THE LIABILITY OF HEALTH AUTHORITIES UNDER THE HUMAN RIGHTS ACT 1998 IN RELATION TO ARTICLE 2 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS.

By

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ABSTRACT

This thesis will examine the liability of health authorities under the Human Rights Act 1998 in relation to the Article 2 positive operational duty under the European Convention on Human Rights. The decision in *Rabone v Pennine Care NHS Trust* has expanded the scope of the operational duty and has raised issues that have been left undecided. Firstly, to properly understand the operational duty, the relationship between it and the Article 2 investigatory duty will be considered. It will then concentrate on the operational duty and the impact of using vulnerability to trigger the duty. It will define vulnerability and will show that a duty based on vulnerability can still be applied narrowly and effectively. Finally, although the primary focus will be on the Article 2 positive operational duties, the liability of public authorities in negligence for breach of a positive duty of care will be considered, as despite the current judicial emphasis on the separation of the two actions, there are a number of overlaps. It will be argued that these similarities mean that the two causes of action should be more consistent at the duty stage, but should remain separate where breach and remedies are concerned.

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INTRODUCTION

This thesis is primarily concerned with the positive operational duties of health authorities under Article 2 of the European Convention on Human Rights (ECHR). Article 2(1) states that '[e]veryone's right to life shall be protected by law'.[1] It creates a negative duty not to take life, as well as imposing certain positive obligations to protect life. There are three forms that these positive obligations can take: i) the investigatory duty, ii) the general organisational duty, and iii) specific operational duties. Whilst the focus of this thesis will be on the operational duty, to fully understand this it is important to understand how these duties relate to each other.

Over recent years decisions by both the European Court of Human Rights (ECtHR) and the United Kingdom's (UK) courts have shaped the scope of the operational duty imposed on to states by Article 2. As the ECHR is incorporated into UK law by the Human Rights Act 1998 (HRA 1998) these decisions are particularly important as claims can be brought directly against public authorities under the HRA 1998, as well as against the state as a whole before the ECtHR. Consequently, both domestic and ECHR law will be considered in this thesis. Despite these developments there is still a lack of clarity surrounding certain aspects of the positive duty to protect life, especially after the Supreme Court's decision in *Rabone v Pennine Care NHS Trust.*[2] *Rabone* involved a claim by the parents of Melanie Rabone, a voluntary psychiatric patient admitted to hospital to receive treatment for depression, who committed

[1] Article 2(1) ECHR.
[2] [2012] UKSC 2.

suicide while on home leave. Her parents sued the hospital in negligence and for breach of Article 2. The Supreme Court reached the significant decision that the operational duty did apply to voluntary patients, as well as detained patients, and that it had been breached by the hospital. This expansion of the duty beyond the circumstances in which it was originally designed to apply, has raised a number of questions, for example whether the duty should apply to all public authorities and how the emphasis on vulnerability will affect the nature and the scope of the duty. Although the main focus will be on health authorities, it is necessary to consider the law relating to other public authorities as well in order to determine the scope of the operational duty and how it applies. It will be argued that the operational duty should not apply to all public authorities; instead whether a public authority is subject to the duty should depend on the function that it carries out. Adopting this approach will allow the duty to vary depending on the public authority involved and will mean that the concepts that trigger the duty, such as notions of control and vulnerability, can be defined properly. This will allow the duty to be controlled and will prevent it from applying too broadly, as critics of *Rabone* have feared.[3] It will be argued that to establish that the operational duty applies will be a two stage test: firstly, it will need to be established that the relationship between the public authority and the victim gives rise to the operational duty, and secondly, the test from *Osman v United Kingdom*[4] must be satisfied and it should be shown that there was a real and immediate risk to life that the authorities knew or ought to have known about. To establish breach of the duty it must be further proven that they failed to take reasonable steps to prevent this risk.

[3] Andrew Tettenborn, 'Wrongful Death, Human Rights, and the Fatal Accidents Act' (2012) 128 LQR 327, 329.
[4] [2000] 29 EHRR 245.

Following *Rabone,* when applying the duty to health authorities the relevant factors in triggering the duty will be vulnerability coupled with a dependence upon the health authority for protection. At present the courts have acknowledged that vulnerability is important in healthcare cases, but no definition has been given, meaning that it is unclear when a duty based on vulnerability will be triggered. The existing jurisprudence on vulnerability comes from cases involving control and detention of individuals[5] and so this type of vulnerability will be different to that in healthcare cases following *Rabone*, as now the duty can apply to voluntary, as well as detained, patients. This thesis will propose a definition of vulnerability that can be applied specifically to healthcare cases. In doing so it will be shown that even if vulnerability is present this will not necessarily mean that the duty is engaged as the factors set out in the *Osman* test will have to be established.

Following this, the thesis will briefly consider the liability in negligence of public authorities for breaches of a positive duty of care. Although the official judicial position is that actions in negligence and those brought under the HRA 1998 are separate,[6] in practice the law is far more complex than this as there are a number of similarities between the two actions. It will be demonstrated that these similarities mean that the two should be more consistent at the duty stage, but as there are also important differences they should remain separate where breach and remedies are concerned.

Although the primary focus of the thesis will be on the operational duty imposed by Article 2, it is necessary to first discuss the investigatory duty. The existing European

[5] For example in *Keenan v United Kingdom* [2001] 33 EHRR 38.
[6] *Smith v Chief Constable of Sussex* [2008] UKHL 50.

and domestic jurisprudence on the investigatory duty is unclear and so the relationship between the two duties will be discussed in order to determine the scope, and aims, of each duty. The ECHR jurisprudence provides broad guiding principles on the scope of the investigatory duty and applies it to the state as a whole, consequently there is uncertainty over how this should implemented in UK law. As the focus is on health authorities, it will mainly consider the impact of the investigatory duty in cases involving health authorities.

CHAPTER ONE: THE INVESTIGATORY DUTY

To gain a full understanding of the operational duty, it is important to consider its relationship with the Article 2 investigatory duty and so a comprehensive understanding of the investigatory duty is needed before the operational duty will be considered. The investigatory duty imposed by Article 2 of the ECHR was first expressly developed in *McCann and Others v United Kingdom,*[1] where the ECtHR held that there was a duty to investigate 'where individuals have been killed as a result of the use of force by, inter alios, agents of the State.'[2] This duty has since been developed by the ECtHR to apply in a wider number of circumstances, but has largely been neglected in recent years and has attracted little attention from scholars. This chapter will compare ECHR law and domestic law and in doing so will demonstrate that there is a lack of clarity with regards to three aspects of the duty: (i) the remit of the duty, (ii) its relationship with the Article 2 substantive duty, which relates to the general organisational and specific operational duties; and (iii) the form of the investigation required to fulfil the duty.

It is the lack of clarity on this third point that is most problematic in UK law. In the UK the primary method of satisfying the duty is by way of an inquest, but other methods are sometimes used, for example an internal inquiry, a full public inquiry or disciplinary proceedings. Recently it has become more apparent that a clear set of guiding principles is needed about what type of investigation is required or is appropriate in a given set of circumstances. The recent report by an independent panel

[1] [1996] 21 EHRR 97.
[2] ibid [161].

on the Hillsborough disaster has demonstrated this need for clearer guidelines. The report identified in particular that more information is needed on what is required from, and during, investigations as it found that there were problems with disclosure of materials to the public despite 'various different modes [of investigation] and levels of scrutiny'[3] being carried out over a number of years. This has been highlighted by recent calls for reform of the coroners system, which began with provisions in the Coroners and Justice Act 2009.[4] The Chief Coroner, Judge Peter Thornton QC, has also identified a number of issues that he wishes to reform,[5] including Rule 43 Reports.[6] This lack of clarity is further exacerbated by the uncertainty over the purpose of investigations, as acknowledged by the Chief Coroner.[7]

As a result, before it can be identified how the investigative duty will apply in cases involving health authorities these three issues must be considered and the questions answered. This chapter will argue that the purpose of the Article 2 duty is twofold: firstly the investigation should publicly identify any wrongdoing on the part of a state agent and should hold them to account; and secondly the investigation should have a role in identifying mistakes and preventing future deaths in similar circumstances. It

[3] Hillsborough Independent Panel, 'Hillsborough: The Report of the Hillsborough Independent Panel' (2012, HC 581) 3 <http://hillsborough.independent.gov.uk/repository/report/HIP_report.pdf> accessed 10 December 2012.
[4] These provisions have not yet been fully implemented, but are expected to come into force in June 2013 as noted by Peter Thornton, 'The Coroner System in the 21st Century' (Howard League for Penal Reform Parmoor Lecture, 25 October 2012) [24] <http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/coroner-system-21st-century-chief-coroner-speech-howard-league.pdf> accessed 16 November 2012.
[5] Peter Thornton, Chief Coroner's Speech at the Annual Conference of the Coroner's Society of England and Wales (September 2012) <http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/chief-coroner-speech-coroners-society-conference.pdf> accessed 16 November 2012.
[6] Which enable coroners to produce reports making recommendations on how future deaths can be prevented.
[7] Thornton, 'The Coroner System…' (n 4) [39].

will also argue that in terms of its discharge, the form of the duty should be tailored to the circumstances and in particular to the specific nature of the public body involved. It will argue that in the context of health authorities, the most appropriate solution is the creation of independent inquiry panels within individual health authorities.

Section 1: ECHR Law on the Article 2 Investigatory Duty.

(i) Remit of the Duty

As highlighted, the investigatory duty was first expressly developed by the ECtHR in *McCann*. The Court considered that 'a general prohibition of arbitrary killing by agents of the State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities.'[8] Thus the purpose of the investigatory duty is to ensure that those responsible for unlawful deaths are held accountable. The duty to investigate has since been expanded beyond cases involving the use of direct force by a state agent and has been recognised in cases where the victim was under the responsibility of the state,[9] in cases where there was only indirect involvement of state agents,[10] in situations where the State has been carrying out a dangerous activity[11] and even where serious injuries have been inflicted but have not resulted in death.[12] The ECtHR appear to have adopted a flexible and expansive approach to the investigatory duty, which is further highlighted by their willingness to find that the duty to investigate death, or serious injury, applies

[8] *McCann* (n 1) [161].
[9] *Powell v United Kingdom* [2000] 30 EHRR CD 362, *Edwards v United Kingdom* [2002] 35 EHRR 19.
[10] *Menson v United Kingdom* [2003] 37 EHRR CD 220.
[11] *Öneryildiz v Turkey* [2005] EHRR 20.
[12] *Menson* (n 10).

whenever Article 2 is engaged, even where a breach is only suspected. This approach has the benefit of enabling the ECtHR to respond to differing factual circumstances and to provide a wider applicability for the investigatory duty. Consequently, it helps to fulfil the purpose of the investigatory duty given in *McCann* as it allows the court to consider a wide number of scenarios and to expand the duty where necessary in order to review the actions taken by state agents.

(ii) Relationship with the Substantive Duty

This expansive approach suggests that the duty to investigate can occur even where there has not been a breach of the substantive obligation.[13] The ECtHR has previously considered the investigatory duty separately to the substantive duty, for example in *McKerr v United Kingdom*[14] and *Brecknell v United Kingdom.*[15] However, the issue was not specifically dealt with by the ECtHR until recently. Even though the case centred on whether the duty could apply where the death predated entry into the ECHR, the issue of whether the substantive and investigatory duties are separate was expressly considered in *Šilih v Slovenia.*[16] Here, the duty was described as having 'evolved into a separate and autonomous duty'[17] and it was acknowledged that even though the duty is triggered by actions relating to the substantive duty, it is now a 'detachable duty',[18] suggesting that it can be considered in its own right. If the duty to investigate were found to be independent of the substantive duty then it would allow for a very flexible approach and would ensure that an effective investigation is carried

[13] DJ Harris and others, *Harris, O'Boyle and Warbrick Law of the European Convention on Human Right*s (2nd Edn, OUP, 2009) 66-67.
[14] [2002] 34 EHRR 20.
[15] [2008] 46 EHRR 42.
[16] [2009] 49 EHRR 37.
[17] ibid [159].
[18] ibid [159].

out in all cases where one is required, rather than simply in cases where the substantive Article 2 duty has been breached. This would therefore help to achieve the aim of using the investigatory duty to ensure that the Article 2 provisions are 'practical and effective'[19] and to meet the aims of the duty as established in *McCann*.

(iii) Form of the Duty

The ECtHR has not specified the form that an Article 2 investigation must take; instead they have acknowledged that the type of investigation that will meet the aims 'may vary in different circumstances',[20] which allows for flexibility within member states. The Court has emphasised that the duty is on the authorities to begin the investigation as soon as they are aware of the incident; it cannot be left to the victim's next-of-kin.[21] They have, however, set a minimum standard that the investigation must meet in order to be effective.[22] The investigation must be independent, meaning that there must be both 'a lack of hierarchical or institutional connection but also a practical independence.'[23] It must also be able to lead to 'a determination of whether the force used in such cases was justified in the circumstances and to the identification and punishment of those responsible.'[24] However, the emphasis is on the ability of the investigation to secure evidence and testimonies, rather than on the result. The investigation must be prompt, both in its beginning and in its undertaking. It must also be subject to public scrutiny, however, '[t]he degree of public scrutiny required may well vary from case to case' but nevertheless the next-of-kin of the

[19] ibid [153].
[20] *Jordan v United Kingdom* [2003] 37 EHRR 2 [105].
[21] ibid [105].
[22] ibid [105]-[109].
[23] ibid [106].
[24] ibid [107].

victim should always be involved to the extent that their legitimate interests are protected.[25]

As a result, although there are minimum requirements for an effective investigation, what is actually required remains vague due to the lack of clear guidance from the ECtHR. This approach is very flexible as it allows for the fact that the type of investigation needed will depend on the circumstances of the case.[26] As the duty to investigate covers a wide range of scenarios, that continue to be expanded,[27] and involves a number of variables it would be hard to define exactly what is required from an investigation and so this flexibility is important. However, it can be problematic. The ECtHR have simply stated that an investigation needs to be carried out, but have not clarified what kind of investigation is required. In *Pearson v United Kingdom*[28] the ECtHR ruled that 'the essential principle [behind an article 2 investigation] is that the key facts should be brought out for public scrutiny and that the procedures provide for effective accountability.'[29] This appears to provide a basis for the duty to investigate and could potentially provide more guidance for national courts as it states what the investigative duty aims to achieve. However, this is still a vague statement as it must remain flexible enough to cover a wide number of circumstances, as acknowledged: '[i]t cannot be said… that there should be one unified procedure satisfying all requirements: the aims of fact-finding and accountability may be carried out by or shared between several authorities, as long as the various procedures provide for the necessary safeguards in an accessible and

[25] ibid [109].
[26] ibid [105].
[27] *R (on the application of JL) v Secretary of State for Justice* [2008] UKHL 68 [31] (Lord Phillips).
[28] [2012] 54 EHRR SE11.
[29] ibid [71].

effective manner.'[30] The closest guidance on what form of investigation is required comes from *Öneryildiz v Turkey,*[31] where it was held that the duty to investigate can be satisfied by criminal, civil, administrative or disciplinary procedures and that what is required from an investigation depends on what the substantive obligation requires as a remedy.[32]

The duty to investigate has growing relevance and is being extended to apply in an increasing number of circumstances in order to fulfil the aims formulated in *McCann*. It even appears that following *Šilih* the duty has been transformed into one that is independent of the substantive duty. As already acknowledged, where a claim under Article 2 is made before the ECtHR the defendant is the member state accused of breaching the duty by failing to provide an effective investigation. This has implications on the way that the duty has been developed as it means that the duty has been formulated in a very general way, due to each state's margin of appreciation as it is left to each state to determine how to comply with the duty.[33] Consequently, the ECHR law on the duty remains rather vague.

Section 2: Current UK Law.

