HilaryTerm
[2012] UKSC 2
On appeal from: [2010] EWCA Civ 698

JUDGMENT

Rabone and another (Appellants) *v* Pennine Care NHS Foundation Trust (Respondent)

before

Lord Walker
Lady Hale
Lord Brown
Lord Mance
Lord Dyson

JUDGMENT GIVEN ON

8 February 2012

Heard on 7 to 9 November 2011

Appellants
Jenni Richards QC
Nigel Poole
(Instructed by Pannone LLP)

Respondent
Monica Carss-Frisk QC
Jane Mulcahy
(Instructed by Hempsons)

Interveners (INQUEST, JUSTICE, Liberty and Mind)
Paul Bowen and Alison Pickup

(Instructed by Bindmans LLP)

LORD DYSON

1. Some time after 17.00 hrs on 20 April 2005, Melanie Rabone hanged herself from a tree in Lyme Park, Cheshire. She was 24 years of age and was the loved daughter of Mr and Mrs Rabone. At the time, she was on two days' home leave from Stepping Hill Hospital, Stockport where she was undergoing treatment for a depressive disorder as an informal patient (ie one who was not detained under the Mental Health Act 1983 ("the MHA")). She had been admitted to the hospital as an emergency following a suicide attempt. She was assessed by the hospital as a high risk of a further suicide attempt. Mr and Mrs Rabone have always maintained that the hospital authorities should not have allowed her home leave and that they were responsible for their daughter's tragic death. They started proceedings against the Pennine Care NHS Trust ("the trust") alleging negligence and breach of the right to life protected by article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). The trust eventually admitted negligence, but they have never admitted liability for breach of article 2. A number of issues were raised in the proceedings all of which are live in this appeal. The claim failed because the judge (Simon J) held that the operational duty implicit in article 2 did not apply in this case: there was no duty on the hospital authorities under article 2 to take reasonable steps to guard Melanie against the risk of suicide: [2010] EWHC 1827. He also held that, if there was such a duty, there had been no breach of it by the trust on the facts of this case. The Court of Appeal (Rix, Stanley Burnton and Jackson LJJ) dismissed Mr and Mrs Rabone's appeal. The only substantive judgment was given by Jackson LJ (now reported at [2011] QB 1019). They agreed that there was no operational duty, but held that if there had been such a duty, the trust would have been in breach of it. This appeal raises a number of issues, but before I come to them, I need to set out the relevant facts.

The facts

2. Melanie Rabone was born in 1981. During 2000, she was diagnosed as suffering from depression and received medical treatment. There was some improvement in the next few years, although she had intermittent episodes of anxiety. On 4 March 2005, she tried to commit suicide by tying a pillow case round her neck. She was admitted to Stepping Hill Hospital following an emergency referral by her General Practitioner. On 7 March 2005, she was diagnosed by Dr Meagher, a consultant psychiatrist, as suffering from a severe episode of a recurrent depressive disorder. On 18 March, she was assessed as having made a sufficient recovery to be discharged. She went on holiday for a week with her family to Egypt.

3. On 31 March, she cut both of her wrists with broken glass. Dr Meagher advised that she should be readmitted to the hospital. No beds were available on Warren Ward, which is part of Stepping Hill Hospital's Mental Health Services Unit. On 6 April, she was seen by Dr Cook, a senior house officer, as an outpatient. She was noted as having occasional thoughts of suicide and frequent thoughts of deliberate self-harm. On 11 April, she tied lamp flex round her neck. She was assessed by Dr Cook who noted: "Impression: severe depressive episode…..? Psychosis, High risk DSH [deliberate self-harm] and suicide".

4. Melanie agreed to an informal admission to the hospital. Dr Cook noted that, if she attempted or demanded to leave, she should be assessed for detention under the MHA. She was prescribed a course of drugs and thereafter kept under 15 minute observation. A full mental state examination was carried out on admission by Nick Tatnall, one of the ward nurses. He assessed Melanie as a moderate to high suicide risk. On 13 April, Mr Rabone expressed his grave concern to Nurse Tatnall about Melanie's condition and urged that she should not be allowed home on leave or discharged too soon. There were further conversations during the week in which Melanie's parents told the hospital staff that they were concerned about her impulsiveness and the risk of self-harm.

5. At 13.00 hrs on 18 April, Mr Rabone spoke to the ward to state his concern that Melanie was not improving and that she had expressed fleeting suicidal thoughts since her admission and had asked her parents to "get her out" of the hospital.

6. On 19 April, Dr Meagher returned from leave. He was told that Melanie was requesting home leave. On his late afternoon ward round, he met Melanie and Mrs Rabone. He agreed to allow her to have home leave for two days and nights. Mrs Rabone said that she was concerned about Melanie coming home for the weekend, but Melanie was keen to do so. She left the ward at 19.40 hrs. She spent most of the following day with her mother. In the late afternoon, she said she was going to see a friend. Some time after 17.00 hrs, she hanged herself from a tree in Lyme Park.

7. On 31 August 2005, Mr Rabone wrote to the trust criticising the decision to grant home leave on 19 April. On 13 September, the trust informed Mr Rabone that a thorough internal investigation was to be carried out, but that this would take some time. They said that his complaint would be "put on hold" until the completion of the investigation. On 15 September, they duly established a Serious Untoward Incident ("SUI") investigation.

8. On 29 September, the Coroner for the Greater Manchester South District conducted an inquest and retuned a verdict of suicide. In the summer of 2006, Mr Rabone contacted the trust on more than one occasion, expressing his concern about delays in the investigation. Its report was not sent to Mr and Mrs Rabone until 16 March 2007.

The proceedings

9. A claim form was issued on 11 August 2006. Mr Rabone claimed damages against the trust in negligence on behalf of Melanie's estate under the Law Reform (Miscellaneous Provisions) Act 1934 ("the 1934 Act"); and he and Mrs Rabone claimed damages on their own behalf for breach of article 2 of the Convention. Although the pleaded claim for breach of article 2 was for an alleged contravention of both the positive obligation to protect life and the investigative obligation under article 2, in the event the court has only been concerned with the former.

10. By its defence, the trust denied all allegations of breach. It also alleged that the human rights claim was time-barred under section 7(5) of the Human Rights Act 1998 ("the HRA"), since it had been issued more than one year after Melanie's death. By their reply, Mr and Mrs Rabone asked the court to extend the time limit by four months in the exercise of its discretion under section 7(5)(b) of the HRA.

11. The 1934 Act claim was settled in May 2008 for £7,500 plus costs. It will be necessary to examine the implications of this settlement (and the admissions that were made by the trust in May 2009) for the article 2 claim later in this judgment.

Article 2 in outline

12. Before I come to the issues that arise on this appeal, I need to set the scene by making a few introductory comments about article 2 of the Convention which provides: "Everyone's right to life shall be protected by law". These few words have been interpreted by the European Court of Human Rights ("the ECtHR") as imposing three distinct duties on the state: (i) a negative duty to refrain from taking life save in the exceptional circumstances described in article 2(2); (ii) a positive duty to conduct a proper and open investigation into deaths for which the state

might be responsible; and (iii) a positive duty to protect life in certain circumstances. This latter positive duty contains two distinct elements. The first is a general duty on the state "to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life": see *Oneryildiz v Turkey* (2004) 41 EHRR 20 (para 89) applying, mutatis mutandis, what the court said in *Osman v United Kingdom* (2000) 29 EHRR 245 (para 115). The second is what has been called the "operational duty" which was also articulated by the court in *Osman*. This was a case about the alleged failure of the police to protect the Osman family who had been subjected to threats and harassment from a third party, culminating in the murder of Mr Osman and the wounding of his son. The court said 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 "preventative operational measures" to protect an individual whose life is at risk from the criminal acts of another (para 115). At para 116, the court went on to say that the positive obligation must be interpreted "in a way which does not impose an impossible or disproportionate burden on the authorities". In a case such as *Osman,* therefore, there will be a breach of the positive obligation where:

> "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."

13. Since the date of its decision in *Osman,* the court has identified other circumstances in which the operational duty may exist as I shall explain. There seems, however, to be no decision of the court which has considered whether the article 2 operational duty may exist to protect an informal (as opposed to a detained) psychiatric patient from the risk of suicide. That is the first question that arises in the present case. As I have said, the judge and the Court of Appeal held that no operational duty arose on the facts of the present case.

The issues

14. The six issues that arise in this appeal are: (i) whether the operational obligation under article 2 can in principle be owed to a hospital patient who is mentally ill, but who is not detained under the MHA; if the answer to (i) is yes, (ii) whether there was a "real and immediate" risk to the life of Melanie on 19 April 2005 of which the trust knew or ought to have known and which they failed to take reasonable steps to avoid; if the answer to (ii) is yes, (iii) whether Mr and Mrs Rabone were "victims" within the meaning of article 34 of the Convention; if the

answer to (iii) is yes, (iv) whether they lost their victim status, because the trust made adequate redress and sufficiently acknowledged its breach of duty; if the answer to (iv) is no, (v) whether their claims are time-barred by section 7(5) of the HRA; and if the answer to (v) is no, (vi) whether the Court of Appeal erred in holding that they would have awarded £5000 each to Mr and Mrs Rabone if their claims had been established.

The first issue: can an operational duty under article 2 be owed to a hospital patient who is mentally ill, but is not detained under the MHA?

15. As the ECtHR said at para 115 of *Osman,* the operational duty exists in "certain well-defined circumstances". The court has held that there is a duty on the state to take reasonable steps to protect prisoners from being harmed by others including fellow prisoners (*Edwards v United Kingdom* (2002) 36 EHRR 487) and from suicide (*Keenan v United Kingdom* (2001) 33 EHRR 913). The same duty exists to protect others who are detained by the state, such as immigrants who are kept in administrative detention *Slimani v France* (2006) 43 EHRR 49) and psychiatric patients who are detained in a public hospital (*Savage v South Essex Partnership NHS Foundation Trust* [2009] AC 681). The operational duty is also owed to military conscripts. Specifically, there is a duty to protect a conscript against the risk of suicide (*Kilinc v Turkey* (Application No 40145/98)). I have already referred to the circumstances in *Osman* itself, where the deceased and his family were vulnerable to attack by a third party. It would seem that the ECtHR considered that these might in principle have been sufficient to give rise to the operational duty, but the claim failed on the particular facts.

16. More recently, the court has expanded the circumstances in which the duty is owed so as to include what may generally be described as dangers for which in some way the state is responsible. Thus in *Oneryildiz*, the applicant had lived with his family in a slum bordering on a municipal household refuse tip. A methane explosion at the tip resulted in a landslide which engulfed the applicant's house killing his close relatives. The Grand Chamber held at para 101 that the Turkish authorities knew or ought to have known that the tip constituted a real and immediate risk to the lives of persons living close to it. They consequently:

> "had a positive obligation under article 2 of the Convention to take such preventive operational measures as were necessary and sufficient to protect those individuals, especially as they themselves had set up the site and authorised its operation, which gave rise to the risk in question."

