case Law* [2012] PL 639.

⁹ [2011] 1 WLR 2435.

II *Rabone v Pennine Care NHS Trust*

Melanie Rabone who was 24 years old committed suicide by hanging herself from a tree during two days' home leave from Stepping Hill Hospital where she was undergoing treatment as a voluntary psychiatric patient (that is, she had not been detained under the Mental Health Act 1983). She had been admitted to the hospital as an emergency patient following a suicide attempt and assessed as being at a high risk of a further suicide attempt. Despite this assessment, and in the face of serious parental concern, the treating physician bowed to Melanie's wish to go home for the weekend. Having told her parents that she was going to meet friends, Melanie went to Lyme Park where she took her own life. Her parents brought claims in negligence against the defendants under the Law Reform (Miscellaneous Provisions) Act 1934, which provides for the survival of causes of action for the benefit of the estate of a deceased, and under sec 7 HRA for breach of the art 2 right to life. The Trust admitted negligence and paid £ 7,500 to settle the 1934 Act claim: some £ 2,500 for funeral expenses and the balance for Melanie's pain and suffering prior to death.

The key issues before the Supreme Court were: (A) can the operational obligation under art 2 arise in the case of a patient who is mentally ill, but a voluntary patient; (B) if the answer to (A) is yes, was this obligation breached; (C) whether Mr and Mrs Rabone were 'victims' for the purposes of art 34 ECHR; and, finally, (D) whether the Court of Appeal erred in holding that awards of £ 5,000 should be made if the HRA claims were established. We shall now consider each issue in turn.

A Can an operational duty under art 2 be owed to a mentally ill, but voluntary, patient?

Case law under art 2 distinguishes two categories of implied obligations: first there is a primary obligation to put in place a legislative and administrative framework that will protect the right to life and, secondly, there are operational obligations to take active steps to protect life which will arise under some circumstances. The art 2 operational obligation first came to the attention of most tort lawyers in *Osman v United Kingdom*¹⁰ which concerned the alleged failure of the police to protect the Osman family from the threats and deranged behaviour of a third party who went on to murder both a member of the Osman family and a

¹⁰ [1999] 1 Fleet Street Reports (FLR) 193.

schoolteacher. In what has become a familiar formulation, the ECtHR held that in ‘well-defined circumstances’, the state should take ‘appropriate steps’ to safeguard the lives of those within its jurisdiction including a ‘positive obligation ... to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual’.¹¹ This positive obligation, which must be interpreted ‘in a way which does not impose an impossible or disproportionate burden on the authorities’, will be breached where:¹²

the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.

Building on Strasbourg jurisprudence recognising the operational duty to protect prisoners from other inmates¹³ and from suicide¹⁴, as well as the Supreme Court’s decision in *Savage v South Essex Partnership NHS Foundation Trust*¹⁵ concerning a psychiatric patient detained under the Mental Health Act 1983, the Supreme Court held that the operational duty arose and had been breached in Melanie’s case. Importantly, before doing so, the Court had to explain why Melanie’s situation was different from a line of cases concerning what Lord Roger of Earlsferry, echoing Strasbourg, had described in *Savage*¹⁶ as ‘casual acts of negligence’. The leading case here is *Powell v United Kingdom*¹⁷ where parents had complained that the death of their son through negligence engaged the responsibility of the state under art 2. The claim, concerning a child who had died from undiagnosed Addisons’ disease, was held inadmissible by a Chamber of the ECtHR which declared that:¹⁸

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 had 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 coordination among health professionals in the

¹¹ Ibid at [116].

¹² Ibid.

¹³ *Edwards v United Kingdom* (2002) 35 European Human Rights Reports (EHRR) 487.

¹⁴ *Keenan v United Kingdom* (2001) 33 EHRR 913.

¹⁵ [2008] UKHL 74, [2009] 1 AC 681.

¹⁶ Ibid at [45].

¹⁷ (2000) 30 EHRR CD 362.

¹⁸ Ibid at 364.

treatment of a particular patient are sufficient of themselves to call a contracting state to take account from the standpoint of its positive obligations under article 2 of the Convention to protect life.

In a similar vein, in *Stoyanovi v Bulgaria*,¹⁹ concerning an application by the parent of a soldier who had died during a parachute training exercise, the ECtHR held that damage would only be a violation of the state's positive obligations under art 2 if caused by insufficient regulations or insufficient control, 'but not if the damage was caused through the negligent conduct of an individual or the concatenation of unfortunate events'.²⁰ Thus, in the *Powell* type claim, provided that an activity is subject to appropriate regulation or control by the state it is unlikely to ground an art 2 violation. Where a person dies as a result of an act of medical negligence, then, subject to wrongful death legislation, a claim will enure for the deceased's dependants.