The general duty to investigate developed by ECHR law is problematic when national courts apply it, as the defendant in these cases is not the state as a whole, but an organ of the state, i.e. a public authority. Consequently, the duty to investigate becomes

[30] ibid [71].
[31] *Öneryildiz* (n 11).
[32] ibid [92]-[93].
[33] Juliet Chevalier-Watts, 'Effective Investigations Under Article 2 of the European Convention on Human Rights: Securing the Right to Life or an Onerous Burden on a State?' (2010) 21 EJIL 701, 704-705.

subject to interpretation by the national courts and so how the duty is carried out will vary depending on the public authority involved. As a result, the ECtHR jurisprudence has limited use when being applied to individual public authorities, as it is far too general in its scope. It is thus necessary to consider the duty as applied by the UK courts in order to clarify what the duty to investigate involves when applied to public authorities. By looking at the UK jurisprudence it can be determined how the duty is applied to public authorities as organs of the state and whether it is applied as a general duty or whether it is tailored to suit each public authority. Once this has been considered it should be possible to determine how the duty currently applies specifically to health authorities.

(i) Remit of the Duty

Whilst the ECtHR adopt a very flexible approach to the Article 2 duty to investigate, the approach taken by the UK courts appears to be more rigid and a lot depends upon the facts of the case. It has been argued that in the UK the courts attempt to fit the European jurisprudence into a model that they have created where scenarios are classified into three categories.[34] These categories are: i) where death or serious injury resulted from direct unlawful force from a state agent, ii) where death or serious injury occurs whilst in custody and iii) where death or serious injury occurs in hospital.[35] These distinctions were demonstrated by the decision in *R (on the application of Takoushis) v HM Coroner for Inner North London*[36] where it was held that different principles applied to cases where a death occurred in hospital to where a

[34] Aidan O'Neill, 'Some Reflections on Article 2 and the Procedural Obligations to Investigate Deaths' (*UKSC Blog*, 30/06/2010) <http://ukscblog.com/some-reflections-on-article-2-and-the-procedural-obligations-to-investigate-deaths> accessed 1 November 2012.
[35] ibid.
[36] [2005] EWCA Civ 1440.

death occurred in police custody.[37] If a death occurs whilst in police custody then an investigation under Article 2 is automatically required if the state has failed in its duty of care towards the individual, whereas if a death occurs whilst the victim is in hospital then an Article 2 investigation is not required unless there has been gross negligence or a systematic fault. Instead, all that must be satisfied is the positive obligation to have a system in place to provide an investigation if necessary, this can be a civil, criminal or disciplinary investigation depending upon the circumstances. Whether this distinction can be maintained after the Supreme Court decision in *Rabone v Pennine Care NHS Trust*[38] is questionable. The Court in *Takoushis* placed emphasis on the fact that the victim was not detained by the state[39] and so no duty applied. However, in *Rabone* it was said that this distinction between detainees and voluntary patients is irrelevant when considering whether the Article 2 substantive obligations apply and so it is possible that the same may apply to the investigatory duty. The approach taken by the UK courts appears to be less flexible than that taken by the ECtHR, which can be problematic. For example, in *Öneryildiz* the ECtHR were able to find a breach of the investigatory duty as they extended the substantive obligation to cover dangerous activities being conducted by state agents. If a similar case had arisen in the UK first then it is arguable that the courts would have faced more difficulty in determining it, as it would not easily fit into the three categories.[40] As a result the law relating to the investigatory duty is unclear as it is unknown how the duty would apply in different circumstances, as these scenarios cannot cover every situation that could arise. In addition, this results in varying standards for engaging

[37] ibid [105].
[38] [2012] UKSC 2.
[39] Jeremy Hyam, 'Where Inquests Raise a Question of Human Rights' (UK Human Rights Blog, March 2010) 12 <http://www.1cor.com/1155/records/1245/Where_Inquests_Raise_A_Question_of_Human_Rights180109.pdf> accessed 5 November 2012.
[40] Although this is not to say that a duty would not have been found.

the duty depending on the public authority concerned, which potentially creates inconsistent results and is less flexible as it means that where a death has occurred that could be attributable to the state an investigation is not always required.

At present there is no express reasoning to explain why the duty differs depending on the public authority involved. Consequently, there is no recognition that the duty should be different depending on the authority involved, because each carries out specific functions that differ. It is proposed that the duty should be tailored to the public authority in question to allow for these differing functions. A similar approach was acknowledged by the House of Lords in *Re Officer L,*[41] although this case concerned the operational duty under Article 2, it was held that the standard of the duty was 'based on reasonableness'[42] and so what each authority is expected to do depends on the circumstances and so will differ. This could be applied to the investigatory duty as well. It is submitted that the UK courts should adopt a similar approach to that taken by the ECtHR, where each case is judged on an individual basis and it is asked whether or not Article 2 applies and whether or not 'the death occur[ed] in a situation which raises issues of public concern'.[43] This would determine whether or not the duty to investigate applies. If it does then the duty could be formulated so that it is specific to the facts of the case. This could then allow for different results being required and different methods of investigation depending on the facts of the case and the involvement of the public authority. This would allow for more flexibility than the current approach, but would also mean that the threshold for engaging the Article 2 duty is not the same for all public authorities. In addition, by

[41] [2007] UKHL 36.
[42] ibid [21] (Lord Carswell).
[43] O'Neill (n 34).

formulating the duty in relation to the public authority, each will know what is expected of them to fulfil the duty, removing some of the existing uncertainty.

As the duty to investigate has been left vague by the ECtHR there also appears to be doubt over what is actually covered by the duty and what must be involved in the investigation. As highlighted by Mr Aidan Cotter, HM Coroner for the City of Birmingham and the Borough of Solihull, inquests are often subject to large delays, with the inquest sometimes occurring years after the death of the victim.[44] It can be argued that part of the reason for such delays in inquests could result from the lack of clarity over the meaning of the duty to investigate. For example, a lot of time is spent debating the scope of the duty and what is relevant to the inquest in question.[45] The investigatory duty has been interpreted as requiring 'the state to ensure, by all means at its disposal, an adequate investigative response, judicial or otherwise.'[46] This raises the question of what exactly the scope of the duty is and what the coroner has to consider when conducting his inquest. It also demonstrates that more guidance is needed over what must be considered in order to satisfy the duty. This raises questions about the investigatory procedure as a whole and about the role of other procedures available for satisfying the duty and how they relate to the inquest. It highlights that in order for the dual aim of the duty to be properly satisfied what is needed is a way of ensuring that systematic failures are rectified and learnt from, whilst still ensuring that the inquest relates to the death of the individual and simply highlights the problems that exist within the system. This suggests that in practice

[44] Interview with Mr Aidan Cotter, HM Coroner for the City of Birmingham and the Borough of Solihull (Sutton Coldfield Town Hall, 30th November 2012).
[45] ibid.
[46] *Pearson* (n 28).

perhaps what is needed is a system of investigation that provides better incorporation of these other mechanisms for investigation.

(ii) Relationship with the Substantive Duty

Whilst the ECtHR jurisprudence has demonstrated a willingness to find the duty to investigate in cases where the substantive obligation under Article 2 has not been breached, the approach taken by the UK courts is less clear. This raises the question of whether, under domestic law, the duty to investigate can apply independently from the substantive duty under Article 2. Following *R (on the application of Middleton) v HM Coroner for Western Somerset*[47] and *R (on the application of Gentle) v Prime Minister*[48] there appeared to be an established position within the UK that the investigative duty was 'parasitic upon the existence of the substantive right' and its existence depended on the substantive right.[49] However, this was called into question by the decision of the House of Lords in *R (on the application of JL) v Secretary of State for the Home Department*[50] which held that the duty did not just apply in cases where there was an arguable breach of the substantive duty, instead the duty can apply in order to determine if preventive action is necessary.[51] O'Neill has argued that this is less clear following *R (on the application of Smith) v HM Oxfordshire Assistant Deputy Coroner*[52] and that as a result it is questionable whether the current approach is consistent with that taken by the ECtHR.[53] Although the issue in *R (on the application of Smith)* concerned the scope of the ECHR and whether it applied to

[47] [2004] UKHL 10.
[48] [2008] UKHL 20.
[49] ibid [6] (Lord Bingham).
[50] [2008] UKHL 68.
[51] O'Neill (n 34).
[52] [2010] UKSC 29.
[53] O'Neill (n 34).

British troops serving in Iraq, their Lordships briefly explored the issue of whether the duty to investigate is separate to the substantive duty. They did not, however, reach a consensus on this. Lord Phillips argued that the investigatory duty would be 'limited' if it only applied 'if, and only if, there are grounds for suspecting a breach by the State of a substantive article 2 obligation'.[54] This appears to suggest that the possibility of a breach is enough to engage the duty.[55] However, Lord Hope argued that '[t]he procedural obligation depends on the existence of the substantive right. It cannot exist independently'.[56] This approach is consistent with that taken in *Middleton* and *Gentle* and requires more than the possibility of a breach before the duty is engaged. Instead it requires a suspected, or actual, breach, implying that a higher threshold must be passed before the duty is engaged. Whilst the comments in *R (on the application of Smith)* were obiter, they indicate that there is confusion over how the duty to investigate operates in relation to the substantive duty and that it is unclear whether or not the duty can apply independently of the substantive duty. As already stated, the aims of the duty to investigate would be better fulfilled if the duty were separate from the substantive duty as it would ensure effective investigation in a wider number of cases.

(iii) Form of the Duty

When fulfilling the investigatory duty there are a number of forms that investigations can take, for example the duty can be discharged by way of an inquest. In the UK the traditional inquest is known as a *Jamieson* inquest, following the case of *R v HM*

[54] *R (on the application of Smith)* (n 52) [70] (Lord Phillips).
[55] ibid [70] (Lord Phillips).
[56] ibid [97] (Lord Hope).

Coroner for North Humberside and Scunthorpe Ex Parte Jamieson.[57] A *Jamieson* inquest establishes who the deceased was as well as how, when and where they died. In this type of inquest ''how' is to be understood as meaning 'by what means'' and 'the task is not to ascertain how the deceased died, which might raise general and far-reaching issues, but 'how… the deceased came by his death''.[58] However, in *Middleton* it was held that a *Jamieson* inquest does not always satisfy the investigatory duty under Article 2.[59] As a result the House of Lords reinterpreted the relevant sections of the Coroners Act 1988 relating to the determination of how the victim died using section 3 of the HRA 1998. They adopted a wider meaning of the term 'how' in section 11(5)(b)(ii) of the Coroners Act 1988 so that it now means discovering 'by what means and in what circumstance' the victim died.[60] Following this decision there are now two types of inquests that can be held in the UK. The question has since arisen as to when a *Middleton* inquest is required: is it always required where a death has occurred or is it only required when there has been a suspected breach of Article 2? It has also raised the question of what the difference is between a *Middleton* and *Jamieson* inquest. In their recent report, Inquest noted that there is confusion surrounding *Middleton* inquests and that whilst they can be very beneficial these positive implications are being limited.[61] The report highlighted three main problems in the current system: firstly, that there is confusion about when to use *Middleton* inquests, secondly that there is confusion about how to use the *Middleton* inquests, and thirdly, that *Middleton* inquests are not currently being 'properly utilised

[57] [1994] 3 WLR 82.
[58] *R (on the application of Smith)* (n 52) [75] (Lord Phillips).
[59] *Middleton* (n 47) [31] (Lord Bingham).
[60] ibid [35] (Lord Bingham).
[61] Deborah Coles & Helen Shaw, 'Learning From Death in Custody Inquests: A New Framework for Action and Accountability' (Inquest, 2012) 7-8 <http://inquest.gn.apc.org/pdf/reports/Learning_from_Death_in_Custody_Inquests.pdf> accessed 16 November 2012.

as a valuable resource for analysis and learning.'[62] This demonstrates that confusion exists within coronial practice and, as inquests are the normal method of satisfying the investigation duty,[63] also suggests that there is little consistency in how the duty is being fulfilled nationally. It has been argued that Article 2 is relevant to both *Jamieson* and *Middleton* inquests.[64] Hyam argues that all inquests raise Article 2 issues as 'the state still has an obligation under Article 2(1) to provide an independent judicial system to establish the cause of death and any liability.'[65] This implies that the question of Article 2 and whether the duty to hold an effective investigation applies is less straightforward than some have suggested and that there is a lack of clarity over when the duty to investigate is engaged and how it can be satisfied. It seems that in some cases it is covered by the substantive requirement to have an effective system in place, for example in cases of medical negligence,[66] yet in other cases the separate investigative duty is engaged and a full, effective investigation is required.

Recently, there has also been some question over the difference between *Middleton* and *Jamieson* inquests. In *Smith v HM Oxfordshire Assistant Deputy Coroner*, Lord Phillips cast doubt on the difference between the two types of inquest, stating that the only real difference is 'the form of the verdict.'[67] Lord Hope, however, maintained that there is a definite difference between the two inquests and that a *Middleton* inquest should only be used where the Article 2 investigatory duty is engaged.[68] This highlights that there is a lack of clarity within the judiciary about what kind of inquest

[62] ibid 8.
[63] *Middleton* (n 47) (Lord Bingham).
[64] Hyam (n 39) 6-7.
[65] ibid 6-7.
[66] *Powell v United Kingdom* [2000] 30 EHRR CD 362.
[67] *R (on the application of Smith)* (n 52) [70], [76]-[78] (Lord Phillips).
[68] ibid [96] (Lord Hope).

is required. However, following Lord Phillips' comments in *R (on the application of Smith)* it appears that on a practical level there is little difference between *Middleton* and *Jamieson* inquests, other than the type of verdict available and that in some cases the same witnesses would be called and the same questions asked in both a *Middleton* and a *Jamieson* inquest.[69] This implies that there may be differing standards being applied nationally as it remains unclear when a *Middleton* or *Jamieson* inquest is required. Again, this highlights that more guidance is needed as to how to fulfil the investigatory duty.

Lord Bingham stated in *Middleton* that the ECtHR 'has never expressly ruled what the final product of an official investigation, to satisfy the procedural obligation imposed by article 2 of the Convention, should be.'[70] He ruled that a traditional factual inquiry may be enough to satisfy the requirements in some cases, whereas in others a wider investigation is needed and the coroner can choose the type of verdict required depending on the circumstances. Consequently, it is open to the coroner to choose between a narrative verdict, a shorter verdict or he can ask the jury to answer certain questions depending on what is required in order to satisfy the duty.[71] This demonstrates that there are gaps within the law as whilst the coroner is best placed to decide what kind of verdict is required and to direct the jury, the findings in the recent Inquest report[72] suggest that more guidance is needed over when to use each verdict. Similarly, although coroners' inquests are the normal method of satisfying the investigatory duty, there has been no official guidance on the purpose of these inquests and what they aim to achieve, although the Chief Coroner has recently

[69] Interview with Mr Aidan Cotter, HM Coroner for the City of Birmingham and the Borough of Solihull (Sutton Coldfield Town Hall, 30th November 2012).
[70] *Middleton* (n 47) [7] (Lord Bingham).
[71] ibid [36] (Lord Bingham).
[72] Coles & Shaw (n 61) 8.

spoken of what he believes the purpose to be.[73] He concluded that the modern coroner has two purposes: the first is to publicly investigate the death and determine the cause in order to expose any potential wrongdoing by an agent of the state, and secondly to prevent future deaths from occurring in a similar manner.[74] This is further complicated by the lack of guidance from the ECtHR on what the purpose of the investigatory duty actually is. In *R (on the application of Amin (Imtiaz)) v Secretary of State for the Home Department*[75] Lord Bingham gave his interpretation of what the purpose of the duty is: 'to ensure so far as possible that the full facts are brought to light; that culpable and discreditable conduct is exposed and brought to public notice; that suspicion of deliberate wrongdoing (if unjustified) is allayed; that dangerous practices and procedures are rectified; and that those who have lost their relative may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others.'[76] This definition appears to go beyond the decision in *McCann* as it widens the purpose from just accountability of state agents, to include prevention of future deaths. It does, however, resemble the dual purpose identified by the Chief Coroner.[77] This highlights the problem that without a clear purpose behind these investigations it is hard to define what form they should take. For example, if the purpose is prevention as well as accountability then there needs to be more of an emphasis on procedures that allow recommendations to be made by the person conducting the investigation, for example the coroner, and for these recommendations to be acted upon. Inquest reported that there is no such method for acting on recommendations made by coroners in Rule 43 reports and that 'the lack of effective mechanism for monitoring the action taken in response to rule 43 reports is crucial,

[73] Thornton 'The Coroner System…' (n 4) [39].
[74] ibid [46]-[52].
[75] [2003] UKHL 51.
[76] ibid [31] (Lord Bingham).
[77] Thornton, 'The Coroner System…' (n 4) [46]-[52].

particularly where they have commented on serious and systematic problems within an institution, and action that needs to be taken to prevent other deaths occurring.'[78] In order to properly fulfil the identified aims of the investigatory duty, it is crucial that a method for learning from deaths in order to prevent future deaths in similar circumstances, and acting on recommendations, is put into place.