17. Another example of a case in this broad category is *Mammadov v Azerbaijan* (Application No 4762/05) (2009) where the applicant's wife set fire to herself during an attempt by police offices to evict the applicant and his family from accommodation that they were occupying. The court made it clear at para 113 that it was necessary to determine whether "this specific situation" triggered the state's operational duty "that is whether at some point during the course of the operation the state agents became aware or ought to have become aware" that there was a risk of suicide. At para 115, the court continued:

> "in a situation where an individual threatens to take his or her own life in plain view of state agents and, moreover where this threat is an emotional reaction directly induced by the state agents' actions or demands, the latter should treat this threat with the utmost seriousness as constituting an imminent risk to that individual's life, regardless of how unexpected that threat might have been."

18. In *Watts v United Kingdom* (2010) 51 EHRR 66, the applicant complained that her transfer from her existing care home to another care home would reduce her life expectancy. The court held at para 88 that a badly managed transfer of elderly residents of a care home could well have a negative impact on their life expectancy as a result of the general frailty and resistance to change of older people. It followed that article 2 was "applicable". The operational duty was, therefore, capable of being owed in such circumstances, but for various reasons, the claim failed on the facts.

19. These are all examples of cases where the operational duty has been held to exist. They are to be contrasted with cases involving hospital deaths resulting from what in *Savage* ([2009] AC 681, para 45) Lord Rodger described as "casual acts of negligence". The leading Strasbourg case in this category is *Powell v United Kingdom* (2000) 30 EHRR CD 362. An article 2 complaint was made by parents in respect of the death of their son as a result of negligent treatment of him in hospital. Their case was that there had been a breach of the *Osman* operational duty. In holding that the claim was inadmissible, the court said at p 364;

> "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 treatment of a particular patient are sufficient of

> themselves to call a contracting state to account from the standpoint of its positive obligations under article 2 of the Convention to protect life."

Thus to use the language of Lord Rodger in *Savage,* if the hospital authorities have performed their obligation to adopt appropriate general measures for the protection of the lives of patients in hospitals (for example, by ensuring that competent staff are recruited, high professional standards are maintained and suitable systems of work are put in place), casual acts of negligence by members of staff will not give rise to a breach of article 2.

20. The question that lies at the heart of the first issue in the present case is whether the admitted "casual" negligence of the trust in its treatment of Melanie is to be assimilated to the *Powell* line of cases or whether the fact that she was a psychiatric patient (though not detained) means that this case should be assimilated to the class of cases where an operational duty arises. The judge and the Court of Appeal decided that it belongs to the *Powell* line of cases. Jackson LJ said:

> "63. On the law as it stands, I do not believe that health trusts have the article 2 operational obligation to voluntary patients in hospital, who are suffering from physical or mental illness, even where there is a 'real and immediate' risk of death. In my view, it is not possible to separate such patients into categories and to say that the operational obligation is owed to some categories of voluntary patients, but not others. A patient undergoing major heart surgery may be at just as great a risk of death as a schizophrenic patient with suicidal ideation.
>
> 64. It is important for court users (patients, NHS trusts, legal advisers and others) that legal obligations and liabilities should be clearly defined and understood. I do not believe that it either is or should be the law that voluntary patients fall into different categories, some of whom (or some of whose families) can claim under article 2 but others of whom cannot. The remedy for clinical negligence, even where 'real and immediate' risk of death has been disregarded, is an action in negligence. "

21. It is, therefore, necessary to attempt to discover the essential features of the cases where Strasbourg has so far recognised the existence of an operational duty. It is clear that the existence of a "real and immediate risk" to life is a necessary but not sufficient condition for the existence of the duty. This is because, as the Court of Appeal said, a patient undergoing major surgery may be facing a real and

immediate risk of death and yet *Powell* shows that there is no article 2 operational duty to take reasonable steps to avoid the death of such a patient.

22. No decision of the ECtHR has been cited to us where the court clearly articulates the criteria by which it decides whether an article 2 operational duty exists in any particular circumstances. It is therefore necessary to see whether the cases give some clue as to why the operational duty has been found to exist in some circumstances and not in others. There are certain indicia which point the way. As Miss Richards and Mr Bowen submit, the operational duty will be held to exist where there has been an assumption of responsibility by the state for the individual's welfare and safety (including by the exercise of control). The paradigm example of assumption of responsibility is where the state has detained an individual, whether in prison, in a psychiatric hospital, in an immigration detention centre or otherwise. The operational obligations apply to all detainees, but are particularly stringent in relation to those who are especially vulnerable by reason of their physical or mental condition: see, for example, *Keenan* (prisoner suffering from a mental disorder) and *Tarariyeva v Russia* (2009) 48 EHRR 609 (person detained in a prison hospital suffering from a serious physical illness). The significance of the assumption of responsibility was summarised by Lord Rodger in *Mitchell v Glasgow City Council* [2009] AC 874, para 66:

> "The obligation of the United Kingdom under article 2 goes wider, however, In particular, where a state has assumed responsibility for an individual, whether by taking him into custody, by imprisoning him, detaining him under mental health legislation, or conscripting him into the armed forces, the state assumes responsibility for that individual's safety. So in these circumstances police authorities, prison authorities, health authorities and the armed forces are all subject to positive obligations to protect the lives of those in their care. "

23. When finding that the article 2 operational duty has been breached, the ECtHR has repeatedly emphasised the vulnerability of the victim as a relevant consideration. In circumstances of sufficient vulnerability, the ECtHR has been prepared to find a breach of the operational duty even where there has been no assumption of control by the state, such as where a local authority fails to exercise its powers to protect a child who to its knowledge is at risk of abuse as in *Z v United Kingdom* Application No 29392/95 (10 May 2001). It is not relevant for the present purposes that this was a complaint of breach of article 3 rather than article 2.

24. A further factor is the nature of the risk. Is it an "ordinary" risk of the kind that individuals in the relevant category should reasonably be expected to take or is

it an exceptional risk? Thus in *Stoyanovi v Bulgaria* (Application No 42980/04) 9 November 2010, the ECtHR rejected an application made by the family of a soldier who died during a parachute exercise. At paras 59 to 61, the court drew a distinction between risks which a soldier must expect as an incident of his ordinary military duties and "'dangerous' situations of specific threat to life which arise exceptionally from risks posed by violent, unlawful acts of others or man-made or natural hazards". An operational obligation would only arise in the latter situation.

25. All of these factors may be relevant in determining whether the operational duty exists in any given circumstances. But they do not necessarily provide a sure guide as to whether an operational duty will be found by the ECtHR to exist in circumstances which have not yet been considered by the court. 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.

26. I must now come to the central question, which is whether the lower courts were right to hold that *Powell* compels the conclusion that the trust owed no operational duty in the present case. The following is a summary of the submissions of Miss Carss-Frisk QC. *Powell* and similar cases, such as *Calvelli v Italy* (Application No 32967/96), 17 January 2002 and *Vo v France* (2005) 40 EHRR 12, demonstrate the existence of a general rule that no operational duty is owed by the state in the field of medical treatment in public hospitals; but there is an exception to this general rule in the case of psychiatric patients, although only if they are detained in hospital. The existence of this exception is shown by the decision in *Savage.* It is true that (i) patients who are in hospital suffering from physical illnesses are often in a vulnerable state, (ii) the hospital authorities will have assumed responsibility for them and (iii) such patients may face a real and immediate risk to their lives. But the Strasbourg jurisprudence shows that these factors are not sufficient to give rise to an article 2 operational duty on the part of the state. As for psychiatric patients, there is a crucial difference between those who are informal patients voluntarily in hospital and those who are detained by the authority of the state. A psychiatric patient who is voluntarily in hospital, like a patient with a physical illness, is free to refuse treatment and leave.

27. I accept, of course, that there are differences between detained and voluntary psychiatric patients; and there are similarities between voluntary patients who are suffering from mental illness and those who are suffering from physical illness. But the differences between the two categories of psychiatric patient

should not be exaggerated. There are also important differences between informal psychiatric patients who are at real and immediate risk of suicide and patients in an "ordinary" healthcare setting who are at real and immediate risk of death, for example, because they are undergoing life-saving surgery.

28. As regards the differences between an informal psychiatric patient and one who is detained under the MHA, these are in many ways more apparent than real. It is true that the paradigm of a detained patient is one who is locked up in a secure hospital environment. But a detained patient may be in an open hospital with freedom to come and go. By contrast, an informal patient may be treated in a secure environment in circumstances where she is suicidal, receiving medication for her mental disorder which may compromise her ability to make an informed choice to remain in hospital and she would, in any event, be detained if she tried to leave. Informal in-patients can be detained temporarily under the holding powers given by section 5 of the MHA to allow an application to be made for detention under section 2 or 3 of the MHA. The statutory powers of detention are the means by which the hospital is able to protect the psychiatric patient from the specific risk of suicide. The patient's position is analogous to that of the child at risk of abuse in *Z v United Kingdom*, where at paras 73-74 the court placed emphasis on the availability of the statutory power to take the child into care and the statutory duty to protect children. No such powers exist, or are necessary, in the case of the capable patient in the ordinary healthcare setting.

29. Although informal patients are not "detained" and are therefore, in principle free to leave hospital at any time, their "consent" to remaining in hospital may only be as a result of a fear that they will be detained. In *Principles of Mental Health Law and Policy* (2010 OUP) ed Gostin and others, the authors have written in relation to admission at para 11.03:

> "Since the pioneering paper by Gilboy and Schmidt in 1979, it has been recognised that a significant proportion of [informal] admissions are not 'voluntary' in any meaningful sense: something in the range of half of the people admitted voluntarily feel coerced into the admission; it is just that the coercion is situational, rather than using legal mechanisms. "

30. As regards the voluntary psychiatric patient who is at risk of suicide and the patient suffering from a life-threatening physical illness who is in an "ordinary" hospital setting, the nature of the risk to which these two categories of patient are exposed is very different. In the case of the suicide of a psychiatric patient, the likelihood is that, given the patient's mental disorder, her capacity to make a rational decision to end her life will be to some degree impaired. She needs to be protected from the risk of death by those means. The present case is a tragic

illustration of this. Melanie was admitted to hospital because she was suffering from a mental disorder and had attempted to commit suicide. The very reason why she was admitted was because there was a risk that she would commit suicide from which she needed to be protected. On the other hand, the patient who undergoes surgery will have accepted the risk of death on the basis of informed consent. She may choose to avoid the risk by deciding not to go ahead with the medical treatment.