So, why did Melanie Rabone's case, which concerned an error of professional judgement and admitted negligence on the part of the treating physician, fall under the *Edwards* and *Keenan* axis rather than *Powell* and *Stoyanovi*? The judge at first instance and the Court of Appeal had decided that *Rabone* fell within the *Powell* line of authority. Lord Dyson, giving the leading judgment, set out to discover the essential features of those cases where the operational duty under art 2 had already been recognised by Strasbourg. First, the existence of a 'real and immediate risk' to life is a necessary but not a sufficient condition for the existence of the duty. By way of illustration, Lord Dyson cited the Court of Appeal observation that a patient undergoing major surgery may face a real and immediate risk of death but, according to *Powell*, no operational duty under art 2 arises.²¹ In the Court of Appeal, Jackson LJ concluded that, 'the remedy for clinical negligence, even where "real and immediate" risk of death has been disregarded, is an action in negligence'.²²

For the Supreme Court, the decisive issues that brought Melanie Rabone within art 2 were the assumption of responsibility by the state for the individual's welfare and safety (including by the exercise of control) and the particular vulnerability of the victim, noting that in circumstances of 'sufficient vulnerability'²³ the ECtHR has been prepared to find a breach of the operational duty even where there has been no assumption of responsibility such as the failure of local

¹⁹ ECtHR 9.11.2010, no 42980/04.

²⁰ *Ibid* at [61].

²¹ [2012] 2 AC 72 at [21].

²² [2011] Queen's Bench (QB) 1019 at [63] f.

²³ [2012] 2 AC 72 at [23].

authority to exercise its powers to protect children at risk of abuse.²⁴ Indeed, the whole point of the operational duty in many cases is to delineate when there has been a failure to undertake an assumption of responsibility in circumstances that required it. The operational obligations apply to all detainees,²⁵ but are particularly stringent in relation to those who are especially vulnerable by reason of their physical²⁶ or mental²⁷ condition. Furthermore, the distinction between ‘detained’ and voluntary patients should not be exaggerated. Very often a patient may ‘consent’ to hospital treatment because they fear compulsory detention. Furthermore, a detained patient may be ‘free to come and go’.²⁸ For Lord Dyson, giving the leading judgment, the key features of the case were Melanie’s vulnerability and the fact that the Trust had assumed responsibility for her welfare and safety. The evidence demonstrated that, although not a detained patient, had she tried to leave, the hospital ‘could and should have exercised their powers under the MHA to prevent her from doing so’.²⁹ The judge in fact found that had the Trust refused to let her leave she would not have insisted on going. This demonstrated the control the Trust exercised over Melanie. The analogy with *Z v United Kingdom*³⁰ is clear: in both *Z* and *Rabone*, statutory powers were available through which the relevant public authority could seek to protect the victims by asserting physical control over them. In the case of ‘ordinary’ healthcare situations such powers neither exist nor are necessary.³¹

A further factor is the nature of the risk; thus the question is whether the risk is an ‘ordinary’ risk of the kind that an individual should reasonably be expected to take or is it an exceptional risk? Lord Dyson cited the example of a soldier who died during a parachute exercise whose application was rejected by the ECtHR in *Stoyanovi v Bulgaria*. There, the ECtHR drew a distinction between ordinary incidents of military duties and ‘dangerous situations of specific threats to life which arise exceptionally from risks posed by violent, unlawful acts of others or man-made or natural hazards’.³² The nature of the risk to which the voluntary psychiatric patient at risk of suicide on one hand and the patient suffering from a life-threatening illness on the other are exposed is very different. The psychiatric

²⁴ *Z v United Kingdom* (2001) 34 EHRR 97.

²⁵ [2012] 2 AC 72 at [22].

²⁶ *Tarariyeva v Russia* (2006) 48 EHRR 609.

²⁷ *Keenan v United Kingdom* (2001) 33 EHRR 913.

²⁸ [2012] 2 AC 72 at [28].

²⁹ [2012] 2 AC 72 at [34].

³⁰ [2001] 2 FLR 612.

³¹ [2012] 2 AC 72 at [28].

³² ECtHR *Stoyanovi v Bulgaria*, 9.11.2010, no 42980/04 at [59]–[61].

patient's capacity to make a rational decision will be impaired; the patient who undergoes life-saving surgery will accept the inherent dangers on the basis of informed consent and 'she may choose to avoid the risk by deciding not to go ahead with treatment'.³³

For future developments, Lord Dyson stated that these factors may be relevant to determining whether the operational duty exists, but do not provide a sure guide as to whether an operational duty will be found in circumstances not yet considered by that Court. He added:³⁴

Perhaps that should not be altogether surprising. After all, the common law of negligence develops incrementally and it is not always possible to predict whether the court will hold that a duty of care is owed in a situation which has not been previously considered. Strasbourg proceeds on a case by case basis. The jurisprudence of the operational duty is young. Its boundaries are still being explored by the ECtHR as new circumstances are presented to it for consideration. But it seems to me that the court has been tending to expand the categories of circumstances in which the operational duty will be found to exist.

B What is the nature of a 'real and immediate' risk for the purposes of art 2?

Lord Dyson was clear that it is more difficult to establish a breach of the operational duty than 'mere' negligence; in negligence the risk of damage must be 'reasonably foreseeable', under art 2, the risk must be 'real and immediate'. He approved the lower court's conclusion that the risk of suicide was 'real'. On the evidence of Dr Caplan, the Trust's expert psychiatrist, the risk of suicide was 'substantial or significant and not remote or fanciful'.³⁵ It was not necessary, as had been argued by counsel for the Trust, that there had to be a 'likelihood or fairly high degree of risk'.

As to immediacy, the Supreme Court was unanimous that the phrase 'present and continuing' captures the essence of the meaning. This followed Lord Carswell in *In re Officer L*,³⁶ in preference to Lord Hope in *Van Colle v Chief Constable of Hertfordshire Police*.³⁷ The idea is to focus on a risk which is present at the time of the alleged breach of duty and not a risk that will arise at some point in the future.