Consequently, it is argued that the duty would be carried out more effectively if there were a specifically appointed body within the public authority responsible for investigations and acting on recommendations made by coroners in Rule 43 reports. Such a body would need to have the power to call in independent investigators not involved in the event where necessary in order to satisfy the requirement that Article 2 investigations must be independent. In *Jordan*, it was acknowledged that as the police investigation was carried out by officers hierarchically linked to the officer involved in the events this raised issues regarding the independence of the investigation.[79] The responsibility of initiating the investigation could then fall to this body and they could interact with the coroner and report the death to him. This method could also potentially include the reform proposed by the Chief Coroner of creating specialised coroners who deal with specific types of deaths, for example those that occur in custody.[80] The body could also be responsible for receiving the recommendations that result from investigations and any Rule 43 reports made by the coroner. As the body would be part of the public authority they would be best placed to receive these recommendations as they would have the necessary expertise to know whether the idea is feasible and whether the actions can indeed be taken, or how to implement any recommendations. They could also be responsible for publishing these

[78] Coles & Shaw (n 61) 11.
[79] *Jordan* (n 20) [120].
[80] Thornton, 'The Coroner System…' (n 4) [52]-[58].

Rule 43 reports, any recommendations made and actions taken so that reforms can be acted on nationally, rather than just locally. It has recently been noted by the Equality and Human Rights Commission that one current problem with these recommendations is that where they are implemented they are not always implemented nationally or communicated properly.[81]

Article 2 places a duty on the state to hold an effective investigation, and the ECtHR has made it clear that it is up to the state to initiate the investigation.[82] This raises the question of who is responsible for initiating the investigation within the state. There is little guidance from the ECtHR on who should conduct the investigation, other than that the investigators must be independent.[83] The Government appears to have adopted the position that a coroner's inquest is the normal way of satisfying the investigatory duty and that this can be supplemented by independent investigations conducted by other bodies, as well as civil, criminal and disciplinary proceedings, if necessary.[84] The result is that the investigations, and who conducts the investigations, differ depending on the public authority involved and in some cases means that a number of different bodies within public authorities are conducting investigations. For example, when a death occurs in custody there are a number of investigations that can satisfy the Article 2 duty, including an inquest, an investigation by the Independent Police Complaints Commission and an investigation by the Prisons and Probation Ombudsman.[85] The circumstances when each can investigate differ slightly, for

[81] Equality and Human Rights Commission, 'Human Rights Review 2012. How Fair is Britain? An Assessment of how well Public Authorities Protect Human Rights' (2012) 65-66 <http://www.equalityhumanrights.com/uploaded_files/humanrights/ehrc_hrr_full_v1.pdf> accessed 3 December 2012.
[82] *Jordan* (n 20) [105].
[83] *Edwards v United Kingdom* [2002] 35 EHRR19.
[84] Equality and Human Rights Commission, 'Human Rights Review 2012' (n 81) 64.
[85] ibid 54-56.

example a coroner's inquest is required whenever a person dies in custody, but the Prisons and Probation Ombudsman will only investigate 'deaths of prisoners, residents of probation service-approved premises, and immigration detainees',[86] whilst the Independent Police Complaints Commission will investigate where a death has resulted from police conduct. The same is true to an extent where health authorities are concerned. It has been highlighted that '[t]here is no single person or agency responsible for investigating the deaths of patients in mental health settings'[87] and that these deaths can be investigated through a number of methods, including 'an inquest, an internal hospital inquiry… a commissioned independent body, or a combination of some or all of them.'[88] This demonstrates that even within public authorities there is no set protocol for satisfying the investigatory duty and raises the question of whether the duty is actually being satisfied in these circumstances.[89] It is also unclear who has the responsibility for investigating and who must initiate the investigation, suggesting that a simpler and clearer system within each public authority is required.

In *Amin* it was acknowledged that a number of methods of investigation can be used in order to satisfy the Article 2 duty, with Lord Bingham placing particular emphasis on the role of the inquest in doing this: 'it is very unfortunate that there was no inquest, since a properly conducted inquest can discharge the state's investigative obligation'.[90] However, whilst other methods of investigation can be used there is little guidance from the ECtHR on what kind of investigation is required in a given case. Lord Slynn acknowledged that a combination of investigations can be used but

[86] ibid 56.
[87] ibid 64.
[88] ibid 64.
[89] ibid 64.
[90] *Amin* (n 75) [33] (Lord Bingham).

when added together they must meet the minimum requirements specified by the ECtHR.[91] In the UK public inquiries are governed by the Inquiries Act 2005, which provides that a Minister can hold a public inquiry where 'particular events have caused, or are capable of causing, public concern, or there is public concern that particular events have occurred.'[92] However, beyond this there is little guidance on when a public inquiry should be held as Ministers have a lot of discretion under the 2005 Act and much depends on what amounts to an issue of 'public concern'. Amnesty International have specified a set of criteria that can be used to determine if a public inquiry is required: i) where there have been '[a]llegations of serious misconduct… against those acting, or purporting to act on behalf of the state', ii) where '[t]hose allegations are sufficiently widespread and are being treated sufficiently seriously by those outside Government to undermine the public's confidence in the integrity of the State and in the rule of law', iii) where these 'allegations related to a sufficiently defined event or series of events to allow an inquiry to be given proper and clear terms of reference', and, iv) '[a]n inquiry would represent the most effective means of establishing the merit of the allegations made and so of restoring the public confidence.'[93] Yet even these are hard to define and it is submitted that more official guidance is needed, as sometimes a public inquiry will be the most appropriate method of satisfying the Article 2 duty. For example where the issue is so serious that it demands a higher level of public scrutiny than can be provided by another investigation, or where the level of independence required cannot be achieved by a coroner, for example if a death in custody is being investigated then a coroner may not be best placed to fulfil the investigation as they often rely on police

[91] ibid [46] (Lord Slynn).
[92] Inquiries Act 2005, s 1(1).
[93] 'Public Concern' (publicinquiries.org) <http://www.publicinquiries.org/determining_the_need_for_an_inquiry/public_concern> accessed 23 January 2013.

investigations when conducting their inquests.[94] This lack of guidance, and the dissatisfaction with this, is demonstrated by the ongoing legal battle surrounding whether a public inquiry should be held to investigate the shooting of Patrick Finucane in 1989.[95] Despite the Government promising to hold a public inquiry in 2004, David Cameron, in 2011, reneged on this promise and instead proposed an independent review, which has recently published its findings.[96] The lack of guidance on public inquiries means that they are discretionary in nature and so there is uncertainty surrounding when a public inquiry will be held and allows ministers to more easily default on promises to hold inquiries.

When applied by the UK courts the duty is more specific than when applied by the ECtHR as rather than being applied to the state as a whole, it is being applied more narrowly to specific public authorities, as organs of the state. However, the law is unacceptably vague and it is not entirely clear how the duty must be carried out by these authorities, or what results are required. There are also gaps in the law concerning inquests and what kind of inquest is required. The UK's approach also raises the question of whether or not the investigative duty can arise independently of the substantive approach, which in turn raises the issue of whether the UK is complying fully with the decisions of the ECtHR.[97]

Section 3: The Application of the Article 2 Investigatory Duty in Healthcare Contexts.

[94] Adam Wagner, 'Holding the State to Account: Public Inquiries and Inquests. Skeleton Argument of the Intervener' (UK Human Rights Blog, 2012) 29 [14] <http://www.1cor.com/1155/records/1477/Handout.pdf> accessed 9 January 2013.
[95] 'Pat Finucane killing: 'Far worse than anything alleged in Iraq or Afghanistan' (*BBC News*, 31 January 2013) <http://www.bbc.co.uk/news/uk-northern-ireland-21283169> accessed 31 January 2013.
[96] Sir Desmond de Silva, *The Report of the Patrick Finucane Review* (December 2012, HC 802-I).
[97] O'Neill (n 34).

It has been proposed that the duty to investigate should be adapted to each public authority to suit the kind of scenarios that each deals with as this will produce the best results for meeting the aims of the duty. As this thesis is concentrating on the liability of health authorities it will now consider how this would apply specifically to health authorities. It will examine two possible scenarios: i) where a doctor/nurse is directly involved in the death of a patient, for example by administering too much pain medication, and ii) where the health authority fails to protect a patient and they commit suicide.

In the first scenario, the Article 2 investigatory duty would be engaged as *Powell v United Kingdom*[98] extended the duty beyond scenarios involving violence and held that there needs to be 'an effective independent system for establishing the cause of death of an individual under the care and responsibility of health professionals.'[99] It would therefore be up to the investigatory body within the health authority to report the death to the coroner and to initiate the investigation. They could decide whether to establish and conduct an internal hospital inquiry or whether the inquest alone would be enough to comply with the investigative duty. This body could then decide whether to act on any recommendations made by the coroner through Rule 43 reports, or whether to act on findings made by any other investigations that are carried out. It would also be up to the investigatory body to decide whether it is appropriate to refer the case to the Crown Prosecution Service. In this scenario it is likely that an inquiry into the hospital practice would be necessary as the death could potentially mean that there are wider systematic failures, such as problems in communication between

[98] *Powell* (n 66) 364.
[99] ibid 364.

nurses and doctors as to what medication has been administered, that need to be investigated.

The second scenario would also trigger the investigatory duty as although the death was not directly caused by the health authority, the duty from *Powell* would still apply as the patient would have been under the responsibility of the health authority, even if they were not detained.[100] Again, it would be up to the investigatory body to report the death to the coroner so that an inquest could be conducted. They could also decide whether or not a hospital inquiry is needed and could act on any recommendations made by any inquiries conducted or Rule 43 reports made by the Coroner. In this scenario it is likely that an inquiry into the practice would be needed in order to determine what precise failures led to the death of the patient. It would again be up to the independent body to determine if further action needs to be taken as a result of this. In addition to triggering the investigatory duty, this scenario may also trigger the operational duty under Article 2, meaning that the health authority may have had a duty to take certain operational measures to prevent the death.

Conclusion

Overall, when formulating the investigatory duty, the ECtHR has adopted a flexible and expansive approach, as demonstrated by the growing number of circumstances in which they have found the duty. This has resulted in a general duty that applies to states with little specific guidance as to how the duty should be implemented by the state. The duty to investigate is consequently rather vague and certain issues remain

[100] *Rabone* (n 38).

unclear, for example what kind of investigation must be conducted. The jurisprudence from the UK is more specific as it applies specifically to the public authorities involved and so provides more clarity on how the duty works within the UK. However, it is still not entirely clear and there are gaps that remain in the law. For example, with regards to the type of investigation that is required, what results are required and whether or not the investigative duty can arise independently of the substantive duty. There are also differing thresholds for when the duty is engaged depending on the scenario and the public authority involved. This could be problematic if the courts are faced with a different scenario to one of these three categories, for example one similar to that in *Öneryildiz*. Consequently, it is argued that the duty to investigate should be adapted to each public authority so that more guidance is provided on what kind of investigation and results are required. It is submitted that one way of implementing this would be to establish a body within each public authority that has responsibility for initiating the investigation, reporting the death to the coroner and ultimately acting on any recommendations made. This could provide some much needed clarity on what is currently a very vague and general, yet important, duty. It could also provide consistency of approach as at present investigations are conducted on an ad hoc basis, which can result in inconsistencies in how the law is applied.

CHAPTER TWO: THE OPERATIONAL DUTY

Following the recent decision in *Rabone v Pennine Care NHS Trust*[1] the operational duty under Article 2 has been expanded into new circumstances, within the context of healthcare, and a new emphasis has been placed on the role of vulnerability in triggering the duty. Whilst the decision in *Rabone* concerned a patient suffering from a psychiatric illness, the principles can also be applied to patients in hospital suffering from a physical illness, hereafter referred to as physical patients. This has resulted in several questions being raised, in particular about the role of state control and involuntary detention as relevant factors in engaging the duty. This chapter will consider the impact that *Rabone* has had on the operational duty and the questions that have been raised as a result of the decision. To do this it will look at the operational duty in general, the evolution of both ECHR and domestic law to the current position, the decision in *Rabone* and its impact on the law. Ultimately, the decision in *Rabone* will be defended and it will be demonstrated that although it has expanded the operational duty and has placed more importance on the notion of vulnerability in healthcare scenarios, this will not result in the duty becoming too broad. Rather, when the operational duty is applied based on the relationship between the public authority and the individual, and the function of the public authority, then vulnerability can be properly defined and only applied in certain circumstances, thus meaning that the duty can still be controlled as it previously has been. In doing so it will argue that state control is also still relevant in certain circumstances. It will also

[1] [2012] UKSC 2.

consider the impact that *Rabone* has had on the class of victims that can claim under Article 2.

Section One: The Positive Duties Under Article 2

In addition to the positive investigative duty, Article 2 also places positive duties on the state 'to take appropriate steps to safeguard the lives of those within its jurisdiction'.[2] There are two branches to these positive obligations: firstly, there is a duty to have an effective system in place to deter, and if necessary punish, unlawful killings. This duty was considered in *Powell v United Kingdom,*[3] which established that there will not always be a breach of Article 2 where a death occurs in hospital. Rather, part of the positive duty operates at an organisational level and this will only be breached where there has been a systematic or organisational failing. *Powell* involved a claim by the parents of a child who died as a result of medical negligence whilst receiving treatment in hospital. It was held that as the hospital had in place a general framework for protecting life and 'had made adequate provision for securing high professional standards among health professionals'[4] then medical negligence resulting in death did not mean that there was a breach of the general duty under Article 2. The second positive duty is one to take preventive measures to safeguard the life of an individual in certain defined circumstances,[5] and is referred to as the operational duty. This duty requires the state, and its organs, to take preventive measures to control the actions of third parties who may cause harm to individuals in certain circumstances that have been defined by the courts, which will be discussed in

[2] *Osman v United Kingdom* [2000] 29 EHRR 245 [115].
[3] [2000] 30 EHRR CD362.
[4] ibid 364.
[5] *Osman* (n 2) [115].

Section Two. It is this operational duty that will be the primary focus of this thesis, specifically the duty that applies to health authorities.

In Chapter One the law relating to the investigatory duty at ECHR level and at UK level were considered separately as there is disparity between the two approaches. However, where the operational duty is concerned there is no disparity and so in this chapter the law from the ECHR and the UK will be assessed together. When considering the operational duty, the UK courts appear willing to build upon, and develop, the ECHR law. In *Rabone* Lord Brown stated that '[i]f, 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.'[6] Perhaps one reason behind this is that where the operational duty is concerned the ECtHR has provided more guidance on the circumstances in which the duty is likely to apply, although there is still a degree of flexibility over this. In contrast, as already discussed, where the investigatory duty is concerned there is less guidance from the ECtHR. In addition, this approach taken by the UK courts to building upon the operational duty can be contrasted with the approach taken in relation to expanding the investigatory duty, where there courts appear reluctant to depart from the existing model that they have created as to when the investigatory duty will apply.[7]

[6] *Rabone* (n 1) [112] (Lord Brown).
[7] See Chapter One, Section 2(i), and Aidan O'Neill, 'Some Reflections on Article 2 and the Procedural Obligations to Investigate Deaths' (*UKSC Blog*, 30/06/2010) <http://ukscblog.com/some-reflections-on-article-2-and-the-procedural-obligations-to-investigate-deaths> Accessed 1 November 2012.