31. In the *Savage* case, [2009] AC 681, it was submitted on behalf of the defendant NHS Trust that, in the light of the principle stated in *Powell v United Kingdom* 30 EHRR CD 362, no operational duty was owed under article 2 to take steps to protect a detained mental patient from a real and immediate risk of suicide. This submission was rejected by the House of Lords. At para 59, Lord Rodger said:

> "The circumstances in *Powell's* case …were quite different from circumstances where a patient presents a real and immediate risk of suicide. Therefore, the decision of the European court, which I respectfully consider was correct, provides no guidance on the problem before the House."

32. And later he said:

> "65. Neither *Powell's* case…. nor *Dodov's* case 47 EHRR 932 provides any basis whatever for the proposition that, as a matter of principle, medical staff in a mental hospital can never be subject to an 'operational' duty under article 2 to take steps to prevent a (detained) patient from committing suicide—even if they know or ought to know that there is a real and immediate risk of her doing so. The obvious response to that proposition is: Why ever not?...."

33. As I have said, the ECtHR has not considered whether an operational duty exists to protect against the risk of suicide by informal psychiatric patients. But the Strasbourg jurisprudence shows that there is such a duty to protect persons from a real and immediate risk of suicide at least where they are under the control of the state. By contrast, the ECtHR has stated that in the generality of cases involving medical negligence, there is no operational duty under article 2.

34. So on which side of the line does an informal psychiatric patient such as Melanie fall? I am in no doubt that the trust owed the operational duty to her to take reasonable steps to protect her from the real and immediate risk of suicide.

Whether there was a real and immediate risk of suicide on 19 April 2005 (and if so whether there was a breach of duty) is the second issue that arises on this appeal. But if there was a real and immediate risk of suicide at that time of which the trust was aware or ought to have been aware, then in my view the trust was under a duty to take reasonable steps to protect Melanie from it. She had been admitted to hospital because she was a real suicide risk. By reason of her mental state, she was extremely vulnerable. The trust assumed responsibility for her. She was under its control. Although she was not a detained patient, it is clear that, if she had insisted on leaving the hospital, the authorities could and should have exercised their powers under the MHA to prevent her from doing so. In fact, however, the judge found that, if the trust had refused to allow her to leave, she would not have insisted on leaving. This demonstrates the control that the trust was exercising over Melanie. In reality, the difference between her position and that of a hypothetical detained psychiatric patient, who (apart from the fact of being detained) was in circumstances similar to those of Melanie, would have been one of form, not substance. Her position was far closer to that of such a hypothetical patient than to that of a patient undergoing treatment in a public hospital for a physical illness. These factors, taken together, lead me to conclude that the ECtHR would hold that the operational duty existed in this case.

The second issue: was there a "real and immediate" risk to the life of Melanie on 19 April 2005 of which the trust knew or ought to have known and which they failed to take reasonable steps to avoid?

35. In the light of their conclusions on the first issue, both the judge and the Court of Appeal understandably dealt with all the remaining issues more briefly than they might otherwise have done. In relation to the second issue, Simon J accepted the evidence of Dr Caplan (the trust's expert psychiatrist) that the risk of suicide was approximately 5% on 19 April (after Melanie left the hospital), increasing to 10% on 20 April and 20% on 21 April. The judge said that the risk was "low to moderate (but nevertheless, significant)". He concluded that there was a real, but not an immediate risk. In assessing what steps it was reasonable to take to avoid the risk and taking account of the need to respect Melanie's personal autonomy, he would not have held that there had been a breach of article 2. The Court of Appeal agreed that the risk was real, but they also considered that it was immediate. On the question of breach, they said that there was a simple and obvious way of preventing the risk from eventuating, namely by refusing Melanie's request for home leave. If that request had been refused, the judge found that she would not have insisted on going home contrary to medical advice. In these circumstances, the Court of Appeal held that, if there was an operational duty, the trust failed to comply with it.

36. The trust has appealed against all aspects of the Court of Appeal's decision in relation to this issue. They say that the risk was neither real nor immediate and

in any event there was no breach of the operational duty. Miss Carss-Frisk emphasises the fact that, as has often been said, the threshold for the operational duty (real and immediate risk to life) is high: see, for example, per Lord Rodger in the *Savage* case [2009] AC 681, para 41 and para 66, where he said that "given the high threshold, a breach of the duty will be harder to establish then mere negligence". See also per Baroness Hale at para 99.

37. I accept that it is more difficult to establish a breach of the operational duty than mere negligence. This is not least because, in order to prove negligence, it is sufficient to show that the risk of damage was reasonably foreseeable; it is not necessary to show that the risk was real and immediate. But to say that the test is a high one or more stringent than the test for negligence does not shed light on the meaning of "real and immediate" or on the question whether there was a real and immediate risk on the facts of any particular case.

38. It seems to me that the courts below were clearly right to say that the risk of Melanie's suicide was "real" in this case. On the evidence of Dr Caplan, it was a substantial or significant risk and not a remote or fanciful one. Dr Caplan and Dr Britto (the claimants' expert psychiatrist) agreed that all ordinarily competent and responsible psychiatrists would have regarded Melanie as being in need of protection against the risk of suicide. The risk was real enough for them to be of that opinion. I do not accept Miss Carss-Frisk's submission that there had to be a "likelihood or fairly high degree of risk". I have seen no support for this test in the Strasbourg jurisprudence.

39. As for whether the risk was "immediate", Miss Carss-Frisk submits that the Court of Appeal failed to take into account the fact that an "immediate" risk must be imminent. She derives the word "imminent" from what Lord Hope said in *Van Colle v Chief Constable of the Hertfordshire Police* [2009] AC 225, para 66. In the case of *In re Officer L* [2007] 1 WLR 2135, para 20, Lord Carswell stated that an apt summary of the meaning of an "immediate" risk is one that is "present and continuing". In my view, one must guard against the dangers of using other words to explain the meaning of an ordinary word like "immediate". But I think that the phrase "present and continuing" captures the essence of its meaning. 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 time in the future.

40. I think that this approach is supported by some of the Strasbourg jurisprudence. In *Opuz v Turkey* (2010) 50 EHRR 695, para 134, the court concluded that there was "a *continuing* threat to the health and safety of the victims" (emphasis added) and, therefore, that there was an immediate risk. In *Renolde v France* (2009) 48 EHRR 969, the deceased had attempted suicide 18 days before his death and thereafter continued to show signs of worrying

behaviour, but made no further attempts at self-harm. The court said at para 89: "Although his condition and the immediacy of the risk of a fresh suicide attempt varied, the court considers that that risk was real and that [the deceased] required careful monitoring in case of any sudden deterioration." The risk of death was sufficiently immediate for the article 2 claim to succeed. It was not necessary for the risk to be apparent just before death.

41. In my view, the Court of Appeal were right to say that the risk of suicide in the present case was immediate when Melanie was allowed home on 19 April 2005. There was a real risk that she would take her life during the two day period of home leave. That risk existed when she left the hospital and it continued (and increased) during the two day period. That was sufficient to make the risk present and continuing and, therefore, immediate. The judge gave no reasons for reaching the opposite conclusion.

42. Finally, there is the question of breach of the duty. There is no doubt that the trust was or ought to have been aware of the risk. Did they take all steps reasonably necessary to avoid the risk? Miss Carss-Frisk submits that Dr Meagher had a "margin of discretion" which was wider than the law of negligence allows so that the trust's admission of negligence should not automatically lead to a finding of breach of the article 2 duty. Bearing in mind the low levels of risk found by the judge, she submits that it was within Dr Meagher's margin of discretion to consider that it was appropriate for Melanie to go home on 19 April 2005.

43. I cannot accept this submission. The standard demanded for the performance of the operational duty is one of reasonableness. This brings in "consideration of the circumstances of the case, the ease or difficulty of taking precautions and the resources available": per Lord Carswell in *In re Officer L* ([2007] 1 WLR 2135, para 21). In this case, it also required a consideration of respect for the personal autonomy of Melanie. But it was common ground that the decision to allow Melanie two days home leave was one that no reasonable psychiatric practitioner would have made. In these circumstances, it seems to me that recourse to the margin of appreciation is misplaced. The trust failed to do all that could reasonably have been expected to prevent the real and immediate risk of Melanie's suicide. The Court of Appeal were right so to hold.

The third issue: were Mr and Mrs Rabone "victims" within the meaning of article 34 of the Convention?

44. Section 7(1) of the HRA provides that a claim that a public authority has acted in a way which is incompatible with a Convention right may be brought before the courts only if the person bringing the complaint "is (or would be) a

victim of the unlawful act". Section 7(7) provides that a person is a "victim" of an unlawful act only if he would be a victim for the purposes of article 34 of the Convention if proceedings were brought in the ECtHR in respect of that act.

45. Miss Carss-Frisk submits that Mr and Mrs Rabone would not be treated as victims within the meaning of article 34. She relies on the reasoning of Lord Scott in the *Savage* case [2009] AC 681, para 5. Lord Scott said that he could well understand how a member of a deceased's family may be regarded as a "victim" for the purposes of the article 2 investigative obligation. But he could not understand how a close family member could claim to be a "victim" for the purpose of the article 2 substantive obligations. He said that it was not "any part of the function of article 2(1) to add to the class of persons who under ordinary domestic law can seek financial compensation for a death an undefined, and perhaps undefinable, class composed of persons close to the deceased who have suffered distress and anguish on account of the death."

46. Both the judge and the Court of Appeal rejected the trust's submissions. In my view, they were right to do so. The ECtHR has repeatedly stated that family members of the deceased can bring claims in their own right both in relation to the investigative obligation and the substantive obligations. Examples of such cases are *Yasa v Turkey* (1999) 28 EHRR 408, para 64; *Edwards v United Kingdom* at para 106; *Renolde v France* (2009) 48 EHRR 969, para 69; and *Kats v Ukraine* (2010) 51 EHRR 1066, para 94.

47. Miss Carss-Frisk realistically accepts that the Strasbourg jurisprudence is clear on this. She points out that the question of victim status was not argued in any of these cases, so that the weight to be accorded to them is diminished. But there is no basis for believing that the ECtHR would depart from this consistent line of authority if the contrary were argued. In any event, the contrary was argued in *Yasa v Turkey* (1998) 28 EHRR 408 where the court held that a nephew was a "victim".

48. It follows that the observations of Lord Scott in *Savage* (with which no other member of the House expressed agreement) are not correct. They seem to have been made without the benefit of a consideration of the Strasbourg jurisprudence on the point.

The fourth issue: did Mr and Mrs Rabone lose their victim status as a result of the settlement of their negligence claim?