³³ [2012] 2 AC 72 at [30].

³⁴ [2012] 2 AC 72 at [25].

³⁵ [2012] 2 AC 72 at [38].

³⁶ [2007] 1 WLR 2135 at [20].

³⁷ [2009] AC 225 at [66].

C Victim status

Under the HRA, the right to bring an action against a public authority which has acted in a way which is incompatible with a Convention right is available only to a ‘victim’ of the unlawful act (sec 7(1) HRA). Section 7(7) provides that a person is only a ‘victim’ if s/he would be a victim for the purposes of art 34 ECHR. For Lord Scott in *Savage*,³⁸ Mr and Mrs Rabone could be victims in relation to the procedural investigative obligation under art 2,³⁹ but he could not see how next of kin could be victims of the substantive obligation. In fact, as was undisputed by counsel in *Rabone*, there is clear Strasbourg authority that family members of victims of art 2 breaches may themselves be victims with standing to claim under art 2 in relation to both the investigative and the substantive obligations. The Strasbourg jurisprudence is extremely spare in terms of reasoning on this point. *Yasa v Turkey*,⁴⁰ which was cited by Lord Dyson in support of this principle, does shed light on the rationale for this extension of art 2 protection, which lies in the principle of ‘effectiveness’. *Yasa* concerned a claim brought by a nephew in relation to his uncle’s death allegedly at the hands of the security forces. The ECtHR held in *Yasa* that, in the light of established principles in Strasbourg case law, the deceased’s nephew could claim to be a victim of an act as tragic as the murder of his uncle.⁴¹ The ‘established principles’ to which the Court refers are those set out in *Loizidou v Turkey (Preliminary Objections)*:⁴²

The object and purpose of the Convention, a treaty for the collective enforcement of human rights and fundamental freedoms, requires that its provisions be interpreted and applied in the light of its special character and so as to make its safeguards practical and effective.

The principle of effectiveness is frequently relied upon by the Strasbourg organs in order to justify the expansion of the state’s obligations beyond those that might ordinarily be contemplated within domestic jurisdictions. Thus, the ECtHR has expanded its understanding of ‘victim’ for the purposes of art 34 ECHR. Article 34 provides that the Court may receive applications from any person, non-govern-

³⁸ [2009] 1 AC 681 at [5].

³⁹ Inherent within art 2 is an obligation to investigate deaths whenever life has been lost in circumstances which potentially engage the responsibility of the state. Deriving from cases where death has been caused by state agents, the obligation now extends to positive obligations cases. An ‘effective investigation’ is one that establishes the facts, ensures accountability of state bodies for deaths which are their responsibility and that lessons can be learned from for the future: *Menson v UK* (2003) 37 EHRR CD 220.

⁴⁰ (1998) 28 EHRR 408.

⁴¹ (1998) 28 EHRR 408 [65].

⁴² *Loizidou v Turkey (Preliminary Objections)* (1995) 20 EHRR 99.

mental organisation or group of individuals claiming to be the victim of a violation of a convention right. Section 7(7) HRA imports the jurisprudence of the ECtHR as the test for standing to bring a claim against a public authority under sec 7 HRA. It has long been said that (unlike actions in judicial review) art 34 does not allow complaints *in abstracto*: there is no possibility of an *actio popularis* so that complaints should be brought by those directly affected by a violation. However, in *Centre for Legal Resources on behalf of Valentin Câmpeanu v Romania*,⁴³ exceptionally, the ECtHR permitted an application by an NGO for a violation of art 2 where a highly vulnerable adult person, HIV positive with serious learning difficulties, no next of kin and who had grown up in the care of the state, died following appalling neglect in a state run institution and in violation of art 2. The ECtHR was at pains to stress the exceptional nature of the case, the fact that at domestic level no objection had been taken to the Centre for Legal Resources and the fact that otherwise there would be no possibility of examining a very serious allegation at international level; without jurisdiction a state might escape accountability as a result of its own failure to appoint a representative for the deceased. This represents though a considerable extension of the Court's jurisdiction through the application of the 'effectiveness' principle and will undoubtedly inform the litigation strategies of human rights NGOs.

It is worth noting that the approach of the ECtHR to attribution of 'victim' status under art 3 ECHR (prohibition of torture, inhuman or degrading treatment or punishment) is quite different. In determining whether a family member can claim a violation, the Court will look for special factors over and above the closeness of the emotional or family tie with the deceased. Such factors are analogous to the proximity factors that English courts look for in relation to claims for psychiatric harm suffered by secondary victims of negligence, the so-called *Alcock* criteria.⁴⁴ Thus in *Cakici v Turkey*, the Court held that:⁴⁵

Whether a family member is such a victim will depend on the existence of special factors which gives the suffering of the applicant a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human rights violation. Relevant elements will include the proximity of the family tie – in that context, a certain weight will attach to the parent-child bond – the particular circumstances of the relationship, the extent to which the family member witnessed the events in question, the involvement of the family member in the attempts to obtain informa-

⁴³ ECtHR [GC] 17.7.2014, no 47848/08.