Section Two: The Role of State Control and Involuntary Detention

The operational duty under Article 2 was first expressly developed in *Osman v United Kingdom,*[8] which involved a schoolteacher who became obsessed with and harassed a pupil, eventually seriously injuring the pupil and killing his father. Although the ECtHR ultimately found no violation of Article 2, they developed a test for determining whether the operational duty applies and has been breached in cases where a public authority fails to protect a person from the criminal acts of a third party. It was said that there will have been a breach of the operational duty if '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'.[9] However, it will be argued this basic test for determining whether the operational duty is engaged is only relevant once it has been shown that there is a relationship between the victim and the public authority that is capable of raising the duty. A relationship that requires the public authority to protect individuals would engage the duty. By focusing on this relationship before applying the *Osman* test different factors that engage the duty can be considered depending on the public authority involved, for example detention and vulnerability. In *Osman* the basis for the duty arising in police cases has not been fully explained and it is unclear whether the duty arises here because it is a function of the police to protect individuals from criminal behaviour/harm or whether there must be an additional, explicit, assumption of responsibility before the duty is engaged. This latter view was implied by Lord Hope

[8] *Osman* (n 2).
[9] ibid [116].

in *Van Colle v Chief Constable of Hertfordshire,* where he stated that '[t]here are undoubtedly cases where things done by the police can give rise to negative or positive duties under article 2 if life is to be protected.'[10] This would have the effect of providing a further control over situations in which the duty can be engaged and would prevent an influx of litigation. As this thesis is concerned primarily with health authorities, this question of why the operational duty applies to the police will not be answered here. However, it is arguable that the police function is conducive to Article 2 operational duties on the basis that it directly concerns the control and protection of individual members of the public. Although this does mean that the duty is wider initially, it can then be limited sufficiently through the application of the *Osman* test and so will not always result in the duty being engaged.

Since *Osman* the circumstances in which the operational duty applies have been gradually expanded by the courts. In *Keenan v United Kingdom*[11] the ECtHR held that the duty could apply to prisoners at risk of suicide. *Keenan* involved a claim under Article 2 by the mother of a mentally ill prisoner who committed suicide whilst in prison. The court extended the Article 2 duties to apply in cases involving prisoners at risk of self-harm based on the reasoning that prisoners are in a vulnerable position due to their involuntary detention, and the state control that is exercised over them as a result of this detention, and so 'the authorities are under a duty to protect them'.[12] In *Edwards v United Kingdom*[13] the duty was extended to apply in circumstances where prisoners are at risk from other prisoners. *Edwards* involved a claim under Article 2 by the parents of a prisoner who was killed by his cellmate. Again the ECtHR

[10] [2008] UKHL 50 [71] (Lord Hope).
[11] [2001] 33 EHRR 38.
[12] ibid [90].
[13] [2002] 35 EHRR 19.s

highlighted that as he was a prisoner the victim 'fell under the responsibility of the authorities who were under a domestic law and Convention obligation to protect his life'[14] and that the *Osman* test should be applied to determine if there had been a breach of this positive obligation. As a result of these cases it appeared that the operational duty was most applicable in circumstances involving people in custody who were at risk of either harm from a third party or at risk of self-harm. The duty has since been found in cases involving conscripts, where the duty is to protect conscripts against the risk of suicide.[15] In *Kilinç v Turkey*,[16] the ECtHR has indicated that there are two factors that indicate the existence of the operational duty in these cases: i) 'the nature of the military activities and assignments in which the recruits will have to engage' and ii) 'the "human element" which comes into play when a State calls upon ordinary citizens.'[17] There has been no specific articulation of what it is about these circumstances that engages the duty, however, Lord Rodger speculated that both being under the control of the state and being 'placed in situations where… there is a heightened risk of suicide' are relevant factors.[18] Thus expanding the circumstances where state control is relevant in giving rise to the operational duty.

More importantly for the purpose of this thesis, the UK courts have since expanded the operational duty so that it applies in cases involving health authorities. Following recent developments, the duty now applies in scenarios where a patient has been harmed by a third party or has self-harmed and wishes to hold the health authority liable under Article 2 for failing to prevent the harm. In *Savage v South Essex*

[14] ibid [57].
[15] *Savage v South Essex Partnership NHS Trust* [2008] UKHL 74 [34] (Lord Rodger).
[16] App No 40145/98 (ECtHR, 7 June 2005).
[17] *Savage* (n 15) [37] (Lord Rodger).
[18] ibid [39] (Lord Rodger).

Partnership NHS Foundation Trust[19] the House of Lords held that the duty could apply to patients detained in a psychiatric hospital. *Savage* involved a paranoid schizophrenic patient who was detained in a psychiatric hospital under the Mental Health Act 1983 but who escaped and committed suicide. Her daughter sued the health authority claiming that it had breached the Article 2 operational duty owed to her mother. The House of Lords held that a duty was owed by all health authorities to protect the lives of patients, and that this included taking reasonable steps to prevent patients committing suicide where the staff knew, or ought to have known, of a real and immediate risk of suicide. This demonstrated a willingness to expand the duty beyond the traditional scenarios in which it had been previously applied, for example custodial scenarios and cases involving conscripts.[20] However, this was not an especially radical expansion of the duty as the House of Lords asserted that the basis for the duty arising remained rooted in the control exercised over the victim as a result of their involuntary detention,[21] thus likening the facts to those involving prisoners and conscripts.

Section Three: A Duty Based on Vulnerability

The Supreme Court has since expanded the operational duty in relation to health authorities further through its decision in *Rabone.* This case involved a voluntary psychiatric patient, Melanie Rabone, who was admitted to hospital to receive treatment for depression following a suicide attempt. Whilst on home leave Melanie committed suicide. Her parents sued the hospital both in negligence, a claim that was later settled, and for breach of Article 2. The Supreme Court held that the operational

[19] *Savage* (n 15).
[20] *Kilinç* (n 16).
[21] *Savage* (n 15) [49] (Lord Rodger).

duty could also apply to voluntary patients due to their vulnerability, thereby expanding the type of situations in which it can arise beyond prisons and secure hospitals where patients are involuntarily detained. In doing so they placed an emphasis on the vulnerability of the patient, rather than on their status as a detained or voluntary patient. In addition, *Rabone* expanded the class of victims who can claim under Article 2, by allowing the parents of an adult to succeed in their claim and by allowing the claim despite Melanie's parents settling their claim in negligence. By extending the duty in this way the Supreme Court have raised three main questions that remain unanswered**:** i) how far the operational duty can, and will, expand in relation to both health authorities and other public authorities following the emphasis on vulnerability when considering if the operational duty is engaged (and whether this changes the role of state control in triggering the duty), ii) the definition of vulnerability, and, iii) who is entitled to claim under Article 2 as a victim. This chapter will discuss these issues raised in *Rabone* and will attempt to provide more clarity over these uncertainties that now exist in the law.

(i) The Extension of the Operational Duty

Following the decision in *Rabone* concerns have been raised over how far the operational duty will now apply and whether it will continue to expand in the future. In particular, Tettenborn has raised concerns that the duty will now apply too broadly both to health authorities and to other public authorities.[22] Firstly he argues that in *Rabone* the Supreme Court 'waved away as an irrelevance' the notion of state control over the individual as being an important factor in engaging the operational duty, and

[22] Andrew Tettenborn, 'Wrongful Death, Human Rights, and the Fatal Accidents Act' (2012) 128 LQR 327, 329.

instead placed more importance on the vulnerability of patients.[23] By removing this distinction between the two types of patient the Supreme Court have created a wider duty that no longer appears to be based on involuntary detention. As a result it is questionable whether control is still a relevant factor in engaging the duty, which could potentially change the nature of the operational duty. It may result in health authorities being under a duty to protect all vulnerable patients from risks thus creating 'a sort of general safety-net for the vulnerable'.[24] There is currently uncertainty over how far this duty will expand and Poole has suggested that as a result it may extend in the future to patients who are being treated in the community or to non-psychiatric patients who are vulnerable, for example those who are suffering from dementia.[25] It has also been suggested that the duty may also apply to patients who are on home leave from hospital.[26]

However, in making this argument Tettenborn appears to overstate the distinction between voluntary and detained patients. He argues that detention is an effective method of controlling the way that the operational duty is applied and that the decision in *Rabone* to replace this with the notion of vulnerability will lead to an increase in litigation.[27] He acknowledges that the reasoning behind the decision is that 'most voluntary patients could now under the revised Mental Capacity Act 2005 be incarcerated almost at the whim of those treating them' and that there is now 'not so much difference between a detained and a voluntary patient',[28] yet this view is too simplistic. In reality, as Lord Dyson acknowledged, the difference between a

[23] ibid 328.
[24] ibid 329.
[25] Nigel Poole, 'Claiming Damages Under the Human Rights Act: Rabone v Pennine Care NHS Foundation Trust' (2012) 2 JPI Law 127, 131.
[26] *Savage* (n 15) [101] (Baroness Hale).
[27] Tettenborn (n 22) 329.
[28] ibid 328.

voluntary and a detained patient is less clear-cut. Lord Dyson stated that detained patients may be in 'an open hospital with freedom to come and go' and 'an informal patient may be treated in a secure environment',[29] demonstrating that there is less of a distinction between the two types of patient in practice. In addition, a person may be detained by their condition and only receiving treatment in hospital voluntarily because if they did not consent then they fear that they would be detained anyway.[30] This suggests that there are many variables that can affect the nature of the detention and that deciding whether or not the operational duty applies on this basis is 'artificial'.[31] Additionally, Hill identifies that voluntary psychiatric patients are not in the same position as patients with a physical illness.[32] While both are admitted to hospital on a voluntary basis, there is a difference in their ability to make rational decisions over their treatment. This is especially an issue where anorexic patients are concerned, as while they may be capable of making certain rational decisions, they are often not able to make rational decisions about their treatment.[33] These differences between the two types of patients suggests that, as their Lordships found in *Rabone*, distinctions should not be drawn between voluntary and detained patients, as voluntary patients are in a comparable position to detained patients, rather than one comparable to patients with a physical illness.[34] Due to this, in scenarios involving health authorities, detention is not an effective mechanism for controlling the operational duty as to use detention as a control mechanism risks denying the protection of the duty to certain classes of people who need it. Further, as the focus in

[29] *Rabone* (n 1) [28] (Lord Dyson).
[30] ibid [29] (Lord Dyson).
[31] Jason NE Varuhas, 'Liability Under the Human Rights Act 1998: the Duty to Protect Life, Indirect Victims and Damages' (2012) 71 CLJ 263, 265.
[32] Matthew Hill, 'Analysis| Rabone and the Rights to Life of Voluntary Patients Mental Health Patients – Part 1/2' (*UK Human Rights Blog,* 12 February 2012) <http://ukhumanrightsblog.com/2012/02/12/analysis-rabone-and-the-rights-to-life-of-voluntary-mental-health-patients-part-12/> accessed 28 March 2013.
[33] *Re W (A Minor) (Medical Treatment: Court's Jurisdiction)* [1993] Fam 64, 81 (Lord Donaldson).
[34] *Rabone* (n 1) [30] (Lord Dyson).

Rabone was on vulnerability, rather than on detention, this reasoning can be applied to physical patients in certain circumstances where the *Osman* test is satisfied. Again this suggests that detention is no longer an effective mechanism for controlling the duty in healthcare scenarios, as it would also deny these physical patients the protection of the operational duty.

It is also worth noting that although *Rabone* expanded the class of people that the operational duty applies to, it has not changed the *Osman* test itself and so the factors that act to limit the duty still apply. This will prevent the duty from applying too broadly to health authorities. The *Osman* test requires that the public authority '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'.[35] More is therefore required for the duty to apply than just the vulnerability of a patient. The risk must be of a certain nature before the operational duty is engaged: *Osman* identified that 'a real and immediate risk to life'[36] is needed to trigger the duty. *Rabone* provides the most recent, and detailed, consideration of what amounts to a real and immediate risk. Lord Dyson stated that for the risk to be real it must be 'a substantial or significant risk and not a remote or fanciful one'.[37] He also affirmed that immediate should be interpreted as meaning 'present and continuing', but asserted that the risk does not have to be imminent.[38] *Keenan* also demonstrated that not every risk will trigger the operational duty.[39] In *Keenan* it was held that although there was a risk to the deceased's life, it was not immediate as the 'immediacy of the risk varied'.[40] This further demonstrates

[35] *Osman* (n 2) [116].
[36] ibid [116].
[37] *Rabone* (n 1) [38] (Lord Dyson).
[38] ibid [39] (Lord Dyson).
[39] *Keenan* (n 11) [89].
[40] ibid [95].

that the operational duty will only apply in a limited number of circumstances, as its applicability will depend on the nature of the risk in question. Further, following *Powell*, the operational duty only applies to certain types of risks within the context of healthcare and so will not always arise. This would suggest that the operational duty can still be controlled, and its applicability restricted, through the existing mechanisms, for example by considering the nature of the risk[41] and by applying the current criteria that determine breach, which will be considered in more detail in Chapter Three.

Consideration of the risk involved means that following *Rabone* the operational duty can still be restricted to situations involving harm caused by third parties or self-harm. It has been suggested that at present *Rabone* only applies to psychiatric patients, and not to physical patients.[42] Yet, there is a possibility that in the future the duty may apply beyond this in exceptional circumstances. For example, if a person is receiving treatment for a physical illness in hospital and the hospital knows him to be at risk of attack from a third party then it is arguable that they would be under a duty to protect him from harm. However, such an extension of the operational duty would only apply in limited circumstances as in these cases the risk of self-harm or harm from a third party is less obvious. The existence of the duty would depend upon the nature of the risk and the knowledge that the health authority had of it. For example, the courts may require the health authority to have had specific knowledge of the risk and so would consider the definition of knowledge from *Van Colle.* In *Van Colle* it was stated that hindsight cannot be used and that the question to be asked when determining

[41] *Rabone* (n 1) [24] (Lord Dyson).
[42] Bevan Brittan 'Rabone v Pennine Care NHS Trust' (Bevan Brittan, 20 February 2012) <http://www.bevanbrittan.com/articles/Pages/RabonevPennineCareNHSTrust.aspx> Accessed 7 June 2013.

knowledge is whether the authority 'making a reasonable and informed judgment on the facts and in the circumstances known to [them] at the time… appreciated that there was a real and immediate risk'.[43] Liability in these circumstances can be compared to public authority liability for acts of third party harm and self-harm in negligence. Following *Reeves v Commissioner of Police of the Metropolis* the police are under a duty in negligence to take reasonable steps to protect a prisoner from the risk of suicide where they had knowledge of the risk.[44] This was confirmed in *Orange v Chief Constable of West Yorkshire*, where the importance of knowledge of the risk was emphasised: '[t]he obligation to take reasonable care to prevent a prisoner from taking his own life deliberately only arises where the custodian knows or ought to know that the individual prisoner presents a suicide risk.'[45] This indicates that the requirement of knowledge is an important factor in cases where a public authority is said to be under a duty in negligence to protect the life of an individual, and so it is also likely to be relevant when considering a future extension of the operational duty into similar circumstances. This comparison between liability in negligence and under the HRA 1998 for breach of Article 2 will be discussed in more detail in Chapter Four.