49. It is common ground that a person ceases to be a victim within the meaning of article 34 of the Convention if two conditions are satisfied. These are that the domestic public authority has (i) provided "adequate redress" and (ii) "acknowledged, either expressly or in substance, the breach of the Convention". There is ample ECtHR jurisprudence to support both propositions. It is sufficient to refer to the early case of *Eckle v Germany* (1982) 5 EHRR 1, para 66 and the recent case of *R.R v Poland* (Application No 27617/04), 26 May 2011 at para 97. Both conditions must be satisfied. On behalf of the trust, it is submitted that Mr and Mrs Rabone lost their victim status because *both* conditions were satisfied in the present case. But before I address this submission, I should consider whether the settlement of itself has deprived Mr and Mrs Rabone of victim status. As I have said, Mr Rabone accepted £7,500 (£2,499 for funeral expenses and the balance as general damages for Melanie's pain and suffering during the two months' period before she died) in settlement of the 1934 Act negligence claim.

The effect of the settlement

50. Miss Carss-Frisk submits that Mr and Mrs Rabone lost their victim status by reason of the settlement. She says that, in the context of a complaint of medical negligence leading to death, a claimant loses the status of a victim for the purposes of pursuing a claim for breach of article 2 if he or she settles the negligence claim. As I understand it, this is regardless of whether the settlement sum is lower than awards made by the ECtHR in similar cases. Counsel relies on a number of authorities in support of this submission, in particular *Powell* (see para 19 above) and *Rowley v United Kingdom* (Application No 31914/03), February 2005.

51. In *Powell,* the parents of a 10 year old boy who died as a result of misdiagnosis by doctors brought claims including for negligence pursuant to the 1934 Act (on behalf of the boy's estate) and pursuant to the Fatal Accidents Act 1976 on behalf of themselves. The Health Authority admitted negligence and paid a sum in settlement. The parents persisted with other claims relating to the falsification of medical records after their son's death. These claims were unsuccessful and the parents complained to Strasbourg. It is important to note that the parents' complaint before the ECtHR was that there had been a breach of the procedural obligation under article 2 to conduct an effective investigation into their son's death. The court said at p365:

> "Of greater significance for the court is the fact that the applicants settled their civil action in negligence against the responsible health authority and did not pursue individual claims against the doctors. In the court's opinion, the applicants by their decision closed another crucially important avenue for shedding light on the extent of the doctors' responsibility for their son's death…..

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

52. The focus of the court's reasoning seems to have been on the effect of the settlement on the parents' ability to complain about the adequacy of the investigation, rather than on their ability to pursue any other claim for compensation for breach of article 2. Despite the existence of the words that I have emphasised, it is not clear what claim for compensation (if any) the parents wished to pursue. The court emphasised that, by their decision to settle their negligence claim, the parents "closed another and crucially important avenue for shedding light on the extent of the doctors' responsibility for their son's death". In other words, by settling their claim the parents lost the right to have an effective investigation by a civil court and they could not seek to pursue *that right* under the Convention. It is true that in the words that I have emphasised the court also said that settlement prevented the applicants from being able to claim to be a victim "in respect of the circumstances surrounding the treatment administered to the deceased person". But there is no amplification of this statement. Since this was not the focus of the issues in the case or the discussion in the judgment, I do not think that it provides a clear basis for holding that the settlement of a claim for compensation for negligence arising from a death of itself prevents an individual from pursuing a claim for compensation for breach of article 2.

53. In *Rowley*, the applicant's son had drowned in the bath at a residential care home. The applicant threatened to issue proceedings against the City Council, but accepted a settlement offer of compensation of £1,750 and a formal apology. The complaint to the ECtHR included an allegation that there had been a violation of article 2. The complaint was declared inadmissible. The court noted that "the applicant settled her civil claims for damages against the Council on the basis of damages and a formal apology". But the judgment does not state whether the settlement sum of £1,750 was only in respect of one claim for compensation arising from the death and, if it was, what effect this would have on the ability of the applicant to make a different claim for compensation for breach of article 2.

54. In short, I do not consider that the decisions in *Powell* and *Rowley* clearly show that the ECtHR takes the view that acceptance of compensation in settlement of a domestic law cause of action arising from a death necessarily means that an

individual can no longer be regarded as a victim for the purposes of an article 2 claim arising from the same death.

55. There is, however, a line of cases in which the court has held that, by accepting compensation in settlement of a domestic remedy for the consequences of a death, an applicant has *renounced* all claims for the consequences of the death including claims for breach of article 2. Where this occurs, the applicant ceases to be a victim and cannot complain of a breach of article 2.

56. Thus in *Caraher v United Kingdom* (2000) 29 EHRR CD 119, the applicant accepted a sum in settlement of all claims on her own behalf and on behalf of the estate and dependants of the deceased. It was said by the court that "where a relative accepts a sum of compensation in settlement of civil claims and renounces further use of local remedies therefore, he or she will generally no longer be able to claim to be a victim in respect of those matters". It is material that the settlement was of *all* claims on behalf of the applicant herself, the estate and the dependants. A further example of the same reasoning is *Hay v United Kingdom* (Application No 41894/98), 17 October 2000. In that case, the ECtHR declared inadmissible a complaint under article 2 in respect of the shooting dead by the police of the applicant's brother, where civil proceedings against the police had been settled. It made no difference that it was a term of the settlement that it was made without prejudice to the right of those representing the estate of the deceased to pursue a petition before the ECtHR.

57. I do not find it easy to extract from the Strasbourg jurisprudence a clear statement of the effect of the settlement of a domestic law claim on the ability of an individual to pursue a corresponding Convention claim. The court does not, however, seem to adopt a strict approach to the interpretation of a settlement. It does not say that a right of action is preserved unless it has clearly been compromised or renounced. That is demonstrated by the decision in *Hay.* Rather, the court seems to adopt a broad approach to determining the true meaning and effect of a settlement. As they said in *Caraher,* if relatives settle their domestic law claims arising from a death, they will generally cease to be victims in relation to a corresponding Convention claim. The phrase "corresponding Convention claim" is mine. By this I mean that, if (i) the domestic law claim that is settled was made by the same person as seeks to make an article 2 claim and (ii) the head of loss embraced by the settlement broadly covers the same ground as the loss which is the subject of the article 2 claim, then I would expect the ECtHR to say that, by settling the former, the claimant is to be taken to have renounced any claim to the latter.

58. To return to the facts of the present case, I do not accept that by settling the 1934 Act negligence claim on behalf of Melanie's estate, Mr Rabone renounced an

article 2 claim on behalf of himself and Mrs Rabone for damages for non-pecuniary loss for their bereavement. No such claim had been made in the negligence proceedings because such a claim was not available in English law. That is because section 1A of the Fatal Accidents Act 1976 provides that a claim by parents for damages for bereavement for the loss of a child (currently fixed by section 1A(3) at £11,800) shall only be for the benefit of the parents of a minor and Melanie was more than 18 years of age at the date of her death. In these circumstances, the settlement of the 1934 Act claim did not amount to an implied renunciation of any article 2 claim. In the absence of an express renunciation, the settlement of itself had no legal effect on the status of Mr and Mrs Rabone as victims for the purpose of their article 2 claim. It remains to be considered whether (as the Court of Appeal held) the sum of £7,500 was nevertheless "adequate redress".

Adequate redress

59. As I have said, the redress that the trust has made as a result of Melanie's death has been limited to payment of compensation to Mr Rabone in respect of his claim on behalf of the estate. Nothing has been paid to Mr or Mrs Rabone to compensate them for their bereavement. No decision of the ECtHR has been cited to us which supports the surprising proposition that the compensation that has been paid in respect of the estate's losses would be considered by the court to be adequate redress in respect of the personal losses of Mr and Mrs Rabone.

60. Miss Richards relies on *Bubbins v United Kingdom* (2005) 41 EHRR 458 as indicating that the ECtHR would not accept this proposition. The applicant's brother was shot dead by an armed police officer during a police operation. The court held that there had been a breach of article 13, but not of article 2. In relation to the claim under article 13, the court noted at para 172 that the applicant had no right to claim compensation for non-pecuniary damage suffered by her. The most that she could claim was funeral expenses on behalf of the estate under the 1934 Act. It is true that this case was concerned with article 13 (the adequacy of domestic remedies) and not with the separate question of victim status. But it is difficult to believe that the ECtHR would hold that an applicant had received adequate redress through proceedings that would not be regarded as an adequate remedy under article 13. The importance of compensation for the non-pecuniary damage flowing from a breach of article 2 was emphasised in *Bubbins* at para 171: "compensation for non-pecuniary damage flowing from the breach [of article 2] should, in principle, be available as part of the range of redress". The court concluded that the applicant had no prospect of obtaining compensation for non-

pecuniary damage suffered by her if she established a breach of article 2. Accordingly, there had been a breach of article 13.

61. Although *Bubbins* is not precisely in point, it provides a strong indication of the view that the ECtHR would take on the question whether the settlement sum of £7,500 would be adequate redress for the article 2 claim in the present case. In my opinion, it would hold that there has been no adequate redress for the simple reason that there has been no compensation at all for the non-pecuniary damage suffered by Mr and Mrs Rabone as a result of the breach of article 2.

62. It might be said that it is appropriate to look at the matter more broadly and ask whether the sum of £7,500 was adequate redress for the claims on behalf of the estate and on behalf of Mr and Mrs Rabone themselves, when these claims are aggregated. In *Gafgen v Germany* (2011) 52 EHRR 1, para 116, the court said that the question whether redress is appropriate and sufficient is "dependent on all the circumstances of the case, having regard in particular, to the nature of the Convention violation at stake". It might be argued that, if an award to the estate of a deceased person is generous and an award to the family's victims is low, the court would say that there has been adequate redress "in all the circumstances of the case". I accept that the court might adopt this position in some circumstances. But I am sure that it would not do so in the present case. First, Mrs Rabone has been awarded no compensation at all. Neither has Mr Rabone except as personal representative. If Melanie died intestate, Mr and Mrs Rabone would take in equal shares ahead of Melanie's sisters Amanda and Emma. Secondly, although the sum awarded to the estate was reasonable, it was by no means unduly generous; and (as we shall see) the Court of Appeal assessed the damages for breach of article 2 at £10,000, a sum significantly higher than the settlement figure. It is true that the correctness of that assessment is under challenge in this appeal (the sixth issue). But for reasons that I give later, there is no justification for interfering with the Court of Appeal's assessment. In these circumstances, I do not see how it can reasonably be said that the settlement figure was adequate redress for the article 2 claim of Mr and Mrs Rabone.

63. For these reasons, I would hold that the trust did not make adequate redress and therefore that Mr and Mrs Rabone did not lose their victim status by accepting the settlement figure.