⁴⁴ Following *Alcock v Chief Constable of the South Yorkshire Police* [1992] 1 AC 310, where the House of Lords insisted upon (inter alia) a close tie of love and affection with the primary victim and proximity to the accident in time and space.

⁴⁵ *Cakici v Turkey* (199) 31 EHRR at [98].

tion about the disappeared person and the way in which the authorities responded to those enquiries. The Court would further emphasise that the essence of such a violation does not so much lie in the fact of the ‘disappearance’ of the family member but rather concerns the authorities’ reactions and attitudes to the situation when it is brought to their attention. It is especially in respect of the latter that a relative may claim directly to be a victim of the authorities’ conduct.

The Supreme Court held that Mr and Mrs Rabone were victims of the substantive obligation in art 2 and their damages were assessed accordingly.

D The award

The factors taken into account in determining the level of award to reflect non-pecuniary damage are: the seriousness of the breach, the closeness of the tie between the claimant and the deceased and the seriousness of the harm. There is significant variability in terms of awards with sums ranging from € 15,000 for siblings to € 65,000 for a father and son jointly. Although Strasbourg does not explicitly award exemplary damages the state’s conduct may be a factor in fixing the level of award. In one case of particularly egregious conduct by state agents that were held responsible for a protester’s death at the hands of a mob, the total awarded for non-pecuniary damage was € 135,000 (€ 35,000 each for widow and parents and € 15,000 each for siblings).⁴⁶ In Melanie Rabone’s case, the Supreme Court took the view that the violation was serious – the family ties were very strong and the very thing the parents had most feared, and of which they had warned the medical authorities, materialised.

III *Rabone* in the broader context of ECHR jurisprudence

As we have seen, Strasbourg had not pronounced upon whether a patient who has not been compulsorily detained should be brought within the positive obligation recognised under art 2. The key factors that influenced the Supreme Court in recognising that the operational duty under art 2 had arisen were the assumption of responsibility by the Trust, the vulnerability of the victim and the *de facto* control that the medical staff exercised over Melanie. It seems a small step, and a

⁴⁶ ECtHR *Isaak v Turkey*, 24.6.2008, no 44587/98.

defensible one, to extend the state's responsibility from the compulsorily detained psychiatric patient recognised in *Savage* to the voluntary patient; as the evidence showed in *Rabone*, many of the distinctions are more apparent than real – and had Melanie tried to leave the hospital steps would have taken formally to detain her. The role that control plays has been significant so that where a defendant is capable of exerting physical control over a claimant the ECtHR will more readily recognise the operational obligation under art 2.

By upholding the claim in *Rabone*, the Supreme Court has taken art 2 into the field occupied by medical negligence and has also demonstrated a clear willingness to take HRA jurisprudence beyond the situations of art 2 engagement hitherto recognised by Strasbourg. This question of whether English courts should consider themselves constrained only to follow where Strasbourg has trodden has preoccupied many English academics, including this writer. This commentator has argued that the terms of sec 2 HRA leave no room for doubt: the Strasbourg case law does not bind English courts and should not inhibit the development of an indigenous human rights jurisprudence.⁴⁷ In typical common law fashion, the Supreme Court drew upon a number of seemingly disparate cases decided by the ECtHR in which the operational duty under art 2 has been recognised. What they have in common is that art 2 is engaged where dangers have been created for which the state is in some way responsible. The range of situations led Lord Dyson in *Rabone* to observe quite correctly that the operational duty in under art 2 is 'young' but the ECtHR has been tending to expand the circumstances in which the operational duty will be found to exist. Deciding which cases fall on the 'ordinary negligence' side of *Powell* and therefore beyond the reach of art 2 will be a challenge. Cases the Court relied upon in *Rabone*, include *Watts v United Kingdom*, where the ECtHR accepted that the badly managed transfer of elderly residents could have a negative impact on their life expectancy and therefore art 2 was 'engaged', although for various reasons the claim failed on the facts.⁴⁸ Discussing *Watts*, Baroness observed that:⁴⁹

[The positive obligation] ... implies, in appropriate circumstances, a positive obligation to take preventive operational measures to protect an individual whose life is at risk. Although the court originally explained that this positive obligation arose when there was a risk to life 'from the criminal acts of another individual, it has since made it clear the positive obligations under article 2 are engaged in the context of any activity, whether public or not, in which the right to life may be at stake.

⁴⁷ *Wright* [2009] PL 595.

⁴⁸ (2010) 51 EHRR SE 66 at [88].

⁴⁹ (2010) 51 EHRR SE 66 at [82].

In a completely different example of the engagement and violation of art 2, in *Öneryildiz v Turkey*, the applicant and his family had lived near to a tip used by local councils. Experts had warned about the dangers of a methane explosion which eventually happened resulting in several deaths. The public authority had set up and authorised the operation of the site and had known or ought to have known of the serious and immediate risk to life. The ECtHR concluded that the positive obligation under art 2 had been violated as it was impossible for the administrative and municipal departments responsible for supervising and managing the tip not to have known of the risks inherent in the activity or of the necessary preventive measures. This type of scenario brings us back to the tragic loss of life at the Hillsborough football stadium in *Hicks* cited at the beginning of this paper and the question posed there as to whether such facts would engage art 2. The negligent management of the crowd through the actions of the police force at Hillsborough created the dangerous situation that led to 96 people dying of crush injuries. A careful reading of *Oneryildiz* suggests that the Hillsborough tragedy would not be within the purview of the operational obligation. While careful policing is needed to ensure crowd safety at sporting events, there is arguably nothing inherently dangerous in a football match.