To demonstrate how the duty would apply in practice, consider a scenario where a voluntary psychiatric patient, suffering from depression, on leave from hospital commits suicide. In such a case the operational duty would apply following *Rabone*, provided that the criteria for vulnerability, which will be discussed in Chapter Three, are met. The operational duty has been ruled to apply to voluntary psychiatric patients

[43] *Van Colle* (n 10) [36] (Lord Bingham).
[44] [1999] 3 WLR 363, 380 (Lord Hope).
[45] [2001] 3 WLR 736 [43] (Lord Justice Latham).

by both the UK courts and the ECtHR[46] and so the *Osman* test would be applied. Assuming that the individual was in a vulnerable position it would be considered whether there was a real and immediate risk using the interpretations provided in *Rabone*. This would depend on any assessments of the individual and their condition, however, provided that the behaviour was constant and did not vary, as it did *Keenan*, then it is likely that there would be a real and immediate risk, following *Rabone*. The court would then have to consider whether the health authority knew or ought to have known of the risk to the individual and then whether there had been a breach of the duty. The factors that are considered when determining breach will be discussed in more detail in Chapter Three. This demonstrates that the operational duty will not be too widely applicable in healthcare cases as the duty can still be controlled as it currently is using the *Osman* test, but with a clearer definition of vulnerability acting as a limiting factor that is specific to healthcare cases. In contrast, consider a patient suffering from a cancer that is misdiagnosed who dies whilst receiving treatment in hospital. In this instance, the Article 2 operational duty would not apply. Instead, the reasoning in *Powell* would be applied and the health authority would only need to satisfy the first limb of the positive obligations imposed by Article 2, which places a duty on the state to ensure that a general framework to protect life is in place, discussed above. Assuming that this is satisfied in this scenario there will be no breach of Article 2 and also no breach of the operational duty. This demonstrates that the decision in *Rabone* does not place onerous duties on health authorities, as *Powell* will still act to limit the situations in which the operational duty is applicable.

[46] See *Reynolds v United Kingdom* [2012] 55 EHRR 35.

Both domestic and ECHR jurisprudence demonstrate that the operational duty is likely to expand in the future to adapt to new circumstances that arise[47] due to its flexibility and the fact that there are no definite circumstances when the duty will apply.[48] Poole has argued that the Supreme Court in *Rabone* have 'not drawn any neat lines around the circumstances in which the operational duty might exist',[49] suggesting that the duty is very vague. However, it can be argued that the operational duty was already vague before *Rabone* was decided: in *Rabone* itself Baroness Hale identified that the duty is often stated 'in very broad terms'[50] by the ECtHR and there are only guiding principles as to when it may apply. The factors that have been emphasised by the courts so far are: vulnerability, the type of risk involved and any 'assumption of responsibility by the state for the individual's welfare and safety (including by the exercise of control)'.[51] It can thus be suggested that the Supreme Court took advantage of this flexibility and have not made radical changes to the clarity of the operational duty. Instead, they have placed more emphasis on one of the existing concepts within the duty.

Tettenborn's argument also suggests that the widening of the operational duty will result in the duty applying too broadly to other public authorities as well as health authorities.[52] Yet, when the nature of the operational duty is considered this is not necessarily true. It can be argued that the existence of the operational duty is closely related to the relationship between the victim and the public authority and so not all public authorities should be subject to the operational duty. Instead, whether the duty

[47] Poole (n 25) 133.
[48] *Rabone* (n 1) [22] and [25] (Lord Dyson).
[49] Poole (n 25) 129.
[50] *Rabone* (n 1) [69] (Baroness Hale).
[51] ibid [22] (Lord Dyson).
[52] Tettenborn (n 22) 328.

is owed to the individual should depend on the function of the public authority and whether they are required to control third parties or protect individuals as part of this function. *Mitchell v Glasgow City Council*[53] can be used to highlight this. In *Mitchell*, it was found that a local housing authority was not under an operational duty to protect the victim from an attack by his neighbour as there was no real and immediate risk to the victim's life. McIvor has argued that rather than considering whether there was a real and immediate risk, the operational duty could have been ruled out by their Lordships on the grounds that the duty 'was entirely incompatible with the public purpose and function of a housing authority, and with the nature of the relationship which exists between a landlord and a tenant'.[54] Only Lord Rodger discussed the functions of the public authority as being relevant to the duty to protect, stating that the police 'were the public authority with the duty, and with the resources to prevent criminal violence'[55] and that the victim 'was not in the custody or control of the Council'.[56] Allen has argued that Lord Rodger's opinion in *Mitchell* may be based on the reasoning that 'the protective duty is parasitic upon the general obligation'[57] and so cannot apply if there is no Article 2 duty on the public authority. This thesis will, however, argue that the operational duty is independent of the general Article 2 duty. Whilst all public authorities are subject to the general Article 2 duty and the negative duty not to take life, if it is the special nature of the relationship between the public authority and the victim, with such a relationship being determined by the particular function of the public authority, that determines whether the public authority is subject to the operational duty then this will mean that not all public authorities are

[53] [2009] UKHL 11.
[54] Claire McIvor, 'Getting Defensive about` Police Negligence: the Hill Principle, the Human Rights Act 1998 and the House of Lords; (2010) 69 CLJ 133, 148.
[55] *Mitchell* (n 53) [68] (Lord Rodger).
[56] ibid [69] (Lord Rodger).
[57] Neil Allen, 'Saving Life and Respecting Death: A Savage Dilemma' (2009) 17 Med L Rev 262, 271.

subject to it. Instead, the operational duty will apply based on a two-stage test, firstly the function of the public authority and its relationship with the victim should be considered, as Lord Rodger did in *Mitchell*, and then, if the authority has a function compatible with the duty, the *Osman* test should be applied to determine if a duty was owed in the circumstances and if there has breach of this duty. In contrast to this, as discussed in Chapter One, there seems to be more debate over the relationship between the investigatory and the general Article 2 duties. It can also be argued that if the operational duty only applies to public authorities depending on their function then the duty must be independent of the investigatory duty under Article 2. It means that the operational duty is narrower than the investigatory duty as it only applies where a third party, or a risk of suicide, is involved and the public authority has a duty to safeguard life. In contrast, the investigatory duty is much broader as it is triggered whenever the State is involved in a death.

In addition, if not all public authorities are subject to the operational duty then this raises the question of whether the test for the operational duty should be tailored to suit individual public authorities. The *Osman* test was developed in a case involving the criminal acts of a third party and in this context it makes sense and is useful for identifying whether the duty applies. In these scenarios factors other than vulnerability are more important as it is arguable that the operational duty on the police arises out of their function to control the acts of third parties, as mentioned above. Similarly, in custodial/prison cases detention and control are more important. In *Mitchell* Lord Rodger emphasised that ‘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' and as a result are under a positive duty to protect these individuals.[58] The test is less useful in cases involving health authorities, where other factors become more important. In these cases the vulnerability of the victim becomes a more important consideration due to the nature of the relationship between the victim and the public authority. In contrast, in police cases this assumption of responsibility is less likely to be found, unless the individual is taken into custody, as demonstrated in *Van Colle* where it was stated that 'the *Osman* test remains the same' and will not vary even where the individual is acting a police witness.[59] This would suggest that state control does still have a role to play in triggering the operational duty, depending on the context in which the duty is being raised.

(ii) The Role of Vulnerability

Tettenborn has also raised concerns that following *Rabone* the emphasis of the Supreme Court on vulnerability has meant that the duty will be based on a concept that is too vague.[60] In *Rabone* although the Supreme Court did place a large emphasis on the role of vulnerability in triggering the operational duty, they did not provide a definition of what vulnerability is. Lord Dyson simply referred to the emphasis that the ECtHR has placed on vulnerability in its jurisprudence 'as a relevant consideration.'[61] Baroness Hale, meanwhile, referred to the 'special vulnerability of people suffering from mental disorders' that has been noted by the ECtHR.[62] Neither actually attempted to define vulnerability beyond this, which suggests that

[58] *Mitchell* (n 53) [66] (Lord Rodger).
[59] *Van Colle* (n 10) [35] (Lord Bingham); [69]-[70] (Lord Hope).
[60] Tettenborn (n 22) 329.
[61] *Rabone* (n 1) [23] (Lord Dyson).
[62] ibid [102] (Baroness Hale).

Tettenborn's concerns are valid as vulnerability does currently lack definition and so could potentially apply very broadly. However, whilst these concerns are justified the decision in *Rabone* itself is of less concern than he suggests. It can be argued that the importance of vulnerability can be restricted to cases within the healthcare context due to the health authorities' protective function and so in other circumstances state control will remain relevant. The jurisprudence appears to show that in cases where victim is detained then control and assumption of responsibility are more important considerations than vulnerability itself. Therefore the functions of a public authority are relevant and so only certain public authorities can be subject to the operational duty. This can be demonstrated by contrasting the approaches taken in *Keenan* and *Rabone*: in *Keenan* it appears that vulnerability stemmed from the detention of the individual,[63] however, in *Rabone* their Lordships suggest that vulnerability results not from detention, but from the assumption of responsibility by the hospital over the individual.[64] Thus, in the healthcare context, it can be argued that is it the factors of reliance and dependence, which are both features of the patient/hospital relationship, that are most relevant when determining vulnerability where the operational duty is concerned. In addition, Lord Rodger acknowledged in *Savage* that the factors that are important in triggering the duty vary depending on the circumstances. When comparing the situations of prisoners and conscripts he noted that whilst state control is relevant to both, 'the predicaments of prisoners and conscripts are different, the other factors which contribute to the risk, and so give rise to the obligation, are not the same. For instance, the "position of vulnerability" of the prisoners is stressed; the human reaction to being called up to do military service is mentioned in the case of

[63] *Keenan* (n 11) [90].
[64] *Rabone* (n 1) [34] (Lord Dyson).

the conscripts.'[65] Therefore by considering the relationship between the public authority and the victim as well the function that the public authority carries out the influence of vulnerability can be restricted to healthcare cases. If the operational duty is understood in this way then this would enable different tests to be applied to different public authorities, which would enable vulnerability, and what it is that makes an individual vulnerable, to be more clearly defined. By providing a clearer definition, the concerns of Tettenborn, over the loose definition of vulnerability following *Rabone* and fears that the duty will become too wide,[66] would be addressed. The concept of vulnerability and the circumstances in which it will be relevant will be discussed in more detail in Chapter Three.

Tettenborn also suggests that as there was no real definition of vulnerability given in *Rabone* this will result in increased litigation because it is 'open-ended and vague' and has created uncertainty in the law.[67] However, as Baroness Hale asserted in *Savage* 'it is hard to understand how applying the *Osman/Keenan* approach in these circumstances [to detained psychiatric patients] can add to the hospitals' difficulties. They already face potential liability in negligence if they fail to take reasonable care of their patients.'[68] As demonstrated by the above example involving a cancer patient dying in hospital from natural causes, it follows that expanding the operational duty to voluntary patients will not radically impact the amount of litigation as the hospital could already face liability in negligence, as they did in *Rabone*. Rather, the aspect of *Rabone* that could result in more litigation is the decision to widen the class of victims beyond those who can claim in negligence, as will be discussed in Subsection (iii).

[65] *Savage* (n 15) [39] (Lord Rodger).
[66] Tettenborn (n 22) 329.
[67] ibid 329.
[68] *Savage* (n 15) [99] (Baroness Hale).

(iii) The Class of Victims

In *Rabone*, the Supreme Court allowed the parents of an adult child to be classed as victims, thus expanding the class of victims who can claim under Article 2. Under section 7(1) of the HRA 1998 a victim can make a claim against a public authority that has breached a Convention right. A victim is defined in section 7(7) of the HRA 1998 as a person who would be treated as a victim under Article 34 of the ECHR. Lord Dyson justified the decision to class parents as victims by highlighting the Strasbourg jurisprudence that has allowed family members to claim as victims under both the Article 2 investigative and substantive obligations,[69] for example *Edwards* where it was the parents of the victim who brought the claim against the United Kingdom. Prior to this decision it was thought that the class of victims in English law was narrower than that under ECHR law, however, *Rabone* established that the ECHR jurisprudence applies in the UK as well. It is also significant that the Supreme Court allowed Melanie's parents to be classed as victims despite having settled the claim that they made in negligence. It has been established that a person is no longer viewed as a victim if 'the domestic public authority has (i) provided "adequate redress" and (ii) "acknowledged either expressly or in substance, the breach of the Convention".'[70] In *Rabone* the question that arose was whether or not Melanie's parents lost this status as victims as they had settled their claim in negligence. Lord Dyson concluded that they had not lost their status as victims and could still claim under Article 2 'for damages for non-pecuniary loss for their bereavement' as they had not settled this type of claim in negligence 'because such a claim was not

[69] *Rabone* (n 1) [46] (Lord Dyson).
[70] ibid [49] (Lord Dyson).

available in English law.'[71] Under English law claims relating to the loss of a child cannot be made by parents of a child over 18,[72] which Melanie was. It has been argued that this has expanded the class of victims under the HRA 1998 too far as it has gone beyond those entitled to claim under the common law. As a result, 'the courts will have to decide how to deal with claims by victims who were more distantly related to the deceased, where the relationship was a partnership outside marriage or same-sex, or where there are large numbers of relatives each claiming redress.'[73] However, although this does expand the class of victims who can claim under Article 2, it is arguable that it will only be applicable in certain circumstances and allows for important rights to be protected and breaches compensated for where the common law does not allow such compensation or recognition of status as a victim.[74]

In *Savage*, Lord Scott expressed reservations about whether Article 2 should be used to expand the class of victims already defined in domestic law. He argued that the claimant was a victim in relation to the investigatory duty as '[a]n important, and perhaps the main, purpose of the investigative obligation is to enable the family of the deceased to understand why and how the deceased died and who, if anyone, was responsible for the death.'[75] He suggested that a claim under the investigatory duty would be more appropriate as the claimant was not acting to benefit financially, rather she was acting to obtain 'the consolation of a formal vindicatory recognition that Runwell Hospital had failed in its duty to her mother'.[76] In contrast, he argued that the

[71] ibid [58] (Lord Dyson).
[72] Fatal Accidents Act 1976, s 1A.
[73] Poole (n 25) 132.
[74] *Rabone* (n 1) [108] (Baroness Hale).
[75] *Savage* (n 15) [5] (Lord Scott).
[76] ibid [5] (Lord Scott).

class of victims that can claim under the operational duty should be limited to those already defined as victims under domestic law, as it is the role of the operational duty to protect individuals and domestic law already provides compensation to the deceased's estate or dependants 'in any case where an act or omission unlawful under civil law has caused death'.[77] This approach appears to be a sensible one and reflects the fact that both negligence and ECHR law have some different legal functions and so each is suited to a different purpose, an argument that will be returned to in Chapter Four. These comments were rejected by the Supreme Court in *Rabone*, with Baroness Hale stating that parents 'are victims, not only of the state's failure to properly to investigate the death, but also of the failure effectively to protect their child's life'.[78] Hill has asserted that the reasoning behind this rejection of Lord Scott's comments lies in the fact that they 'wholly ignore s.7 of the HRA, by which Parliament expressly widened the possible range of claimants in HRA claims'.[79] Another explanation for this rejection lies in the function of Article 2 claims, and human rights law in general. Whilst Lord Scott argued that only the investigatory duty could be used to vindicate rights, others have argued that vindication can be achieved through other claims as well. Varuhas argues that human rights law itself fulfils a vindicatory function, which explains the wider class of victims who can claim, and that 'actions by relatives may be the only "vehicle" for achieving the public finding that the deceased's right to life was violated'.[80] This vindicatory nature of human

[77] ibid [5] (Lord Scott).
[78] *Rabone* (n 1) [92] (Baroness Hale).
[79] Matthew Hill, 'Analysis| Rabone and the Rights to Life of Voluntary Patients Mental Health Patients – Part 2/2' (*UK Human Rights Blog*, 14 February 2012) <http://ukhumanrightsblog.com/2012/02/14/analysis-rabone-and-the-rights-to-life-of-voluntary-mental-health-patients-part-22/> Accessed 28th March 2013.
[80] Varuhas (n 31) 265.

rights law, and the emerging vindicatory role of tort law that was identified in *Ashley v Chief Constable of Sussex,*[81] will be discussed in more detail in Chapter Four.