Acknowledgement

64. In view of my conclusion on the issue of the adequacy of redress, it is not necessary for me to consider the further question of whether Mr and Mrs Rabone lost their victim status because the trust acknowledged "expressly or in substance" their breach of the article 2 operational duty. But since the matter was fully argued and it raises a point of some importance, I shall deal with it. It is common ground that there was no express acknowledgement of a breach of article 2 in this case. But it is submitted on behalf of the trust that there was such an acknowledgement in substance.

65. It is necessary to set out a little of the relevant history. As I have said, the claims were (i) by Mr Rabone alone for negligence on behalf of Melanie's estate under the 1934 Act and (ii) by Mr and Mrs Rabone on their own behalf for breach of article 2. In May 2008, the negligence claim was settled by a consent order which provided for payment of £7,500 in respect of the estate's claim. There was no admission of liability in relation to either claim. The consent order explicitly recorded that Mr and Mrs Rabone were continuing with their claim under the HRA.

66. The trust continued to deny negligence until 6 May 2009, when their solicitors wrote a letter headed "letter of admission". They wrote that the trust admitted that the common law duty of care owed to Melanie was breached when she was allowed home on 19 April 2005. They went on to state expressly that they continued to deny the article 2 claims. On the following day, the trust's chief executive wrote as follows:

> "I have seen a copy of the report provided by my Trust's independent psychiatric expert, Dr Caplan, concerning the standard of care provided to your daughter Melanie during her admission to our Trust's unit in Stepping Hill Hospital in April 2005. The Trust accepts Dr Caplan's view that the decision to allow Melanie to have two days leave on 19 April fell below the standard of care which we owed to her at that time.
>
> Having learned of Dr Caplan's view and in addition to the condolences I expressed to you in September 2005, I wanted to write personally to you on behalf of the Trust to say how deeply sorry I am for the error we made on 19 April 2005.

> I realise what deep grief Melanie's death has caused to you and I know that this apology will not undo what has happened, but I wanted you to know how sorry we are for the error we have made."

67. Miss Richards submits that nothing less than a clear and unequivocal acknowledgement of a violation of article 2 would have sufficed. She points out that the importance of the requirement that there be an acknowledgment of the breach of the Convention has been repeatedly emphasised by the ECtHR: see, for example, *Jensen v Denmark* (Application No 48470/99), *Ludi v Switzerland* (1993) 15 EHRR 173, para 34 and *Gafgen v Germany* 52 EHRR 1, para 120. She says that the trust have not acknowledged the consequences of their error and have not accepted responsibility for Melanie's death. It follows that there has been no acknowledgement of its breach of article 2 and, without such an acknowledgement, Mr and Mrs Rabone would remain victims entitled to bring their claim.

68. In my view, the trust have clearly accepted that their error was the cause of Melanie's death. The chief executive's letter of 7 May (in particular its last paragraph) contained a clear admission that the negligence for which the chief executive was apologising had caused Melanie's death. But the question remains whether that admission was a sufficient acknowledgment of the breach of article 2 to result in the loss of victim status. The Strasbourg authorities shed some light on this question.

69. In *Nikolova and Velichkova v Bulgaria* (2009) 48 EHRR 915, the applicants were relatives of the deceased police officer who had died as a result of an attack on him by two fellow officers. The two officers were convicted of causing the death by intentional grievous bodily harm and the applicants were awarded compensation in the criminal proceedings. The applicants were also awarded compensation in civil proceedings that they brought against the police authority. They then made a complaint to the ECtHR that there had been a breach of article 2. The court upheld the complaint. The applicants had not lost their victim status since the domestic authorities had failed to provide adequate redress. But the court also held at para 51 that "the judgments convicting the police officers and awarding compensation to the applicants amounted to an acknowledgement in substance that the death of Mr Nikolov *had been in breach of article 2 of the Convention*" (emphasis added). The importance of the words that I have emphasised is that they show that, despite the differences that there may be between the elements of a violation of the substantive article 2 obligation and the elements of criminal and/or civil liability in domestic law, an admission or a finding of criminal or civil liability will often be sufficient to amount to an acknowledgement "in substance" of a breach of article 2.

70. In *Rowley* (see para 54 above), the court said:

> "In the present case there have been numerous findings that the applicant's son was subject to inadequate care while under the responsibility of the council. The internal complaints procedure by the Independent Investigator found defects in procedures as did the council's Senior Safety Officer. Furthermore, the council pleaded guilty to an offence under the Health and Safety at Work Act 1974 for failure so far as reasonably practicable to ensure Malcolm's safety and was fined a substantial amount.
>
> The court would also note that the applicant settled her civil claims for damages against the council on the basis of damages and a formal apology to the effect that their failure in standards in care and safety had resulted in the death of her son.....
>
> Having regard to the considerations above and the fact that the applicant settled her claims in civil proceedings accepting compensation and an apology, the court finds that she may no longer, in these circumstances, claim to be a victim of a violation of the Convention..."

71. None of the domestic institutions in *Rowley* had dealt expressly with article 2 or made findings on whether there had been a real or immediate risk to the life of the applicant's deceased son. And yet the court held that the findings that were made and the apology and payment of compensation for negligently causing the death amounted to a sufficient acknowledgment in substance of the breach of article 2.

72. In both *Nikolova* and *Rowley,* the article 2 claim was declared to be inadmissible. These cases show that an authority may in substance acknowledge a breach of article 2 without making an explicit admission of the elements of the breach of the article 2 duty (ie that there was a real and immediate risk etc). To insist on that would be tantamount to insisting on an express acknowledgement of the breach. In the present case, the trust admitted that they had negligently caused Melanie's death and they paid compensation to reflect that admission. There is a considerable degree of overlap between the claim in negligence and the article 2 claim. The essential features of the case against the trust were that: (i) Melanie was a vulnerable patient in the care of the trust at the material time; (ii) she was known to be a suicide risk; (iii) the trust acted negligently in failing to take reasonable steps to protect her; and (iv) their negligence caused her death. In substance these features formed the basis of the claim in negligence and the claim

for breach of the article 2 operational duty. Had it been necessary to decide the point, I would have held that the trust in substance acknowledged their breach of the article 2 duty.

The fifth issue: limitation

73. Section 7(5) of the HRA provides that proceedings under section 7(1)(a) (a claim that a public authority has acted in a way which is incompatible with a Convention right) must be brought "before the end of (a) the period of one year beginning with the date on which the act complained of took place; or (b) such longer period as the court or tribunal considers equitable having regard to all the circumstances".

74. Melanie died on 20 April 2005. Proceedings were issued on 11 August 2006, almost four months after the expiry of the one year limitation period. The question that arises, therefore, is whether it was equitable to extend the one year period by almost four months having regard to all the circumstances.

75. The relevant principles are not in dispute. The court has a wide discretion in determining whether it is equitable to extend time in the particular circumstances of the case. It will often be appropriate to take into account factors of the type listed in section 33(3) of the Limitation Act 1980 as being relevant when deciding whether to extend time for a domestic law action in respect of personal injury or death. These may include the length of and reasons for the delay in issuing the proceedings; the extent to which, having regard to the delay, the evidence in the case is or is likely to be less cogent than it would have been if the proceedings had been issued within the one year period; and the conduct of the public authority after the right of claim arose, including the extent (if any) to which it responded to requests reasonably made by the claimant for information for the purpose of ascertaining facts which are or might be relevant. However, I agree with what the Court of Appeal said in *Dunn v Parole Board* [2009] 1 WLR 728, paras 31, 43 and 48 that the words of section 7(5)(b) of the HRA mean what they say and the court should not attempt to rewrite them. There can be no question of interpreting section 7(5)(b) as if it contained the language of section 33(3) of the Limitation Act 1980.

76. The judge expressed his final conclusion on the limitation issue at para 131:

> "However, in my judgment, the decisive factor is that, at this stage of the trial process, I am in a position to conclude that there is no merit in the claims to which this issue is relevant. In addition, the contents

> of the SUI Report, the formal acknowledgement of its negligence by the Trust and its letter of apology are very substantial matters to weigh in the balance when considering whether it would be right to extend time."

For these reasons, he refused to extend time. The Court of Appeal agreed that the fact that the claim was doomed to failure was "the decisive factor". They said that, if the claim were otherwise well-founded, they would have been inclined to extend time.

77. In the light of my conclusions on the earlier issues in the case, I would reject the premise on which the judge and the Court of Appeal exercised the section 7(5)(b) discretion. It follows that I must exercise the discretion afresh. The extension of time that is sought is less than four months. There is no suggestion that the evidence has become less cogent as a result of the delay in issuing the proceedings or that the trust have been prejudiced in any other way by the delay. Mr and Mrs Rabone made a formal complaint within five months of Melanie's death. They were advised that their complaint would be "put on hold" until an internal investigation had been completed. Their evidence to the judge was that they believed that the trust would produce a "reasonably prompt report" providing a proper explanation about the decision to allow Melanie to have home leave: see per Simon J at para 129. They said that their waiting for the report was a material factor in their decision not to issue proceedings. As the judge found, if the investigation which began in September 2005 had produced a reasonably prompt report, they might have issued proceedings sooner. The investigation report was not in fact sent to them until 16 March 2007.

78. A number of points are made on behalf of the trust. First, a claim could have been brought at the time of the formal letter of complaint on 31 August 2005. Secondly, Mr and Mrs Rabone accepted that, in the year following the death, they were aware in general terms of the HRA and the possibility of bringing a legal claim. Even then, they did not seek legal advice, but only proceeded with a claim after a discussion with a friend in June or July 2006. Thirdly, they could not have been waiting for the trust's final investigation report, because, in the event, they issued proceedings before a copy of it was sent to them.

79. I accept that Mr and Mrs Rabone could have issued proceedings within the one year period. But in my view they acted reasonably in not issuing proceedings, rather than waiting for the report (as they were encouraged by the trust to do). The strength of this point is not undermined by the fact that, in the end, they felt that the delay in publishing the report to them was so great that they could wait no longer and decided to issue proceedings before seeing it. In summary, the points which strongly militate in favour of granting the extension of time are that the

required extension is short; the trust have suffered no prejudice by the delay in the issue of the proceedings; Mr and Mrs Rabone acted reasonably in holding off proceedings in the hope that the report might obviate the need for them; and (most important of all) they have a good claim for breach of article 2. I would, therefore, grant the necessary extension of time.

The sixth issue: quantum of damages

80. In the light of the judge's decision on the main issues, the question of remedy did not arise. Nevertheless, he dealt with it briefly. He noted that the real purpose of Mr and Mrs Rabone was not to claim damages, but rather to achieve a public recognition of the serious errors that led to Melanie's death. He said that a proper award of damages would have been a modest sum which recognised the breaches of their Convention rights. He would have assessed the sum at £1,500 each for Mr and Mrs Rabone.