In *Oneryildiz*, the ECtHR did not in terms refer to *Powell* but drew on the same language, saying:⁵⁰

Where it is established that the negligence attributable to State officials or bodies ... goes beyond an error of judgment or carelessness in that the authorities *fully realising the likely consequences and disregarding the powers vested in them*, failed to take measures that were necessary and sufficient to avert the risks, the fact that those responsible have not been charged with a criminal offence or prosecuted may amount to a violation of article 2.

There is an implication here that errors of judgment, or what might be termed ‘ordinary’ professional negligence, are not violations of the operational obligation; something more is required. This dictum suggests that the art 2 positive obligation will be violated where a public authority turns a blind eye to a danger that is obvious. Returning to *Hicks*, while the police commander in charge of crowd safety made a very serious error of judgement there was nothing on the facts to suggest a deliberate or reckless disregard of safety. Failure to provide remedies for such negligent conduct at state level would be a breach of the primary framework duty incumbent on a state under art, 2 but that should not be confused with the substantive operational obligation. This distinction is important for any state, such as the UK, which has different remedies depending upon

⁵⁰ *Öneryildiz v Turkey* (2004) 41 EHRR 325.

the classification of the right infringed – whether common law or statutory under the HRA.

Having noted that, according to *Powell*, ‘the acts and omissions of the authorities in the context of public health policies may, in certain circumstances, engage their responsibility under article 2’, in *Mehmet Şentürk and Bekir Şentürk v Turkey*, the ECtHR found that art 2 was engaged on the facts and indeed violated. This was a case where the relevant public authority did act with a reckless disregard for patient safety. The claimants were husband and son of a deceased pregnant woman and unborn child who was victim of a ‘flagrant malfunctioning of the [relevant] hospital departments’ when she ‘was deprived of the possibility of access to appropriate emergency care’.⁵¹ The deceased woman was in the thirty fourth week of pregnancy and in considerable pain. She visited three hospitals, each of which failed either to properly examine or diagnose. At the fourth hospital, the Ege hospital, it was realised that the baby had died and that she was in need of immediate surgery to remove the baby. However, the applicant and his wife could not afford the medical fees and the woman was taken by ambulance to another hospital; she died during the journey. The Court found that there was a violation of the substantive element of art 2 but in a carefully reasoned judgment drew a distinction between the care provided to the deceased woman prior to her arrival at the Ege Hospital and the events which occurred subsequent to her arrival at that hospital. The preceding hospitals were clearly guilty of errors of judgment but there was an aggravating factor at the Ege hospital in that the claimant had alleged that, apart from negligent diagnosis, he and his wife had been turned away from the hospital because they could not afford emergency fees. The implication to be drawn is that the conduct by the first three hospitals, although negligent, did not reach the threshold to amount to a violation of art 2. The claimants were awarded € 65,000 in respect of their non-pecuniary damage.

For the sake of completeness, it should be noted that in *Reynolds v United Kingdom*,⁵² which engaged broadly similar facts to *Rabone* (claim by parent of adult child who committed suicide while a voluntary patient), but which was decided before the Supreme Court decision in *Rabone* and on the basis of the reasoning in *Savage*, English courts had rejected the art 2 claim. The ECtHR found the UK to be in violation of art 2 in conjunction with art 13. *Rabone* is a case of potential significance for any professional person who works in situations that impact on the right to life. The Supreme Court took the view that extending the application of the positive obligation under art 2 to non-custodial situations was

51 ECtHR 9.4.2013, no 13423/09 at [97].

52 (2012) 55 EHRR 35.

a small step. As we have seen, by rejecting the ‘mirror’ principle, *Rabone* is also of constitutional significance in confirming the law-making role of English courts under the HRA. It was only to be a short time before the English Supreme Court was confronted again with consideration of the boundaries of liability regarding the positive obligation under art 2 in *Smith v Ministry of Defence*⁵³ and *Michael v Chief Constable of South Wales*.⁵⁴

IV Further expansion of the art 2 obligation – *Smith and Michael*

Although they are both English precedents, like *Rabone*, *Smith* and *Michael* have the potential to impact across the Council of Europe Member States. The ECtHR has developed its case law under ECHR through dialogue across the member states which is manifested through an explicit search for consensus. *Smith*, in particular, has the potential to break new ground in a highly contested area, namely the extent to which the art 2 obligation applies to military personnel when they are deployed on activities such as those in which the UK was engaged in Iraq in 2005/06. Major combat operations had ceased and the British army was engaged in a period of military occupation which frequently entailed dealing with threats from insurgents opposed to the interim Iraqi government. In *Smith*, the claimants were family members of British soldiers who had been killed by improvised explosive devices which were detonated at the roadside as they travelled in Snatch Land Rover vehicles while on duty in Iraq in 2006. The claimants alleged a breach of art 2 in the failure to provide suitably safe equipment. As the judge at first instance remarked, all the claims involved issues of procurement, as well as operational decisions on the ground by commanders.