When the test for the operational duty was formulated in *Osman* it was designed to protect individuals from harm caused by third parties. The Court emphasised that the victim must be known to the authorities in order for the duty to apply[82] and so from the outset the class of individuals who could claim was limited. As the duty has been found in new circumstances, the class of victims has also been expanded, as it was in *Rabone*. Hill argues that this 'represents a welcome re-assertion of the fundamental importance of the notion that the Convention gives rights to individuals, and imposes obligations on state agencies to meet them'.[83] Whilst a degree of flexibility is welcome, there must be some limits on who can claim under the duty due to its nature, for the operational duty imposes more onerous obligations on to the state, and thus public authorities, to take measures to protect individuals it has to be individual in its scope. Instead of applying to the wider public, the ability to claim depends upon the relationship between the public authority and the individual and so the class of people who can claim remains limited.[84]

Conclusion

[81] [2008] UKHL 25.
[82] *Osman* (n 2) [116].
[83] Matthew Hill, 'Analysis| Rabone and the Rights to Life of Voluntary Patients Mental Health Patients – Part 1/2' (n 32).
[84] This can be contrasted with the investigatory duty. Although the scope of the investigatory duty has not been expressly considered, it appears that this duty does apply to the public in general. The investigatory duty is not individual in nature as this would entitle individuals to invoke the duty, rather than it being up to the state to instigate the investigation. It is submitted that rather than individuals claiming under the investigatory duty, the law would be clearer if independent third parties invoked the duty instead.

Since its development the operational duty has been expanded into new scenarios beyond that originally envisioned in *Osman*. This has resulted in a wider class of victims able to claim under the duty and appears to have contributed to the vindicatory element of the duty. Although the duty is more defined than the investigatory duty, it retains a degree of flexibility that enables this expansion to continue, meaning that it can continue to protect the rights of individuals who need this protection. The expansion of the duty into these new circumstances has also resulted in the question of whether the *Osman* test can continue to apply to all public authorities, and indeed whether the duty should apply to all public authorities. It is argued that the duty should not apply to all public authorities, instead this should depend on the functions that are carried out by the public authority and thus their relationship with individuals. This would enable the test for the operational duty to be further refined in relation to specific public authorities, and would mean that the concepts within it, such as vulnerability and assumption of responsibility, could be better defined. In relation to health authorities this would mean that vulnerability could be further defined, which would provide more clarity over when the operational duty applies in healthcare scenarios. If the operational duty is understood and applied in this way then the decision of the Supreme Court in *Rabone* can be defended as it does not widen the duty too much as feared,[85] rather it allows it to continue to protect individuals and removes the distinction between classes of patients who are in similar positions.[86] However, it is acknowledged that at present the decision does lack clarity, particularly in relation to the definition of vulnerability, and this will be the subject of the Chapter Three.

[85] Tettenborn (n 22) 329.
[86] *Rabone* (n 1) [28] (Lord Dyson); [106] (Baroness Hale).

CHAPTER THREE - VULNERABILITY

As highlighted in the previous chapter, the decision in *Rabone v Pennine Care NHS Trust*[1] has placed a new emphasis on the role of vulnerability in defining when the Article 2 operational duty applies. Concerns have been raised that following this decision the definition of vulnerability is too vague and will result in the operational duty applying far too widely, increasing the amount of litigation in this area.[2] However, as the previous chapter demonstrated, this is not necessarily true as vulnerability is not applicable to all scenarios where the operational duty is raised. Instead its applicability can be limited to cases involving health authorities. This chapter will aim to identify a more precise definition of vulnerability that is specific to this field, thereby addressing some of the concerns of critics like Tettenborn,[3] and will demonstrate how a duty based on vulnerability can work narrowly and effectively in practice, without the duty becoming too wide. It will also consider what else is needed in addition to vulnerability, if anything, to engage the operational duty.

This chapter will then consider how the *Osman* test applies in practice once vulnerability has been established. This thesis is adopting the view that whether or not the operational duty applies is a two-stage test. The first stage of this test depends on the function of the public authority and its relationship with the victim; in cases involving health authorities this involves looking at the vulnerability of the victim and

[1] [2012] UKSC 2.
[2] Andrew Tettenborn, 'Wrongful Death, Human Rights, and the Fatal Accidents Act' (2012) 128 LQR 327, 329.
[3] ibid 329.

for a relationship of dependence between them and the health authority.[4] Once these have been established, the second stage of the test applies the *Osman* test. This chapter will consider what amounts to a 'real and immediate risk' and the factors that determine whether or not there has been a breach of this duty. By considering these factors this thesis will demonstrate that although the operational duty has been widened following *Rabone*, it has not become too broad and can still be controlled.

Section One: Defining Vulnerability

To recap briefly on relevant points made in Chapter Two, since the decision in *Osman v United Kingdom*[5] the ECtHR and the UK courts have developed the operational duty and attempted to explain more precisely when it may arise. At first the duty appeared to be most applicable in cases where the state was exercising control over the victim, for example in custodial cases. The ECtHR explained that the reasoning behind this lay in the fact that 'persons in custody are in a vulnerable position' and so 'the authorities are under a duty to protect them.'[6] This position was reiterated in *Edwards v United Kingdom*.[7] From these cases it appeared that state control and detention are important factors that indicate vulnerability, and consequently demonstrate a need for the protection of the operational duty. The UK courts have since expanded the duty into psychiatric healthcare cases where a patient is detained under the Mental Health Act 1983.[8] In making this decision, Lord Rodger noted that the ECtHR has highlighted control over detainees as an important factor in custodial

[4] Where other public authorities are concerned these factors will vary, for example in custodial cases a relationship of control will be important in determining whether the operational duty applies.
[5] [2000] 29 EHRR 245.
[6] *Keenan v United Kingdom* [2001] 33 EHRR 38 [90].
[7] [2002] 35 EHRR 19.
[8] *Savage v South Essex Partnership NHS Foundation Trust* [2008] UKHL 74.

vulnerability,[9] while Baroness Hale placed emphasis on the assumption of responsibility over the victim by the state.[10] Thus when extending the operational duty to detained psychiatric patients the court focused on the fact that these patients are in a similar position to detainees as they too are subject to state control, which makes them vulnerable, and in need of protection, but, in addition, they are also vulnerable because of their psychiatric conditions.[11]

Brennan has argued that the ECtHR justified the expansion of the operational duty into cases involving the vulnerable because of the control that the state exercises over the individual as through this 'positive act of restricting the subject's freedom… the state has increased the possibility of his coming to harm, either at his own hand or through some other means.'[12] This can be linked to Tettenborn's argument that the ECHR is 'quintessentially an instrument about the exercise of State power'.[13] However, he uses this to argue that vulnerability should not be a relevant consideration; rather it is control that is more important in determining the applicability of the operational duty.[14] Yet, in the existing jurisprudence it is hard to separate vulnerability and control as the two have often been mentioned in the same cases, for example in *Savage*.[15] One reason for this may be that, as Stychin argues, there is a link between vulnerability and control as 'the flipside of vulnerability is control on the part of the defendant, which underscores that it is the relative power of the parties that helps us to understand the relationship, and the ethical and legal

[9] ibid [33**)** (Lord Rodger).
[10] ibid [82] (Baroness Hale).
[11] ibid [49] (Lord Rodger); [97] (Baroness Hale).
[12] Carol Brennan, 'One More Step in the Expansion of the "Right to Life"' (2012) 28 PN 149, 154.
[13] Tettenborn (n 2) 329.
[14] ibid 329.
[15] *Savage* (n 8) [49] (Lord Rodger).

responsibilities that flow from it.'[16] This suggests that in order to understand why the operational duty has arisen in a certain scenario the relationship between the parties needs to be considered. Where detention is concerned, although the victim may be vulnerable, it is the control exercised over them that is the more important factor. For example, although vulnerability has been mentioned in custodial cases, such as *Keenan v United Kingdom*[17] and *Edwards,* as Lord Rodger acknowledged the ECtHR 'was only stating the obvious: unable to get away, [prisoners] are vulnerable to being assaulted or even murdered by a fellow inmate… to being bullied, to being blackmailed, or to being subjected to sexual abuse etc.'[18] Therefore it was the fact that the prisoners were under the control of the public authority, and the public authority's consequent assumption of responsibility for their protection, that engaged the duty.

It is worth noting that this existing dicta on vulnerability comes from cases involving the exercise of state power over an individual, either in the custodial sense or through detention under the Mental Health Act 1983. As a result the concept of vulnerability discussed in these cases is different to vulnerability in the healthcare context, as non-custodial cases can now be considered following *Rabone*. In healthcare cases vulnerability can be defined more precisely as it stems from a physical or mental condition and so its relevance can be restricted to these types of cases. It will be argued that outside of the healthcare context, vulnerability will not be determinative and that in these circumstances the operational duty will arise due to the existence of other factors, such as the exercise of control over an individual or detention.

[16] Carl F Stychin, 'The Vulnerable Subject of Negligence Law' (2012) 8 Int JLC 337, 345.
[17] *Keenan* (n 6).
[18] *Savage* (n 8) [28] (Lord Rodger).

To make the argument that vulnerability is most applicable in healthcare cases, this thesis will now consider the impact that *Rabone* has had on the concept of vulnerability and its role in engaging the operational duty. In *Rabone* their Lordships highlighted that the victim's mental state made her vulnerable,[19] suggesting that mental illness is an important factor in determining vulnerability. It was stated that as a result of having a mental illness a person may 'lack the ability to make an autonomous decision to take her own life'.[20] From this, their Lordships were able to make references to an assumption of responsibility by the hospital over the victim and the potential to use legislation to detain her if necessary, demonstrating control.[21] However, in this case, rather than the exercise of control leading to vulnerability, as in custodial cases, it appears that it was the vulnerability of the victim that led to the assumption of responsibility over her. Consequently, it was the status of the victim as a psychiatric patient that made her vulnerable, as this affected her ability to make a rational decision and meant that she required the protection of the operational duty.[22] This analysis can be compared to reasoning given in cases involving Article 3 of the ECHR. Foster argued that where Article 3 is concerned, *Keenan* 'clearly establishes that authorities owe an enhanced duty towards those placed in custody with mental or physical disabilities' and that this is in part due to their 'inability, in some cases, to complain coherently or at all about how they are being affected by any particular treatment.'[23] This reasoning suggests that those with a mental or physical health condition are vulnerable and require extra protection.

[19] *Rabone* (n 1) [34] (Lord Dyson).
[20] ibid [105] (Baroness Hale).
[21] ibid [34] (Lord Dyson).
[22] ibid [30] (Lord Dyson).
[23] Steve Foster, 'Prison Authorities and the Duty of Care and Protection of Prisoners' Rights' (2005) 10 Cov LJ 1, 12-13.

By removing the distinction between voluntary and detained patients, *Rabone* has opened up the possibility of the operational duty applying to vulnerable patients with a physical illness as well. Whilst this creates the impression that the duty may now apply in more cases, in practice it can still be restricted and prevented from applying too broadly. *Rabone* demonstrates that vulnerability will naturally apply in cases involving psychiatric patients, however, the operational duty can then be limited by applying the *Osman* test and considering the factors influencing breach, as will be discussed in Section Two. Where physical patients are concerned, however, the scope of the operational duty will be much narrower. Where physical patients are concerned it will be harder to prove that the operational duty has been engaged, as a higher degree of knowledge of the risk of specific harm will be required. Where physical patients are concerned the risk is more likely to come from a third party due to the nature of the patient's vulnerability. As will be argued, vulnerability stems from an inability to protect oneself. In cases involving physical patients this vulnerability will mostly likely come from the fact that they are physically weak and will be unable to protect themselves from third party harm, rather than the risk coming from harm they may cause themselves. In order to protect against a risk from a third party the hospital will require a high degree of knowledge of this threat, thus the second limb of the *Osman* test will be harder to satisfy.[24] However, where a psychiatric patient is concerned the nature of the risk will be different and is more likely to be from self-harm: '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.'[25] The operational duty is more likely to be engaged in these cases as the hospital should already have knowledge of the risk upon admission as the reason for the patient requiring treatment

[24] See discussion in Chapter Two.
[25] *Rabone* (n 1) [30] (Lord Dyson).

would be due to their mental disorder. Therefore, although the duty has been expanded into new fields by the emphasis on the concept of vulnerability in triggering the duty, it can still be controlled and prevented from applying too widely.

This raises the question of what it is in addition to vulnerability that gives rise to the operational duty, if anything. Stychin argues that '[t]he function of vulnerability is to help us to understand the ethical and legal connection between the two parties – the basis of the relationship that may give rise to liability',[26] suggesting that vulnerability alone may be enough to engage the duty. However, it can be argued that in addition to vulnerability, it is a relationship of dependence that engages the duty. The Department of Health defined a vulnerable adult[27] as being someone over 18 'who is or may be in need of community care services by reason of physical or other disability, age or illness; and who is or may be unable to take care of him or herself, or unable to protect him or herself against significant harm or exploitation.'[28] When a person enters hospital they may fall under this definition of vulnerability due to an inability to protect themselves and so will depend on the hospital for this protection.

Where psychiatric patients are concerned this is supported by the jurisprudence on Article 3, as the courts are required to take into account the victim's vulnerability and possible resulting inability to complain about their treatment, thus suggesting that part of their vulnerability lies in the fact that they are unable to protect themselves from

[26] Stychin (n 16) 346.
[27] It is submitted that those under 18 would automatically be treated as vulnerable and so in these cases a relationship of dependence would then need to be shown and the *Osman* test could be applied as in cases involving adults.
[28] Department of Health, *No Secrets: Guidance on Developing and Implementing Multi-Agency Policies and Procedures to Protect Vulnerable Adults From Abuse* (2000) <http://www.dignityincare.org.uk/_library/Resources/Dignity/OtherOrganisation/No_Secrets.pdf> Accessed 14 May 2013.

such treatment.[29] Bedford argues that vulnerability is important where people with mental illnesses are detained as 'it demonstrates how mentally ill individuals are placed higher on a spectrum of dependency, whereby they rely heavily on others for protection and preservation of their well-being.'[30] Although Bedford makes this point in relation to Article 3 detention cases, the reasoning can be applied to Article 2 cases even where a person is not detained. Due to their mental health condition, psychiatric patients depend upon the health authority for protection from possible harm that they may cause themselves because of their condition. It can be argued that this view was adopted by the Supreme Court in *Rabone* as demonstrated by the emphasis placed on the vulnerability of Melanie Rabone and the assumption of responsibility over her by the health authority. Both of these factors stemmed from her lack of ability to make a rational decision about ending her life and resulted in her needing the protection of the health authority.[31] In contrast, where physical patients are concerned, as highlighted above, the risk is more likely to come from third parties, rather than from themselves. This is because their vulnerability will come from a physical weakness, rather than from their mental state, meaning that they may not be able to effectively protect themselves from third party threats. As a result, they will depend upon the health authority for a different kind of protection than psychiatric patients. Vulnerability demonstrates a higher dependence upon others for protection, and so the two factors of an inability to protect oneself and a relationship of dependence work together to engage the operational duty. This interpretation supports the argument that only certain relationships engage the operational duty and that this depends on the function of the public authority. Arguably, it is the function of a health authority to protect

[29] For example, *Keenan* (n 6) [111].
[30] Daniel Bedford, 'MS v United Kingdom: Article 3 ECHR, Detention and Mental Health' (2013) 1 EHRLR 72, 78.
[31] *Rabone* (n 1) [30] (Lord Dyson).

patients and one characteristic of the relationship between a patient and a health authority is dependence.

Rabone raises the additional question of whether cases involving outpatients can also engage the operational duty, or whether it will only be applicable in cases involving inpatients. It is submitted that the duty should also extend to vulnerable outpatients who depend upon a health authority for protection. The two stages of the *Osman* test should be applied in order to determine if the duty is engaged, however, it is likely in these cases that the second stage of the test and breach will be harder to establish. When assessing the second limb of the *Osman* test, knowledge will be harder to prove in cases involving outpatients due to the nature of the relationship between the patient and the health authority, as it is more distanced than that between an inpatient and a health authority. In addition, even if knowledge is proved, it will be difficult to show breach because of this distanced relationship: it may be hard to show that reasonable steps were not taken to prevent the risk.