81. At para 112, Jackson LJ said:

> "If the issue were to arise, I would incline to the view that the judge's award of £3,000 (£1,500 for each claimant) was too low. Looking at the sums awarded by the Strasbourg court in other cases, I would have proposed an award of £10,000 (£5,000 for each claimant). In my view, that is a more appropriate nominal sum. It also reflects what would have been the claimant's entitlement under the Fatal Accidents Act, if Melanie would have been under 18."

82. The power to award damages for breach of a Convention right derives from section 8(3) of the HRA. No award of damages should be made unless, taking account of all the circumstances of the case, including any other relief or remedy granted, the court is satisfied that the award is necessary to afford just satisfaction: see *Lester, Pannick and Herberg: Human Rights Law and Practice* 3rd ed (2007), para 2.8.3. In *R (Greenfield)v Secretary of State for the Home Department* [2005] 1 WLR 673, para 9, Lord Bingham approved the observations of the Court of Appeal in *Anufrijeva v Southwark London Borough Council* [2004] QB 1124 at paras 52-53 that "the remedy of damages generally plays a less prominent role in actions based on breaches of the articles of the Convention, than in actions based on breaches of private law obligations…..[w]here an infringement of an individual's human rights has occurred, the concern will usually be to bring the infringement to an end and any question of compensation will be of secondary, if any, importance". It is also important to keep in mind section 8(4) of the HRA which provides that, in determining whether to award damages or the amount of an award, "the court must take into account the principles applied by the European

Court of Human Rights in relation to the award of compensation under article 41 of the Convention". As Lord Bingham said in *Greenfield* (para 19), our courts should therefore look to Strasbourg for precedents on the levels of compensation.

83. With those considerations in mind, Miss Carss-Frisk submits that the Court of Appeal should not have interfered with the judge's assessment: the decision to award £1,500 to each claimant was not an error of law or principle.

84. There are many Strasbourg cases in which the court has awarded the victims of a breach of article 2 compensation for non-pecuniary loss. No decision has been cited to us which purports to be a guideline case in which the range of compensation is specified and the relevant considerations are articulated. It is, therefore, necessary for our courts to do their best in the light of such guidance as can be gleaned from the Strasbourg decisions on the facts of individual cases.

85. In *Savage (No 2)* [2010] EWHC 865 (QB), Mackay J considered a substantial number of decisions of the ECtHR in which compensation has been awarded for non-pecuniary loss to victims of a breach of the substantive article 2 obligation. At para 97, he said that the range of awards for such loss was between €5,000 and €60,000. This summary of the effect of the cases had not been disputed before us. What they show is that the sums awarded are fairly modest, but nevertheless within a considerable range. This is not surprising, because Strasbourg does not award a fixed conventional figure for this head of loss. One would expect the court to have regard to the closeness of the family link between the victim and the deceased, the nature of the breach and the seriousness of the non-pecuniary damage that the victim has suffered. Factors which will tend to place the amount of the award towards the upper end of the range are the existence of a particularly close family tie between the victim and the deceased; the fact that the breach is especially egregious; and the fact that the circumstances of the death and the authority's response to it have been particularly distressing to the victims. Conversely, factors which will tend to place the award towards the lower end of the range are the weakness of the family ties, the fact that the breach is towards the lower end of the scale of gravity and the fact that the circumstances of the death have not caused the utmost distress to the victims.

86. There is a passing reference to some of these considerations in *Kallis v Turkey* (2009) ECHR 1662 (27 October 2009), where the court awarded €35,000 to each of the applicants (parents of the deceased), saying that an award should be made under that head "bearing in mind the family ties between the applicants and the victim of the killing and the seriousness of the damage sustained, which cannot be compensated for solely by a finding of a violation..."

87. I am in no doubt that the award of £1,500 each to Mr and Mrs Rabone was too low. It may be that the judge was strongly influenced by the fact that their main purpose in bringing these proceedings was not to obtain an award of damages. That is true, but the fact is that they did make a claim for damages and it is necessary to make a proper assessment in the light of such assistance as can be derived from the Strasbourg cases. I would emphasise the following points. First, the family ties between Mr and Mrs Rabone and Melanie were very strong. They were a close family. They had been on holiday to Egypt with Melanie for a week in March 2005. They had shown the utmost concern for her mental health and had done all they could to support her. Secondly, they had expressed their anxiety to the hospital authorities about the dangers of allowing Melanie to come home on leave for the weekend of 19 to 21 April 2005 and urged them not to allow it. Thirdly, the fact that the very risk which they feared and warned the authorities against eventuated must have made the death all the more distressing for them. This was a bad case of breach of the article 2 operational duty. In my view, it merited an award well above the lower end of the range of awards.

88. There is real force in Miss Richards' submission that £5,000 each was too low, but there is no appeal by Mr and Mrs Rabone against the decision on the Court of Appeal on this issue. I would reject the trust's argument that the Court of Appeal should not have interfered with the judge's awards.

Overall conclusion

89. For all these reasons, I would allow this appeal and award Mr and Mrs Rabone £5,000 each.

LORD WALKER

90. I agree that this appeal should be allowed for the reasons set out in the judgment of Lord Dyson. I also agree with the further observations in the judgments of Lady Hale, Lord Brown and Lord Mance.

LADY HALE

91. A hospital trust, in breach of its duty of care towards its patient, allowed a young woman, who was suffering from a severe depressive episode with psychotic symptoms and had been admitted a week earlier after a serious suicide attempt, to go home on leave for two days. The only support plan was the care of her parents who were not in favour of her being allowed home. The following day she hanged

herself from a tree in a well-known local beauty spot, at last succeeding in the suicide which she had previously attempted and seriously threatened even more often. The hospital trust has admitted liability to her and paid a sum in compensation to her estate. So why, some might ask, are we here?

92. 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. In this day and age we all expect our children to outlive us. Losing a child prematurely is agony. No-one who reads the hospital's notes of the series of telephone calls made by this patient's father to the hospital on the night in question can be in any doubt of that; or that the agony may be made worse by knowing that the loss both could and should have been prevented. It is not surprising, therefore, that parents are among the recognised victims when the right to life of their child, protected under article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, is violated. It is also not surprising that, as Lord Dyson has shown, they are victims, not only of the state's failure properly to investigate the death, but also of the failure effectively to protect their child's life. There is no warrant, in the jurisprudence or in humanity, for the distinction between the two duties drawn by Lord Scott in *Savage v South Essex Partnership NHS Foundation Trust* [2009] AC 681, para 5.

93. Article 2 begins "Everyone's right to life shall be protected by law". As Lord Dyson has explained, it is now clear that this simple sentence imposes three distinct obligations upon the state. The first, which does not arise here, is a negative obligation, not itself to take life except in the limited cases provided for in article 2(2). The second, which also does not arise here, is a positive obligation to conduct a proper investigation into any death for which the State might bear some degree of responsibility. And the third, with which this case is concerned, is a positive obligation to protect life. As a general rule, that positive obligation is fulfilled by having in place laws and a legal system which deter threats to life from any quarter and punishes the perpetrators or compensates the victims if deterrence fails. In the health care context, this also entails having effective administrative and regulatory systems in place, designed to protect patients from professional incompetence resulting in death. But it is not suggested that English law and the English legal system are defective in this respect.

94. However, in certain circumstances, the state's positive obligation to protect life goes further than that. It entails an obligation to take positive steps to prevent a real and immediate risk to the life of a particular individual from materialising. In *Savage*, the House of Lords held that this obligation arose in the case of a psychiatric patient detained in hospital under the Mental Health Act 1983. In reaching that conclusion, the House of Lords was not following any exact Strasbourg precedent. There was then, and still is, no Strasbourg decision cited to us which concerns a psychiatric hospital patient, whether informal or detained, as

opposed to a mentally ill prisoner or detainee. There is a line of Strasbourg cases, beginning with *Powell v United Kingdom* (2000) 30 EHRR CD 362, 364 holding that:

> ". . . 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 co-ordination among health professionals in the treatment of a particular patient* are sufficient of themselves to call a contracting state to account from the standpoint of its positive obligations under article 2 of the Convention to protect life." (emphasis supplied)

But it would be wrong to see the House of Lords in *Savage* as carving out an exception to a general rule that the State is not responsible for the deaths of hospital patients. The House was trying to deduce the principles applicable to when this so-called "operational" duty might arise from such Strasbourg jurisprudence as there is and to decide, in the light of those principles, whether it did so in that case.

95. This is no easy task. People suffering from mental disorders have the same human rights as everyone else and are entitled to enjoy those rights without discrimination on account of their mental status. So we must start from the proposition that they are entitled to the same freedom and autonomy as everyone else, unless there is some justification within the scheme of the Convention for interfering in this. The Convention recognises that it may be justifiable to interfere in their private and family lives, and even to deprive them of liberty in certain circumstances. If they have already been deprived of their liberty for other reasons, the Convention recognises that there may be a special duty to protect them from the risk of self-harm: see, in particular, *Renolde v France* (2009) 48 EHRR 969. Because of the difficult and delicate issues raised, therefore, I would like to work them through for myself, although I have reached the same conclusions for essentially the same reasons as Lord Dyson has done.

96. Strasbourg has recognised the possibility of the operational duty arising in several cases since it was first articulated (but not violated) in *Osman v United Kingdom* (2000) 29 EHRR 245, paras 115 – 116. Its tendency is to state the principle in very broad terms, without defining precisely the circumstances in which it will apply. A recent example is *Watts v United Kingdom* (2010) 51 EHRR 66:

> "82. The court observes at the outset that article 2 imposes both negative and positive obligations on the State. The negative obligation prohibits the intentional and unlawful taking of life by agents of the state. The positive obligation . . . requires that they take appropriate steps to safeguard the lives of those within their jurisdiction (see *LCB v United Kingdom* (1999) 27 EHRR 212, para 36; and *Edwards v United Kingdom* (2002) 35 EHRR 19, para 54). This implies, *in appropriate circumstances*, a positive obligation on the authorities 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' (see *Osman v United Kingdom* (2000) 29 EHRR 245 at para 115), 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 (see *Öneryildiz v Turkey* (2005) 41 EHRR 20, para 71).
>
> 83. *For the court to find a violation* of the positive obligation to protect life, it must be established that 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 and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. The court reiterates that the scope of any positive obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities, including in respect of the operational choices which must be made in terms of priorities and resources. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising." (emphasis supplied.)

97. Such broad statements of principle are hard to interpret and even harder to apply. It is tempting for a common lawyer to treat them as if they were Lord Atkin's statement of the neighbour principle in *Donoghue v Stevenson* [1932] AC 562, p 580: the duty arises in the circumstances explained in para 82 of *Watts* and is breached in the circumstances explained in para 83. But is the court in fact laying down a broad principle that, in the context of any public or private activity in which the right to life may be at stake, the State has a duty, if the authorities know or ought to know of a real and immediate risk to the life of a particular individual, to take such measures as might reasonably be expected of them to avoid that risk?