By a narrow 4–3 majority, the Supreme Court held that the claims should go to trial. The Court held that the application of the operational obligation under art 2 to military operations will vary and that an unrealistic and disproportionate positive obligation in relation to the planning or conduct of military operations should not be imposed. However, where it is reasonable to expect an individual to be afforded the protection of art 2 then art 2 should be given effect. The Court held that allegations relating to either matters of procurement, training or the conduct of operations linked to the exercise of political judgement or issues of

⁵³ [2013] UKSC 41, [2014] AC 52.

⁵⁴ [2015] UKSC 2, [2015] 2 WLR 343.

policy on the one hand, or to acts or omissions occurring during actual operational engagements on the other, would be beyond the reach of art 2. However, the trial should establish the facts to determine whether the claims raised fall between these two areas and any decision on liability should therefore be deferred until the conclusion of that factual inquiry. In *Smith*, which included a number of appeals heard together, two of the claims were also brought in the common law tort of negligence, the scope of which can be limited by the doctrine of ‘combat immunity’. This doctrine applies to situations of armed conflict so that neither the army nor fellow soldiers can be subject to civil claims based on conduct that occurs during hostilities. The Supreme Court confirmed that the doctrine is to be applied narrowly and would apply only to action taken in the course of actual or imminent armed conflict.

Smith is a remarkable case. It is the clearest example yet of the rejection of the ‘mirror’ principle by the English courts. Lord Hope acknowledged that Strasbourg has not yet considered whether art 2 can protect the armed forces engaged in operations such as those in Iraq in 2006. While the military could not expect the same level of protection as civilians he considered that as a general rule service personnel should receive the same protection from death or injury by the provision of appropriate training and equipment as other members of the police, fire and emergency services. To this he added the caveat that it is different when service personnel move to active operations at home or overseas and he stated that ‘it is here that the national interest requires that the law should accord the widest measure of appreciation to commanders on the ground who have the responsibility of planning for and conducting operations there’.⁵⁵

Lord Hope asserted that *Stoyanovi v Bulgaria* supports his analysis. In fact, *Stoyanovi* which is the only direct authority from Strasbourg on the death of a serviceperson on active duty, points in the other direction and, as described above, would generally seem to deny the protection of the operational obligation under art 2. In *Smith*, Lord Hope quoted from the ECtHR decision:⁵⁶

Whenever a state undertakes or organises dangerous activities, or authorises them, it must ensure through a system of rules and through sufficient control that the risk is reduced to a reasonable minimum. If nevertheless damage arises, it will only amount to a breach of the state’s positive obligations if it was due to insufficient regulations or insufficient control, but not if the damage was caused through the negligent conduct of an individual or the concatenation of unfortunate events.

⁵⁵ [2014] AC 52 at [71].

⁵⁶ ECtHR *Stoyanovi v Bulgaria*, 9.11.2010, no 42980/04 at [61].

He then went on to contrast that situation and the instant case of⁵⁷

operations undertaken in a situation where it was known or could reasonably have been anticipated that troops were at risk of attacks from insurgents by unconventional means such as the planting of IEDs. Regulation of the kind contemplated in *Stoyanovi* is likely to be very difficult, if not impossible, to achieve on the ground in situations of that kind. Even where those directing operations are remote in place and time from the area in which the troops are operating, great care is needed to avoid imposing a burden on them which is impossible or disproportionate.

This quotation would suggest that recognising the protection of art 2 in situations such as counter-insurgency operations would not be appropriate. But that is not what Lord Hope concluded. Instead, he suggested that there is an area of potential state responsibility that lies between issues of policy and procurement on the one hand and combat operations on the other. The argument on behalf of the claimants is essentially that soldiers' lives should not be put at risk through their deployment in situations where their equipment is not adequate. On the other hand, he held that the courts should be slow to question operational decisions on the ground. Procurement decisions take place far from the theatre of war, but commanders on the battlefield or otherwise engaged in challenging security situations, such as the patrols in Iraq, must deploy the equipment they have, often in fast developing and unpredictable situations. Is it really possible to separate those procurement decisions from operational decisions taken in conflict situations? Lord Hope did not refer to *Powell v United Kingdom*, but it would seem that this authority was not cited to the Court.

Lord Mance, dissenting and with whom Lords Carnwarth and Lord Wilson agreed, stated that the operational obligation does not embrace casual acts of negligence as is evidenced by cases in the medical field and to which can now be added *Stoyanovi*. Lord Mance went so far as to say that it is regrettable that the ECtHR has set about creating an independent substantive law of tort albeit only in cases involving death or the risk of death. Quoting from *Stoyanovi*, he stated 'that the armed forces [like the medical profession] routinely engage in activities that could harm; it is in a manner of speaking part of their essential functioning'.⁵⁸ Thus Lord Mance, who had supported the decision in *Rabone*, would not extend art 2 to the operational decisions of military commanders on the ground. He referred to the lack of Strasbourg guidance on the question of whether a state should be liable for the death of a soldier due to the negligence of his commander

⁵⁷ [2014] AC 52 at [73].