Section Two: Application of the *Osman* Test in Practice

Although the Supreme Court has widened the operational duty by emphasising the role of vulnerability, this will not result in the duty applying too broadly, as critics have suggested.[32] Firstly, as already argued, vulnerability can be narrowly defined so that it is limited effectively to cases involving health authorities and so will not always be a consideration that determines the scope of the operational duty. Secondly, as this section will discuss, once vulnerability and a relationship of dependence have

[32] Tettenborn (n 2) 329.

been shown, this does not necessarily mean that the operational duty was engaged, or even breached, in the circumstances. To determine this, the test defined in *Osman* must be considered and it will be asked if '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'.[33] Consequently, there are factors that will place limits on how broadly the operational duty applies.

(i) Engaging the duty

It must first be demonstrated that there was a real and immediate risk to life. However, there is speculation over what types of risks are covered by Article 2. Allen has argued that the risk must be 'to life, not just to limb' but that this is a 'distinction often difficult to draw.'[34] He questions whether actions such as wrist cutting or taking an overdose would amount to a risk to life[35] and states that what is required is an 'objectively justified risk to life; a risk of serious injury resulting from self-harm would not suffice.'[36] However, it is arguable that any risk that could realistically result in a threat to life can, and should, be considered under Article 2, and so an action that aims to end life, such as taking an overdose could be considered. Furthermore, in *R (on the application of JL) v Secretary of State for the Home Department*[37] it was held that the investigatory duty imposed by Article 2 was engaged where a prisoner attempted to commit suicide but was left with the

[33] *Osmam* (n 5) [116].
[34] Neil Allen, 'Saving Life and Respecting Death: A Savage Dilemma' (2009) 17 Med L Rev 262, 266.
[35] ibid 266.
[36] Neil Allen, 'Protecting the Suicidal Patient' (2008) J Mental Health L 93, 98.
[37] [2008] UKHL 68.

possibility of a serious injury as a result. Although this case related to the investigatory duty and, as already argued, this duty is independent of the operational duty,[38] it may be influential if a similar case were to arise involving a claim under the operational duty. There is therefore a possibility that the duty could apply to serious injuries that arise as a result of a suicide attempt. This in turn raises the question of whether the duty could apply to any injury that is sustained or only to serious injuries where the risk to life has not actually materialised. If it were to only apply to significant injuries then this would limit liability and prevent the duty from applying too widely, however, there is no direct jurisprudence on this question and so no definite answer can be provided. It is submitted that the duty should also apply in cases of serious injuries sustained even where the risk to life has not materialised. In *JL* Lord Rodger stated that the investigative duty would apply where a prisoner has attempted suicide and 'even though the prisoner has not died, his life has been in danger.'[39] This reasoning could be applied to cases involving the operational duty so that where a person has sustained serious injuries and his life has been threatened the duty could potentially apply, as long as the *Osman* test is satisfied. This would provide greater protection for victims, but the application of the duty could still be limited through the use of the *Osman* test so that it would not apply too broadly. If the operational duty was held not to apply in these cases involving serious injuries then this would leave a gap in the protection offered by the ECHR. A potential claim for these injuries could be made under Article 3, however, to establish this inhuman or degrading treatment needs to be demonstrated, which would be hard to prove.[40]

[38] See Chapter One.
[39] *JL* (n 37) [62] (Lord Rodger).
[40] Claire McIvor, 'The Positive Duty of the Police to Protect Life' (2008) 24 PN 27, 35.

Hill argued that *Rabone* has 'relaxed the test for finding a "real and immediate" threat'[41] as Lord Dyson stated that to be real a risk must be 'substantial and significant'.[42] Hill points out that this is a similar test to that used by the common law, which is recognised as being a lower threshold to cross.[43] The similarities between the Article 2 operational duty and the law of negligence will be discussed in more detail in Chapter Four, but it is submitted that the test for determining a real and immediate risk has not been lowered, as it will still be hard to demonstrate such a risk. Risk is an individual concept and must be judged on the specific facts of the case. As Allen argued '[p]redicting a person's risk to themselves is an inherently unreliable exercise'[44] and what amounts to a risk for one person may not be for another. Furthermore, certain risks are difficult to identify. For example, the risk of suicide can be particularly difficult to identify[45] because a person's behaviour can vary daily, as shown in *Keenan*,[46] and the behaviour exhibited can differ from person to person. In addition, McBride has pointed out that a real and immediate risk may be hard to establish as it questionable how obvious the risk must be in order to be real and immediate: '[t]hreats do not have to be explicit in order to be taken seriously but those that are cryptic, as in *Osman*, need not be seen as compelling. Similarly behaviour open to various constructions can justifiably lead to a risk not being considered as serious.'[47] This can also be seen in *Van Colle v Chief Constable of Hertfordshire.*[48] *Van Colle* involved a claim against the police for breach of the Article 2 operational

[41] Matthew Hill, 'Analysis| Rabone and the Rights to Life of Voluntary Mental Health Patients – Part 2/2' (UK Human Rights Blog, 14 February 2012) <http://ukhumanrightsblog.com/2012/02/14/analysis-rabone-and-the-rights-to-life-of-voluntary-mental-health-patients-part-22/> Accessed 28 March 2013.
[42] *Rabone* (n 1) [38] (Lord Dyson).
[43] Hill, 'Analysis| Rabone and the Rights to Life of Voluntary Mental Health Patients – Part 2/2' (n 41).
[44] 'Allen, 'Saving Life…' (n 34) 267.
[45] ibid 267.
[46] See Chapter Two for the facts of this case.
[47] Jeremy McBride, 'Protecting Life: a Positive Obligation to Help' (1999) 24 Supp (Human Rights Survey) EL Rev 43, 48.
[48] [2008] UKHL 50

duty for failing to take measures to prevent the death of Mr Van Colle, who was shot by a man who had been threatening and harassing Mr Van Colle and who was known to the known. Here it was said that the behaviour was 'less clear and obvious' than that in *Osman,* as it did not obviously show that there was a risk to the victim's life, and so did not meet the required threshold to satisfy the *Osman* test.[49] Consequently, a real and immediate risk will still be difficult to show, as there are many factors that can affect how a risk is interpreted.

In addition to a real and immediate risk, the *Osman* test also requires that the authorities had, or ought to have had, knowledge of the risk. As discussed in Chapter Two, hindsight cannot be used and that the question to be asked when determining knowledge is whether the authority 'making a reasonable and informed judgment on the facts and in the circumstances known to [them] at the time… appreciated that there was a real and immediate risk'.[50] Both Lord Bingham and Lord Phillips considered what is meant by 'ought to have known'. Lord Bingham argued that constructive knowledge means that 'stupidity, lack of imagination and inertia do not afford an excuse to a national authority which reasonably ought, in the light of what it knew or was told, to make further enquiries or investigations: it is then to be treated as knowing what such further enquiries or investigations would have elicited.'[51] Thus suggesting that constructive knowledge should be based on how a public authority acting reasonably should have carried out its obligations. Lord Phillips, meanwhile, provided two possible definitions: i) that it means 'ought to have appreciated on the information available to them', or ii) that it means 'ought, had they carried out their duties with due diligence, to have acquired information that would have made them

[49] ibid [39] (Lord Bingham), [67]-[68] (Lord Hope).
[50] ibid [36] (Lord Bingham).
[51] ibid [32] (Lord Bingham).

aware of the risk'.[52] He ultimately decided that the first interpretation is the correct one.[53] Allen argues that this represents a lack of clarity over what is meant by having constructive knowledge of a risk,[54] and so there is potential for the meaning to be debated again in the future. As McBride observes, the inclusion of constructive knowledge means that the operational duty is 'not restricted to situations where the risk is effectively staring the authorities in the face; there is effectively a need to be open to the possibility that risks might exist.'[55] However, whilst this inclusion of constructive knowledge appears to widen what amounts to knowledge, it can be argued that it is still limited by the fact that hindsight cannot be used. In *Van Colle*, their Lordships placed a lot of emphasis on 'the dangers of hindsight',[56] showing that knowledge of a risk will still be hard to prove and so it will be hard to show that the operational duty applies. This view that the duty is limited by the first interpretation of constructive knowledge is also shared by Burton, who argued that the result of this interpretation is that 'the duty is emptied of much of its content if it refers only to the information the police had and not information which they ought, with due diligence, to have acquired.'[57] She argues that this places the police in a 'reactive role', which limits their liability[58] and consequently limits the scope of the operational duty, especially where the police are concerned.

(ii) Breach

[52] ibid [86] (Lord Phillips).
[53] ibid [86] (Lord Phillips).
[54] Allen, 'Saving Life...' (n 34) 268.
[55] McBride (n 47) 50.
[56] *Van Colle* (n 48) [32] (Lord Bingham).
[57] Mandy Burton, 'Failing to Protect: Victims' Rights and Police Liability' (2009) 72 MLR 283, 287.
[58] ibid 287.

It must also be remembered that simply because it has been established that there was a real and immediate risk that the authorities knew, or ought to have known, about, does not mean that there will have been a breach of the operational duty. Once this test determining whether the duty applies has been satisfied, additional factors must then be considered to determine breach. In *Rabone* Lord Dyson identified that 'the standard demanded for the performance of the operational duty is one of reasonableness.'[59] He supported this by stating that this standard allows for consideration of the wider circumstances, for example in *Rabone* an important consideration was 'respect for the personal autonomy of Melanie'.[60] The importance of considering other Convention rights has been stressed in other cases as well, for example in *Savage* Lord Rodger identified that 'in particular the liberty and autonomy rights protected by articles 5 and 8' should be considered.[61] Baroness Hale, however, suggested that reasonableness may not be the standard for determining breach in every case: '[i]t 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.'[62] Hill argues that this has created a lack of clarity over the standard of breach and so there is potential for debate over it in the future.[63] However, this can instead be used to demonstrate that the factors affecting breach will vary depending on the facts of the case. For example, as Baroness Hale asserts, in *Rabone* it was the decision to allow home leave without proper assessment that caused the breach of article 2 and so the reasonableness of the decision to allow leave from hospital must be considered,

[59] *Rabone* (n 1) [43] (Lord Dyson).
[60] ibid [43] (Lord Dyson).
[61] *Savage* (n 8) [100] (Lord Rodger).
[62] *Rabone* (n 1) [107] (Baroness Hale).
[63] Hill, 'Analysis| Rabone and the Rights to Life of Voluntary Mental Health Patients – Part 2/2' (n 41).

however, in contrast, when determining breach in *Keenan* the ECtHR considered what further measures could have been taken to prevent his suicide.[64] When considering breach the court must therefore take into account the circumstances of the case and the relationship between the victim and the public authority, which allows the duty to be moulded to the function that the public authority was carrying out at the time.

This standard of reasonableness also allows for consideration of wider factors, for example the resources available to the public authority.[65] In *Osman* it was noted that when interpreting the operational duty 'the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources' must be considered.[66] This shows that what is required by the duty to prevent the risk will vary depending on the facts of the case and the public authority involved. As Baroness Hale highlighted in *Savage*, resources can be just as important to consider in healthcare cases: '[t]he facilities available for looking after people with serious mental illnesses are not unlimited and the healthcare professionals have to make the best use they can of what they have.'[67] *Osman* also established that the duty 'must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities.'[68] This reiterates that when considering what steps the public authority should have taken to prevent the risk the court must not expect too much from the authority and again demonstrates that the duty will vary. Allen argues that this requirement of proportionality will limit how the operational duty applies as it means that not every

[64] *Rabone* (n 1) [107] (Baroness Hale), *Keenan* (n 6) [98].
[65] This can be contrasted with the approach taken in negligence, which uses an objective and subjective test. See Chapter Four for further comparison of Article 2 with the law of negligence.
[66] *Osman* (n 5) [116].
[67] *Savage* (n 8) [100] (Baroness Hale).
[68] *Osman* (n 5) [116].

risk needs to be protected against as 'it would be impossible to satisfy such an absolute standard.'[69] Consequently, although the decision in *Rabone* has expanded the operational duty, breach will still be hard to prove and so the duty can still be controlled, which will prevent it from applying too widely.

In *Van Colle* it was asserted that the test for the operational duty, as defined in *Osman,* 'is one not easily satisfied, the threshold being high'.[70] It was also acknowledged that the threshold is constant, and will not vary depending on the circumstances of the case.[71] Yet despite this, it appears that how easy it is to prove the existence of the operational duty depends on the public authority in question and, more specifically, on the functions that it carries out. The existing jurisprudence suggests that in cases involving certain public authorities the operational duty is more likely to be found to exist and to have been breached. For example, in cases involving the police, such as *Osman* and *Van Colle*, it is unlikely that a breach of the operational duty will be found. In these cases the jurisprudence appears to show that the duty is less likely to be found either because knowledge is harder to prove, as it was in *Van Colle* and *Osman*, or for public policy reasons, for example concerns over defensive practice resulting or fears that there may be an increase in the number of claims. However, in cases involving prison services[72] or health authorities[73] a breach is more likely to be found. Poole has argued that this means that 'the threshold is perhaps not as high as previously considered and may be more easily established in a healthcare or

[69] Allen, 'Protecting…' (n 36) 99.
[70] *Van Colle* (n 48) [30] (Lord Bingham).
[71] ibid [70] (Lord Hope).
[72] Such as *Edwards*.
[73] Such as *Savage* and *Rabone*.

prison setting where the risk of suicide is, or ought to be, assessed and recorded.'[74] However, this is not necessarily true. Instead it can be argued that the threshold is still high, but appears lower in cases involving certain public authorities because of the relationship between the public authority and the victim. For example, the police are relatively distant from victims and so it can be hard to establish that they knew or ought to have known of a real and immediate risk to the victim, as in *Van Colle*.[75] In contrast, both health authorities and prison services have a closer relationship with victims and the courts have identified that the control exercised over detainees or the need to protect the vulnerable under their care are particularly important elements of these relationships.[76] This suggests that it is not that the threshold is lower in these cases; rather it is the relationship between the public authority and the victim that affects how easy it is to satisfy the *Osman* test, as the duty itself is more applicable to certain relationships than others.

To demonstrate how duty and breach would be assessed under *Osman*, consider a scenario involving a voluntary psychiatric patient, suffering from anorexia, who commits suicide whilst on leave from hospital. Given the criteria discussed above, and the decision in *Rabone*, it is likely that the patient would be classed as vulnerable, as well dependent upon the health authority for protection, and so the operational duty would apply to the relationship and may be engaged. In addition to the factors determining risk discussed in Chapter Two, the court would then have to assess whether the health authority knew or ought to have known of the risk and would then need to consider the factors that determine breach. Knowledge would be judged by

[74] Nigel Poole, 'Claiming Damages Under the Human Rights Act: Rabone v Pennine Care NHS Foundation Trust' (2012) 2 JPI Law 127, 130.
[75] *Van Colle* (n 48).
[76] *Keenan* (n 6) [90]; *Savage* (n 8) [49] (Lord Rodger); and *Rabone* (n **1**) [22]-[23] (Lord Dyson)

the test given in *Van Colle* and what was known at the time of the risk, without the benefit of hindsight.[77] Again, this would depend on the circumstances of the case and on any assessments that were carried out on the individual in question when in hospital. If the patient was assessed as being at risk of suicide on admission, or if there had been an attempt at suicide before and this behaviour continued during the admission then it is likely that there would be knowledge of the risk, as there was in both *Savage* and *Rabone*. However, if there was no history of depression and no suicidal behaviour demonstrated during the hospital admission then it is unlikely that the health authority could be said to have had knowledge of the risk. If this were the case then it is unlikely that the operational duty would be engaged. If the duty were engaged, to assess breach it would be asked if the health authority did all that they reasonably could do to avoid the risk. This would depend on the reasonableness of the actions taken by the health authority in the circumstances. When assessing this, the court would need to consider the autonomy of the patient and the resources available to the health authority to prevent the risk.[78] Factors which may be influential in healthcare scenarios would include the levels of observations that the patient was under and any decision made regarding allowing the patient home leave. In this scenario, if the patient appeared to be at a continued risk of suicide then the decision to allow home leave is not one that is reasonable, as in *Rabone*.[79] This would result in a breach of the operational duty.