98. This is certainly how the decision in Mrs Watts' case reads. Mrs Watts was complaining that the local authority's decision to close the care home in which she had lived for five years violated this duty because it put her life at risk. The court accepted that the badly managed transfer of elderly residents could have a negative impact on their life expectancy and thus that article 2 was "engaged" (para 88). However, what the authorities had to do about it would depend upon the extent of the risk, on which in that case the evidence was equivocal. Bearing in mind the choices which had to be made by the authorities in providing residential care for the elderly and the careful steps which had been taken to minimise any risk to this applicant's life, the authorities had met their positive obligations in that case (para 92).

99. On the other hand, is the reference to "in appropriate circumstances" (in *Watts*, para 82, among others) designed to set limits to the situations in which the operational duty can even arise? After all, in Mrs Watts' case, the activity which gave rise to the risk to life – moving the elderly residents out of their home - was one in which the authorities were themselves engaged. In that respect, it is like the case of *Öneryildiz v Turkey*, cited by the court for the broader proposition, where the authorities were responsible for the municipal rubbish tip which endangered the lives of local residents. Another example where the duty not only arose but was violated is *Branko Tomašić and Others v Croatia*, Application No 46598/06, 15 January 2009. Shortly after his release from prison a man shot dead his former co-habitant, their child and himself. The risk to life was well known to the authorities when they released him from prison, but he had received no adequate psychiatric treatment while inside and there was no power to detain him for treatment after his sentence expired. They had not, therefore, done all that could reasonably be expected to guard against the risk. In the context of state activities constituting a risk to life, therefore, the court may have reached the point where the operational duty is engaged, but the circumstances will be carefully scrutinised to see what, reasonably, the authorities could be expected to do about it, bearing in mind the gravity of the risk and the problems they face in responding to it.

100. We are not here concerned with that broader question, but with the more precise question of when the state has a duty to protect an individual from taking his own life. It does seem fairly clear that there is no general obligation on the State to prevent a person committing suicide, even if the authorities know or ought to know of a real and immediate risk that she will do so. I say this because, in the case of *Mammadov v Azerbaijan*, Application No 4762/05, 17 December 2009, decided only a few months before *Watts*, the court twice stated, at paras 99 and 100, that the duty to protect a person from self-harm arose only "in particular circumstances", citing *Keenan v United Kingdom* (2001) 33 EHRR 913, *Renolde v. France* (2009) 48 EHRR 969, and *Tanribilir v. Turkey,* Application No 21422/93, 16 November 2000. This is understandable. Autonomous individuals have a right to take their own lives if that is what they truly want. If a person announces her

intention of travelling to Switzerland to be assisted to commit suicide there, this is not, by itself, sufficient to impose an obligation under article 2 to take steps to prevent her.

101. What those "particular circumstances" are is harder to determine. All the Strasbourg cases so far have concerned prisoners (as in the three cases cited above) or conscript soldiers (as in *Kilinç v Turkey*, Application No 40145/98, 7 June 2005; and more plainly *Ataman v Turkey,* Application No 46252/99, 27 April 2006). There clearly is a general obligation to take certain routine steps to try to prevent prisoners and other detainees from committing suicide, because the very fact of incarceration heightens the risk of self-harm. The question then arises of whether more individualised steps are required. This will depend upon whether the authorities should have foreseen a real and immediate risk and what more they could be expected to do. Thus in *Tanrilbir v Turkey*, there was no violation when a young man with no apparent mental disorder calmly and silently committed suicide by hanging himself from a rope made from his unstitched shirt-sleeves; he was accused of helping the Kurdish separatist organisation, the PKK, and there was a view that he might have decided to hang himself rather than reveal their secrets; but it could not reasonably have been foreseen that he would do so. In *Keenan v United Kingdom,* although the prisoner was known to be mentally ill and from time to time to pose a risk to his own life, his condition varied, he was regularly monitored by the doctors, and there was nothing to suggest an immediate risk of suicide on the day in question, so it was not apparent that the authorities had omitted to take any steps which ought reasonably to have been taken to prevent it. But in *Renolde v France*, the prisoner was known to be suffering from a psychotic disorder with delusions capable of causing him to commit acts of self harm, he had made previous attempts, but he was not transferred into psychiatric care; he was simply handed his anti-psychotic medication twice a week without any monitoring of whether he was taking it; so the authorities had not done all that could reasonably be expected of them.

102. Throughout these cases, the special vulnerability of people suffering from mental disorders, especially psychosis, is stressed. It was not, therefore, a large step in *Savage* for the House of Lords to conclude that a mentally ill person detained in hospital for psychiatric treatment was owed the same duty as a mentally ill prisoner. But might the obligation stretch further than this? It seems clear from cases such as *Mammadov* that it can do so. In *Mammadov*, the applicant's wife poured petrol over herself and set herself alight while the police were trying to evict her and her family from the building in which they had taken up residence without permission. Although the court found that there was no violation of the substantive obligation, the matter was discussed in terms of whether the police should have realised what she was going to do and stopped her (see para 115). The court found itself unable to conclude whether they could or should have done more (para 118) and drew a contrast with the case of death in

custody, where the burden would be on the State to provide a satisfactory and plausible explanation (para 119). But there is no suggestion that the operational obligation to prevent suicide is limited to prisoners and detainees.

103. This too is not surprising. The court has more than once found a violation of the prohibition of inhuman and degrading treatment in article 3 when the authorities have failed to use their powers to take action to protect children from the risk of serious abuse or ill-treatment about which the authorities knew or ought to have known. Thus in *E v United Kingdom* (2003) 36 EHRR 519, the court stated the general principles thus:

> "88. . . . The obligation on High Contracting Parties under article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals (*A v United Kingdom* (1999) 27 EHRR 611, para 22). These measures should provide effective protection, in particular, of children and other vulnerable persons, and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge (*mutates mutandis*, *Osman v United Kingdom* (2000) 29 EHRR 245, para 116). Thus a failure, over four and a half years, to protect children from serious neglect and abuse of which the local authority were aware disclosed a breach of article 3 of the Convention in the case of *Z v United Kingdom* (2002) 34 EHRR 3."

In that case, the court was satisfied that the social services in Scotland should have been aware of the risk of sexual abuse to these children from a particular individual yet they failed to take any steps to discover the extent of the problem and protect the children from further abuse. Thus, "proper and effective management of their responsibilities might, judged reasonably, have been expected to avoid, or at least, minimise the risk of the damage suffered" (para 100). Accordingly there was a breach of article 3.

104. The cross reference to *Osman* indicates that the operational duties under both article 2 and article 3 are similar if not identical. The State does have a positive obligation to protect children and vulnerable adults from the real and immediate risk of serious abuse or threats to their lives of which the authorities are or ought to be aware and which it is within their power to prevent. Whether they are in breach of this obligation will depend upon the nature and degree of the risk and what, in the light of the many relevant considerations, the authorities might

reasonably have been expected to do to prevent it. This is not only a question of not expecting too much of hard-pressed authorities with many other demands upon their resources. It is also a question of proportionality and respecting the rights of others, including the rights of those who require to be protected. The court acknowledged in *Keenan* that restraints would inevitably be placed upon the preventive measures available in the context of police activity by the guarantees in article 5 and 8 and also that "the prison authorities, similarly must discharge their duties in a manner compatible with the rights and freedoms of the individual concerned" (para 91).

105. In the light of all this, there can be little doubt that the operational duty under article 2 is engaged in the case of a patient such as Miss Rabone. She was admitted to hospital precisely because of the risk that she would take her own life. The purpose of the admission was both to prevent that happening and to bring about an improvement in her mental health such that she no longer posed a risk to herself. The experts were agreed that for patients such as Miss Rabone, one of the most risky periods for further suicide attempts is within a week or so of beginning to recover. Her mental disorder meant that she might well lack the capacity to make an autonomous decision to take her own life. Although she was an informal patient, the hospital could at any time have prevented her leaving. Section 5(4) of the Mental Health Act 1983 empowers a suitably qualified nurse to authorise the detention of an informal patient who is receiving treatment for mental disorder for up to six hours if the nurse believes that the patient is suffering from mental disorder to such a degree that it is necessary for her health or safety for her to be immediately restrained from leaving the hospital and it is not practicable to secure the immediate attendance of a doctor or approved clinician who can act under section 5(2). Section 5(2) empowers a doctor or approved clinician to authorise detention for up to 72 hours if it appears appropriate that an application be made to detain her under the 1983 Act. The experts were agreed that it would have been appropriate to detain her under the 1983 Act if she had intended to leave the hospital without medical approval. The judge in fact found that she would not have done so.

106. The analogy with a patient detained under the Mental Health Act is much closer than the analogy with a patient admitted for treatment of a physical illness or injury. A patient receiving treatment in hospital for a physical illness or injury is in a quite different position. She has made an informed and autonomous choice to be in hospital and to receive the treatment in question. There is no power to detain her should she decide to leave. Any risk to her life stems from her physical condition. Any failure to prevent her death is likely to stem from what in *Savage* Lord Rodger called "casual acts" of medical negligence rather than from a deliberate decision. If there is a deliberate decision to take a risk, she should have given her informed consent to it. By contrast, if in fact she is known to be at risk of harm from the criminal acts of a third party (a risk which ironically it appears may

recently have arisen at this very hospital) the operational duty under article 2 would indeed be engaged in her case too.

107. However, it does not follow that because the operational duty was engaged in this case, it has necessarily been broken. There is first the question of whether the risk was sufficiently real and immediate to require consideration of what might be done to prevent it. I agree, for the reasons given by Lord Dyson, that it was. Although the doctors gave different assessments of the degree of risk, they were agreed that it was real and ever-present, or in the words of Weatherup J approved in *In re Officer L*, [2007] 1 WLR 2135 "objectively verified" and "present and continuing". There is next the question whether the hospital should have done more to prevent it. There is a difficult balance to be struck between the right of the individual patient to freedom and self-determination and her right to be prevented from taking her own life. She wanted to go home and her doctor thought that it would be good for her to begin to take responsibility for herself. He was obviously wrong about that, but was he so wrong that the hospital is to be held in breach of her human rights for failing to protect her? It may not always be enough simply to say that the experts were agreed that the decision to give her home leave was one which no reasonable psychiatrist would have taken. But in this case it also appears that there was no proper assessment of the risks before she was given leave and no proper planning for her care during the leave. This is unlike the situation of Mark Keenan, where the question was what further preventive measures, over and above the normal precautions already being taken within the prison, should have been taken at the time. There is every indication that had she remained in hospital she would not have succeeded in killing herself. The question was whether she should have been allowed to go home for a whole weekend. Having regard to the nature and degree of the risk to her life, and the comparative ease of protecting her from it, I agree that her right to life was violated.