⁵⁸ [2013] UKSC 41, [2014] AC 52 at [138].

or another soldier: the prospect of Strasbourg reviewing this was so striking that he could not give a positive answer and the domestic court should await clear guidance from Strasbourg. He could not countenance any extension of art 2 obligations in the absence of prior Strasbourg authority or the court otherwise being confident what Strasbourg would decide. In a hark back to the mirror principle he stated that: '[i]f the European court considers that the Convention requires it to undertake the retrospective review of armed conflicts to adjudicate on the relations between a state and its own soldiers, without recognising any principle similar to combat immunity, then it seems to me that a domestic court should await clear guidance from Strasbourg to that effect'.⁵⁹

Clearly, this statement contradicts Lord Mance's position in *Rabone* where he supported the extension of art 2 to a new situation in the absence of clear Strasbourg authority. Lord Mance's broader concern is related to coherence, both within ECHR jurisprudence itself and between English common law and ECHR jurisprudence. He points out that the issues of procurement and supply of technology and equipment, training for active service and the conduct of military operations on the ground cannot realistically be separated. He rightly cautions that the proper attribution of responsibility cannot depend upon how a claimant frames his case.⁶⁰ The nub of his concern is that in his view the claim in *Smith* is that the claimants were not properly equipped. If this is the case, it is a policy matter and not justiciable either under art 2 (a view with which Lord Hope agrees) or under the common law. Lord Mance's fear is that the decision of the majority that the operational obligation under art 2 could extend to 'procurement decisions taken on the ground about the provision of vehicles and equipment, as well as decisions about their deployment' could extend the *Osman* type obligation to situations involving active engagement with the enemy. Strasbourg has not (as yet anyway) developed a doctrine akin to the doctrine of combat immunity and the risk is that the English court will develop art 2 obligations in a way that is not required by Strasbourg, in the absence of any discussion at Strasbourg, and in a way that renders English law incoherent as regards different legal consequences flowing from the same conduct. These concerns are justified; nevertheless the trial judge in *Smith* will now have the unenviable task of evaluating the evidence to see whether the claims fall within the gap between the two areas highlighted by Lord Hope.

Michael also illustrates the challenges for coherence that have been brought to bear by the co-existence of common law principles and the action under the

59 [2014] AC 52 at [142].

60 [2013] UKSC 41, [2014] AC 52 at [125].

HRA. In *Michael*, the claimants were the parents and children of Joanna Michael who was murdered by her abusive ex-partner. The claim was for damages in negligence at common law and for damages under the HRA for breach of the operational obligation under art 2. In order to understand the impact of the case, the facts need recitation. Ms Michael was killed by her former partner, Cyron Williams. Williams had found Ms Michael at her home with another man in the middle of the night. He attacked Ms Michael and then drove the other man home and said that he would return. For reasons that are not clear her emergency call was routed to a call centre within another jurisdiction and the call was assigned the highest priority. On being routed to Ms Michael's local police authority, the receiving call handler downgraded the call meaning that the police were required to respond within 60 minutes. Ms Michael called the police emergency number again and the call was again routed to the wrong call centre. Ms Michael was heard to scream and when the police arrived they found she had been stabbed to death. If the first call had been graded a priority call in all probability she would not have died.

The negligence claim was rejected on the basis of clear common law authority that in the absence of an assumption of responsibility no claim will lie with regard to an omission. However, the Supreme Court held that the HRA claim under art 2 should proceed to trial in order to determine whether the telephone conversation between Ms Michael and the emergency call handler gave rise to the operational obligation under art 2. At issue was whether the call handler ought to have heard Ms Michael say that her former partner was threatening to return and kill her and if she could not hear clearly what was said whether she should have asked Ms Michael to repeat what she was saying.

Michael signifies a willingness on the part of the Supreme Court to allow an art 2 claim on facts that are arguably less persuasive than claims which have previously been denied.⁶¹ At issue is the effect of one telephone call; the *Osman* criteria require a 'real and immediate risk' which as we have seen has been described under English law as one that is 'present and continuing'. It is striking also that the Supreme Court confirms that a duty of care in negligence at common law may be owed by the police where they make a representation which is relied upon by the claimant. However, the argument that the police had assumed such a responsibility for Ms Michael's safety was very shortly dismissed and what is more on the basis of disputed facts. This is also relevant to coherence as evidence about what Ms Michael said and how the call operator should have responded would be as relevant to establishing an assumption of responsibility in order to ground a

61 *Van Colle v Chief Constable of Hertfordshire Police* [2006] 3 All ER 963.

claim in negligence at common law, as in relation to art 2. Lord Mance's observation that the attribution of responsibility should not depend upon how the claimant frames their case applies with equal force on the facts of *Michael*.

Taken together, *Rabone*, *Smith* and *Michael* evidence a greater receptiveness by English courts to allow claims which can be framed under the HRA but which are in fact based upon negligent conduct on the part of public authorities. As demonstrated above, the ECHR jurisprudence does not appear generally to equate negligence by a public authority with a breach of the operational obligation under art 2. While these cases have arguably created uncertainty regarding the reach of the operational duty under art 2 they have clarified the law making relationship between Strasbourg and the English Supreme Court.

IV Law making and section 2(1) Human Rights Act 1998

Important as *Rabone* and *Smith* are in terms of shaping the right to life under art 2 ECHR, they have a wider significance for English law which lies in their impact on sec 2(1) HRA and judicial lawmaking regarding the interpretation of the ECHR. As noted above, the pages of academic journals have been replete with discussion as to whether English courts should mirror Strasbourg in setting the reach of the ECHR – that is, should English courts regard themselves as limited by the Strasbourg jurisprudence? Lord Bingham in his much cited remarks in *R (Ullah) v Special Adjudicator* stated that ‘the duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less’.⁶² Lord Brown in *R (Al-Skeini) v Secretary of State for Defence* added an important gloss stating that the sentence ‘could well have ended: “no less, but certainly no more.”’⁶³ In *Ambrose v Harris*,⁶⁴ the Supreme Court (Lord Kerr dissenting) held that it was not for the court to expand the scope of rights under the Convention further than the jurisprudence of the ECtHR justified.