108. I also agree that her parents have not ceased to be victims of this violation simply because the hospital has paid compensation to her estate. They are victims in their own right and remain so whether or not she died intestate so that, as it happens, her estate would be shared between them. I also agree that it would obviously be equitable to extend their time for bringing this action. The delay was short and readily explicable by the delay in the hospital's own inquiry. No prejudice has been suffered. The discretion is open-ended but I agree with Lord Dyson that the factors set out in section 33(3) of the Limitation Act 1980 may be relevant. A claim such as this, as I said in *A v Essex County Council* [2010] UKSC 33, [2011] 1 AC 280, para 116, is more in the nature of a claim in tort than for judicial review. It is also important that fundamental human rights be vindicated, and never more so than when the most fundamental right of all, the right to life, is at stake. That is what Mr and Mrs Rabone have sought to do and that is what they have achieved. They are entitled to the modest compensation assessed by the Court of Appeal.

109. For all those reasons, therefore, I agree that this appeal should be allowed.

LORD BROWN

110. I agree with the leading judgment of Lord Dyson in this appeal and also with the additional observations made by Lady Hale and Lord Mance. I too, therefore, would allow the appeal and make an award of £5,000 in favour of each appellant.

111. It may be said that in finding in the present case a violation of the article 2 duty on a state in certain circumstances to take "preventative operational measures", this court is going rather further than the evolving jurisprudence of the European Court of Human Rights has yet clearly established to be required. No Strasbourg decision has yet equated the position of voluntary patients with that of detained patients with regard to this article 2 duty. Even assuming that to be so, however, I would not regard our decision here as offending against the familiar principle first adumbrated by Lord Bingham in *R (Ullah) v Special Adjudicator* [2004] 2 AC 323 (at para 20) and frequently since repeated – as, for example, in *R(Al-Skeini) v Secretary of State for Defence* [2008] AC 153, by Lady Hale (at para 90) and myself (at para 106).

112. Nobody has ever suggested that, merely because a particular question which arises under the Convention has not yet been specifically resolved by the Strasbourg jurisprudence, domestic courts cannot determine it – in other words that it is necessary to await an authoritative decision of the ECtHR more or less directly in point before finding a Convention violation. That would be absurd. Rather what the *Ullah* principle importantly establishes is 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. Indeed, the more reluctant the domestic court may be to recognise in the circumstances a violation of the Convention, the readier it should be to reject the complaint unless there exists (as, of course, there existed in *Secretary of State for the Home Department v AF (No 3)* [2010] 2 AC 269 and in *R (GC) v Commissioner of Police of the Metropolis* [2011] 1 WLR 1230 – but did *not* exist in *R v Horncastle* [2010] 2 AC 373) an authoritative judgment of the Grand Chamber plainly decisive of the point at issue. If, however, the domestic court is content (perhaps even ready and willing) to decide a Convention challenge against a public authority and believes such a conclusion to flow naturally from existing Strasbourg case law (albeit that it could be regarded as carrying the case law a step further), then in my judgment it should take that further step. And that, indeed, is to my mind precisely the position in this very case. Just as, I may add, it was the position in *R(Limbuela) v*

Secretary of State for the Home Department [2006] 1 AC 396, *In re G (Adoption: Unmarried Couple)* [2009] AC 173 and *EM (Lebanon) v Secretary of State for the Home Department* [2009] AC 1198.

113. The other, less often considered, limb of the *Ullah* principle is that the court may in certain circumstances if it wishes decide a case against a public authority by developing the common law to provide for rights more generous than those conferred by the Convention; but that it should not grant such rights by purporting to extend the reach of the Convention beyond that recognised by, or reasonably envisaged within, existing Strasbourg jurisprudence. As Lord Bingham observed in the *Ullah* case at para 20 - and as again later noted by Lady Hale in the *Al-Skeini* case at para 90 – it is for Strasbourg alone definitively to interpret the Convention and determine what rights are guaranteed by it and "the meaning of the Convention should be uniform throughout the states party to it".

114. Suppose, for example, that the domestic court was inclined to give a Convention right an altogether greater reach than Strasbourg showed any likelihood of giving it, but that, so interpreted, the right would plainly conflict with domestic legislation. Is it seriously to be suggested that, pursuant to section 4 of the 1998 Act, the court could and should make a declaration of incompatibility? Or indeed, suppose there to be clear Grand Chamber authority directly in point, is it to be said that the domestic court, because section 2 of the 1998 Act requires it merely to "take into account" such an authority, should, if it regrets the Strasbourg judgment, itself decide the point differently? I cannot suppose that Parliament so intended or, indeed that such an approach would lead to satisfactory results. In saying that the courts ""must take into account" any judgment of the ECtHR", Parliament left it open to the courts to decide how far they should be influenced by a Strasbourg judgment in any particular circumstances. I do not believe the *Ullah* principle, as I have here sought to illustrate its application, in any way offends section 2. On the contrary, it operates to my mind to promote each of two frequently expressed aims: engaging in a dialogue with Strasbourg and bringing rights home.

LORD MANCE

115. I agree with the judgment prepared by Lord Dyson.

116. One can only have the greatest sympathy for the agony of parents who suffer the immeasurable tragedy of loss of a child by suicide, made even more acute by the knowledge that this was facilitated by avoidable negligence.

However, I have not found the resulting legal issues entirely easy either to identify or to resolve.

117. As Lord Dyson explains (para 12), the European Court of Human Rights has under article 2 of the Convention developed various obligations on states. One is the general substantive obligation "to establish a framework of laws, precautions and means of enforcement which will, to the greatest extent reasonably practicable, protect life": *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182, para 2, per Lord Bingham. This includes a general duty to have "an appropriate regulatory, investigatory and judicial system": *R (Smith) v Oxfordshire Assistant Deputy Coroner* [2010] UKSC 29; [2011] 1 AC 1, para 211. Another is a specific operational duty to take "appropriate steps", by way of "preventative operational measures" in defined circumstances to safeguard lives within the state's jurisdiction. This latter duty carries with it a specific Convention duty to provide for or ensure an effective public investigation by an independent official body of deaths or near deaths involved in breach of the specific operational duty.

118. An extending series of cases exemplifies the specific operational duty. It starts with *Osman v United Kingdom* (2000) 29 EHRR 245 and continues with cases which Lord Dyson discusses at paras 15 to 18 above, and which I considered in *R (Smith) v Oxfordshire Assistant Deputy Coroner* [2010] UKSC 29; [2011] 1 AC 1, para 210. Although the European Court of Justice described the incidence of this duty as "well-defined" in *Osman*, the subsequent case-law suggests that this was over-optimistic. Lady Hale has in paras 96 to 104 cogently identified the uncertainty which exists about both the extent of the duty and its existence in the particular context of suicide. But it is at least clear in that context that various factors, such as control, assumption of responsibility and the nature (as well as the reality or immediacy) of the risk, may lead to the duty arising. Taking those factors into account in the present case, I agree with Lord Dyson that, for reasons he gives in para 34, the operational duty existed in relation to Melanie. It was a duty to protect her from any real or immediate risk that she would commit suicide, of which state authorities knew or ought to have known. In that context (although the contrary was submitted to us) simple negligence in failing to identify or to guard appropriately against such a risk appears sufficient to establish breach of the duty.

119. A line has been sought to be drawn between this series of cases and cases of "casual acts of negligence" by medical authorities in relation to persons submitting themselves voluntarily to medical care. Such persons are entitled to the benefit of the general substantive duty referred to in paragraph 113 above, but the state does not answer directly for ordinary acts of negligence by public health authorities, however clear it was that the particular medical emergency, procedure or treatment in the context of which the negligence occurred involved a real or immediate risk to the patient's life.

120. It follows that, in the event of a breach of the operational duty, the range of persons entitled as victims to bring claims against the state, and the nature and scale of compensation or just satisfaction which they may receive, will depend upon legal principles established by the European Court of Human Rights. In contrast, in the event of ordinary negligence by a public health authority, the range of victim and the nature and scale of compensation are defined by the domestic law of tort.

121. In this way, the European Court of Human Rights has, under the operational duty, began to develop its own Convention rules of, in effect, tortious responsibility, when in other areas it is left to national systems (as part of their general systematic duty "to establish a framework of laws, precautions and means of enforcement which will, to the greatest extent reasonably practicable, protect life") to develop an appropriate law of tort in the light of particular legal traditions and needs. The court might have left it to national systems in all areas to address any real or immediate risk to life which is or ought to be within their knowledge. It could have left it to national systems, in the event of any failure by state authorities to address such a risk, to recognise a range of victims and to provide compensation consistent with their ordinary law of tort. The court could still have reviewed the appropriateness of the protection and of the recourse available under national tort law. But that is not how the Convention has been interpreted. Hence, the difficult line to be drawn between direct Convention rights and national tort law in cases such as the present.

122. In the event of a breach of the operational duty, we have to apply Convention jurisprudence on the question who counts as a victim. This requires us to address some particularly difficult Convention jurisprudence on the impact of settlement of a domestic claim on victim status. It requires us also to address numerous Strasbourg cases giving only limited guidance on the factors governing and the range of compensation appropriate under Convention. Lord Dyson has dealt with these issues in his paragraphs 49 to 72 and 80 to 88. In the last analysis, what he has done in each context is to identify and apply underlying principles which best make sense of the rights which have become part of domestic law under the Human Rights Act 1998. That is in my view an appropriate course.

123. We are required to "take account of" the case-law of the European Court of Human Rights - no less but no more. That requirement makes it inescapable that we examine the court's case-law. In doing so, common law habits are difficult to shake off. But it is perhaps worth remembering expressly that individual section decisions of the court are not, and may not respond well to the same close linguistic analysis that a common lawyer would give to, binding precedents. The apparently irreconcilable section decisions on the issue of loss of victim status, put before us in this case, make clear that any attempt at such an analysis can be a somewhat fruitless task.

124. In the result, Lord Dyson's examination of the Strasbourg case-law persuades me that the only coherent principle regarding loss of victim status is that found in *R.R v Poland* (Application No 27617/04). That means that there must be both a recognition in substance of a failure to comply with the operational duty and adequate redress for all the heads of claim recognised under the Convention by the European Court of Human Rights. I agree that Mr and Mrs Rabone did not in this case lose their victim status by Mr Rabone's acceptance of a settlement figure which was on behalf of Melanie's estate alone, and which did not cover their bereavement. I agree that the time limit for proceedings should be extended. Finally, I agree with the Court of Appeal that the judge undervalued the claims when he said that any award of compensation should have been in the sum of £1,500 each claimant, and the sum of £5,000 each claimant would be appropriate. I would accordingly allow the appeal and award Mr and Mrs Rabone £5,000 each.