In *Rabone*, however, the Supreme Court, drawing upon general principles, expanded the scope of art 2 beyond those instances recognised by Strasbourg as giving rise to the operational obligation under art 2 and held that the duty to protect from the risk of suicide extended to the informal patient. *Ambrose* was not

⁶² [2004] 2 AC 323 at [20].

⁶³ [2008] AC 153 at [106].

⁶⁴ [2011] 1 WLR 2435.

cited or discussed. Lord Brown regarded the suggestion that an authoritative Strasbourg decision more or less directly in point would be necessary before a domestic court could make a ruling as ‘absurd’.⁶⁵ In a gloss on *Ullah*, he said that *Ullah* ‘establishes that the domestic court should not feel driven on Convention grounds unwillingly to decide a case against a public authority (which could not then seek a corrective judgment in Strasbourg) unless the existing Strasbourg case law clearly compels this’. *Rabone* is to be preferred to *Ambrose*. Otherwise, English courts would be, contrary to sec 2(1), effectively regarding themselves as bound by Strasbourg and they would be denying the basic principle of subsidiarity which is the cornerstone of the ECHR – it is for national authorities to safeguard human rights.⁶⁶ If English courts have to wait for Strasbourg decisions that are on ‘all fours’, English courts would effectively become subsidiary to Strasbourg.⁶⁷

V Conclusion

Rabone, *Smith* and *Michael* (in terms of the application of recognised principles) signify a decisive turning point in the development of an indigenous jurisprudence of human rights in English law. The English Supreme Court, drawing upon general principles developed by Strasbourg, was prepared to extend the art 2 right recognised through the HRA to entirely novel factual situations. While there exist clear analogies from which appropriate principles can be drawn in the case of *Rabone*, military engagement is a different matter and *Smith v MOD* arguably gives pause to reflect. The trial judge will now be required to pick her way through an extremely complex factual background in which many of the issues will relate to decisions about government policy, resource allocation and defence procurement. Deciding whether decisions to deploy service personnel and their equipment on the ground have been appropriately taken can be divorced from procurement decisions only with difficulty.

The implication to be drawn from *Rabone* and *Smith* seems to be that the operational obligation under art 2, as developing under English law, potentially extends well beyond the situations hitherto recognised by the ECtHR and could potentially include many situations relating to ‘casual acts’ of professional negligence. As noted by Lord Mance in *Smith*, this direction of travel appears directly

⁶⁵ [2012] 2 AC 72 at [112].

⁶⁶ *Kudla v Poland* (2002) 35 EHRR 198.

⁶⁷ *M Andenas*, Leading from the Front: Human Rights and Tort Law in *Rabone* and *Reynolds* (2012) LQR 323.

contrary to both *Powell v United Kingdom* and *Stoyanovi v Bulgaria*. Argument and judgment so far in these cases have not addressed the impact that extension of liability under the HRA would have insofar as it entails the circumvention of restrictions applying to Fatal Accidents Act claims in relation to public authority defendants.

In concluding, it would be remiss to ignore potential political developments in the UK. It has become unfashionable in common law circles to try to evaluate tort law in terms of particular ‘functions’. It is said that tort law, as an aspect of private law, which is premised upon principles of corrective justice has no function or purpose other than to be tort law.⁶⁸ Whatever view one takes of tort principles enshrined in common law, it is incontestable that the function of sec 7 HRA is to provide a remedy at domestic level for breaches of ECHR rights. Against a background of hostility among Ministers, as well as the right wing press, the Conservative Government elected in May 2015 pledged in their manifesto to repeal the HRA and to replace it with a British Bill of Rights. However, despite a huge amount of political rhetoric during the election campaign, repeal of the HRA was not included in the Queen’s Speech to Parliament and, moreover, there was no mention of the HRA either in the Prime Minister’s speech to the Conservative Party Conference in October. It is also nine years since David Cameron set up a panel to draw up a British Bill of Rights and none has appeared.

A key question that would flow from a repeal of the HRA and the introduction of a ‘British’ Bill of Rights would concern the nature of any remedy that would accompany a breach of such a Bill. The action under sec 7 HRA has enabled English courts to reject calls for the expansion of common law boundaries in order to accommodate ECHR violations, evidenced most recently in the rejection of the common law negligence action in *Michael*. Furthermore, the absence of a civil remedy for violations of art 2 ECHR would mean that the UK is also in violation of the art 13 ECHR right to a remedy. Human rights discourse in the UK remains subject to a great deal of political rhetoric, but if a new framework for the protection of human rights is introduced it will be essential to ensure effective remedies at domestic level if the UK is not to return to the bad old days of being one of the most frequently appearing defendant states at the ECtHR.

⁶⁸ The leading exponent of this view is *E Weinrib*, *The Idea of Private Law* (1995). For a helpful summary, see *M Lunney/K Oliphant*, *Tort Law: Text and Materials* (5th edn 2013) 17 ff.