Conclusion

[77] *Van Colle* (n 48) [32] (Lord Bingham).
[78] *Rabone* (n 1) [43] (Lord Dyson).
[79] ibid [43] (Lord Dyson).

The concept of vulnerability is most applicable in healthcare scenarios. When used in this context it can be properly defined and applied in a narrower and more controlled manner than critics have feared.[80] Vulnerability has been mentioned throughout the Article 2 jurisprudence, but the majority of these cases have involved detention. As a result the concept of vulnerability discussed will differ as it relates to the control that is exercised over the person. In contrast, in healthcare cases vulnerability will stem from a psychiatric or physical condition. It will be expressed by an inability to care for oneself or protect oneself from third party threats, and will be coupled with a dependence upon the health authority for this protection. This distinction enables vulnerability to be interpreted in a narrower, context specific, way, preventing it from being applied too broadly. Although *Rabone* has widened the operational duty in healthcare scenarios, by extending its applicability to vulnerable physical patient as well as psychiatric patients, whether or not the duty applies can be limited, as a higher degree of knowledge will be required to engage the duty where a physical patient is concerned. It is also argued that in addition to vulnerability, dependence on the health authority for protection is needed to engage the operational duty, as this further emphasises that it is only certain relationships that will trigger the duty. Often, vulnerability and dependence will coincide and mean that the person requires protection from certain risks as they are unable to protect themselves and it is this combination that triggers the duty.

Once vulnerability has been established, this does not necessarily mean that the duty will have been raised in the situation. To determine this, the *Osman* test must be considered and it will have to be established that there was a real and immediate risk

[80] Tettenborn (n 2) 328.

which the authorities had knowledge of, or ought to have had knowledge of. This limits the applicability of the operational duty as it means that although the duty could potentially have applied in a situation, because of the existence of vulnerability and dependence, in practice it was not engaged because the *Osman* test was not satisfied. It is argued that it will be hard to establish both a real and immediate risk and knowledge, especially following the decision in *Van Colle* as a very high threshold has been established.[81] Furthermore, even if the test is satisfied and the duty does apply, this does not necessarily mean that there will be liability as breach still has to be shown, providing another hurdle for a claimant to surpass. Breach will be hard to prove as this stage requires the court to take into account all the factors of the case, including other Convention rights, and to decide if the public authority did all it reasonably could in the situation. This requirement of proportionality means that it will be hard to demonstrate breach as the public authority does not have to protect against every risk to life.[82]

[81] Claire McIvor, 'Getting Defensive about Police Negligence: the Hill Principle, the Human Rights Act 1998 and the House of Lords' (2010) 69 CLJ 133, 149.
[82] Allen, 'Protecting…' (n 36) 99.

CHAPTER FOUR: A COMPARISON WITH TORT LAW

This chapter will consider liability in negligence for breach of a positive duty of care and will compare this to actions for breach of Article 2 brought under the HRA 1998. It will address the question of whether a distinction should be maintained between these two actions. To do this, it will consider the current position of the law, in particular the decision in *Smith v Chief Constable of Sussex*.[1] Finally, it will suggest a way in which the law could be developed. It will be argued that actions in negligence for breach of a positive duty of care and actions brought under the HRA 1998 should remain separate due to the different functions of each, but that the law of negligence in relation to liability of public authorities should be developed so that it is more consistent with actions brought under the HRA 1998. The two should adopt the same approach at the duty stage, but should then take different approaches for the breach and remedies stages. Finally, this chapter will also consider how this applies specifically to health authorities.

Section One: The Current Position

It has previously been argued that following the implementation of the HRA 1998, the law on the liability of public authorities in negligence should be developed so that it is more consistent with actions brought under the HRA 1998.[2] However, the UK courts have taken a different approach and have ruled that the two actions should remain

[1] [2008] UKHL 50.
[2] Cherie Booth and Dan Squires, *The Negligence Liability of Public Authorities* (OUP, 2006) 384.

separate.[3] In *Smith* the majority of the House of Lords adopted this position, with only Lord Bingham dissenting and expressing the opinion that the two actions ought to be harmonised. The main reasoning behind the majority's opinion was that the two actions have different functions:[4] whilst the aim of tort law is to provide compensation for injuries, claims brought under the HRA 1998 are "intended to uphold minimum human rights standards and to vindicate those rights.'[5] In addition, it was asserted that the two also have important procedural differences. For example, Lord Hope pointed out that the common law has 'its own system of limitation periods and remedies',[6] while Lord Brown expressed a similar view, only adding that 'it is quite unnecessary now to develop the common law to provide a parallel course of action' now that claims can brought for breach of Article 2 under the HRA 1998.[7] In the conjoined case of *Van Colle v Chief Constable of Hertfordshire*,[8] which did involve an Article 2 claim, liability of the police was denied and as a result it has been argued that '[a] route to redress for police inaction that seemed to be opening up under the Convention has, at least partially, been closed down.'[9] Arden has argued that the decision in *Smith* means that there will now only be development of the common law to become more consistent with human rights law 'in specific cases where that is appropriate for domestic reasons', unless 'the Convention goes against the grain of some established position of domestic law'[10]. This was what happened in *Smith*, where the established position of the common law, as laid down in *Hill v Chief Constable of West Yorkshire*[11] and *Brooks v Commissioner of Police of the*

[3] *Smith* (n 1).
[4] These functional differences will be discussed in more detail in Section Two.
[5] Kevin Williams, 'Emergency Services to the Rescue, or not, Again' (2008) 4 JPI Law 265, 268.
[6] *Smith* (n 1) [82] (Lord Hope).
[7] ibid [136] (Lord Brown).
[8] *Van Colle* (n 1).
[9] Mandy Burton, 'Failing to Protect: Victims' Rights and Police Liability' (2009) 72 MLR 283, 289.
[10] Mary Arden, 'Human Rights and Civil Wrongs: Tort Law Under the Spotlight' (2010) PL 140, 153.
[11] [1989] AC 53.

Metropolis,[12] was that the police do not owe a duty of care to protect individuals from harm caused by criminals, except in exceptional circumstances, and it was this position that prevented a duty from arising. Where public authority negligence is concerned it appears that the official judicial position is that claims in tort will remain separate to those made under the HRA 1998 and the two will not be developed together.

Nevertheless, it has been argued that in *Rabone v Pennine Care NHS Trust*[13] there was a 'blurring of the line where tort stops and human rights begin'.[14] Despite the official judicial position, in practice the position of the law is much more complex than having the two actions as either completely separate or completely harmonious. When considered together, there appear to be similarities between the two actions, which suggests that they should be developed together. In his judgment Lord Dyson referred to concepts that are used in negligence**,** for example his 'discussion of assumption of responsibility, the nature of risk and the defendant's awareness of it'.[15] In addition, Hill points out that Lord Dyson's 'juxtaposition of "real" with "remote or fanciful" is a common one in the domestic civil law'.[16] Lady Hale also discussed 'the duty to prevent suicide in terms of a balance between autonomy and the need to protect the susceptible'.[17] It is perhaps understandable that their Lordships would make reference to concepts from the common law, as there is not enough clear guidance from Strasbourg beyond that given in *Osman*. For example, as discussed in

[12] [2005] UKHL 24.
[13] [2012] UKSC 2.
[14] Andrew Tettenborn, 'Wrongful Death, Human Rights, and the Fatal Accidents Act' (2012) 128 LQR 327, 330.
[15] ibid 330.
[16] Matthew Hill, 'Analysis| Rabone and the Rights to Life of Voluntary Mental Health Patients – Part 2/2' (UK Human Rights Blog, 14 February 2012) <http://ukhumanrightsblog.com/2012/02/14/analysis-rabone-and-the-rights-to-life-of-voluntary-mental-health-patients-part-22/> accessed 28 March 2013.
[17] Tettenborn (n 14) 330.

Chapter Three, questions still remain over what amounts to a real and immediate risk. *Rabone* is not the first judgment to liken ECHR and common law concepts: the Court of Appeal in *Van Colle* highlighted that the *Osman* test makes a reference to police resources when determining if the operational duty was owed and that these 'policy considerations… are very similar to those which led the House of Lords in *Hill* and *Brooks* to conclude that no duty of care is owed'.[18] Despite this, the ease with which the two sets of concepts are likened does suggest that there are some similarities between the two actions, meaning that, despite judicial opinion, the two actions cannot be seen as completely separate. In addition, to determine breach, Lord Dyson asked '[d]id they take all steps reasonably necessary to avoid the risk?'.[19] Hill argues that this use of the test for negligence to determine breach of the operational duty also suggests that the distinction between common law claims and actions under the HRA 1998 is lessening.[20] However, as already argued in Chapter Three, this test will vary depending on the facts of the case and so, as Lady Hale pointed out, the common law test may not always be the appropriate test of breach,[21] meaning that the two actions will not always be similar in this respect. Tettenborn has also suggested another similarity between the two claims by arguing that both achieve the same aim of compensation.[22] However, this argument underestimates the vindicatory nature of claims brought under the HRA 1998, which Varuhas has argued justifies the decision in *Rabone*.[23] Thus, although they may achieve the same results in certain cases, there are differences between the two claims, suggesting that, to an extent, they should remain separate. Consequently, there will not always be similarities between liability

[18] *Van Colle v Chief Constable of Hertfordshire* [2007] EWCA Civ 325 [63].
[19] *Rabone* (n 13) [42] (Lord Dyson).
[20] Hill, 'Analysis| Rabone and the Rights to Life of Voluntary Mental Health Patients – Part 2/2' (n 16).
[21] *Rabone* (n 13) [107] (Baroness Hale).
[22] Tettenborn (n 14) 329.
[23] Jason NE Varuhas, 'Liability Under the Human Rights Act 1998: the Duty to Protect Life, Indirect Victims and Damages' (2012) 71 CLJ 263, 265.

in negligence for breach of a positive duty of care and actions brought under Article 2, but there are enough similarities to suggest that the two actions cannot, at present, be seen as either completely separate or completely consistent.

Despite this emphasis on the differing functions, such as what the two actions aim to achieve, there are areas of overlap between the two. Varuhas points out that the concept of reasonableness and 'the relevance of professional standards in assessing breach' are important in both actions.[24] Spencer has also highlighted that even the *Osman* test itself '[t]o the untutored eye… looks much like the sort of test the English courts would apply in deciding if the police were negligent'.[25] This indicates that there is force behind the argument that the two actions can, and should, be harmonised, which will be discussed in more detail in Section Three. There are, of course, however, areas where the two actions differ. For example, despite some similarities noted above, the two actions use different principles when determining breach. To determine breach in negligence an objective test is used and it is asked whether the reasonable person would have done what the defendant did. Where a professional is concerned, an objective test with a quasi-subjective element is used: '[t]he test is the standard of the ordinary skilled man exercising and professing to have that special skill.'[26] However, when assessing breach of Article 2 an objective standard will be applied, and it must be shown that the public authority did not do all that they reasonably could to avoid the risk.[27] Like the test of breach in negligence, the Article 2 test of breach does incorporate an element of subjectivity as it requires consideration of the available resources, amongst other factors. Yet, these additional

[24] ibid 266.
[25] JR Spencer, 'Suing the Police for Negligence: Orthodoxy Restored' (2009) 67 CLJ 25, 26.
[26] *Bolam v Friern Hopsital Management Committee* [1957] 1 WLR 582, 586.
[27] *Rabone* (n 13) [43] (Lord Dyson).

considerations mean that the test of breach for Article 2 is perhaps less onerous than that under negligence,[28] suggesting that although they share some similarities, there are fundamental differences between the two. The focus of the tests for breach also differ in each action. As discussed in Chapter Three, the test for breach of the operational duty uses a proportionality test, whereas the test in negligence focuses on whether the behaviour of the defendant was reasonable. Du Bois points out that although the two appear similar as they both use concepts of reasonableness, they do differ: 'while tort law focuses on the reasonableness of behaviour, human rights law focuses on the reasonableness of outcomes.'[29] Therefore despite similarities in certain concepts, the focus is still different and so suggests that the two actions should remain separate. Where health authorities are involved the considerations involved at the breach stage will vary depending on whether the action is brought under the HRA 1998 or in tort law. If brought under the HRA 1998 then the courts will be wider than it would be under negligence. The courts will have to consider the proportionality of the actions taken by the health authority, the other rights of the victim, for example rights to liberty and autonomy,[30] as well as considering the available resources and any other actions that could have been taken to prevent the risk. However, if the claim were brought in negligence then the court would use the *Bolam* test to determine breach and so would focus on what the health authority actually did in the circumstances.

[28] Claire McIvor, 'Getting Defensive about Police Negligence: the Hill Principle, the Human Rights Act 1998 and the House of Lords' (2010) 69 CLJ 133, 147.
[29] François du Bois, 'Human Rights and the Tort Liability of Public Authorities' (2011) 127 LQR 589, 601.
[30] *Savage v South Essex Partnership NHS Foundation* [2008] UKHL 74 [100] (Lord Rodger).

It has been acknowledged that the *Osman* test is 'harder to establish than "mere negligence"'[31] and this can partially be attributed to the differing components of the two tests. For example, in *Rabone* Lord Dyson pointed out that to make a claim in negligence it must be shown that 'the risk of damage was reasonably foreseeable' whereas Article 2 requires that the risk be real and immediate before the duty will even be engaged.[32] Another difference between the two is the limitation periods: section 7(5) of the HRA 1998 places a limitation period of one year on actions brought against public authorities, whereas claims in negligence for personal injury or death can be brought up to three years after the negligent act or omission.[33] Overall, actions brought under the HRA 1998 and actions in negligence have significant differences.

Section Two: Should There Be A Distinction?

The above discussion raises the question of whether there should be a distinct separation between actions brought in negligence and those brought under the HRA 1998, or whether the two should be developed together. In order to address this question, this section will look at the underlying differences and similarities between the two actions and the functions that they carry out. It has been suggested that the 'mirror principle' is also relevant here.[34] This principle dictates that 'domestic law should "mirror" developments in Strasbourg'.[35] If this is accepted then it follows that the two actions should be merged as where rights are concerned it is important that

[31] *Savage v South Essex Partnership NHS Foundation Trust* [2010] EWHC 865 (QB) [80].
[32] *Rabone* (n 13) [37] (Lord Dyson).
[33] Limitation Act 1980, s 11.
[34] Jenny Steele ,'Damages in Tort and Under the Human Rights Act: Remedial or Functional Separation?' (2008) 67 CLJ 606, 610.
[35] ibid 610.

the ECtHR achieves the same level of protection across all member states[36] and so it is important that domestic law be consistent with ECHR law.

Although the two actions have some similarities, as acknowledged above, one suggested reason for maintaining the distinction is that the functions of each are very different. Du Bois uses this to argue that the two actions are fundamentally different and so each is suited to a different type of claim.[37] Whilst tort law treats liability for omissions as highly exceptional and will not normally impose liability for an omission,[38] du Bois highlights that the ECHR does not draw these distinctions.[39] Instead, the ECHR 'goes well beyond prohibiting the infliction of harm' and '[a]ll of the major substantive Convention rights have... a "positive" dimension alongside their "negative" dimension, imposing extensive duties on states to take positive measures to the benefit of right-holders.'[40] This suggests that tort law's reluctance to impose a duty of care in cases involving omissions 'results in a refusal to examine the reasonableness of failures to comply with such positive duties, while human rights law engages in such examination as a matter of course.'[41]

Further, public authority liability in tort has been built upon the principles of personal liability, rather than developed on its own. This can be contrasted with French law, which adopts a system where public and private liability are treated separately, with public liability claims being dealt with by separate administrative courts. Nolan states that this is due to 'revolutionary ideology', meanwhile in the UK 'the influence of the

[36] ibid 611-612.
[37] Du Bois (29).
[38] *Smith v Littlewoods Organisation* [1987] 2 WLR 480, *Stovin v Wise* [1996] 3 WLR 388.
[39] Du Bois (n 29) 593.
[40] ibid 593-594.
[41] ibid 594.

Diceyan principle of equality before the law meant that it was special treatment of state organs that was taboo.'[42] Whilst the UK's approach means that tort can appropriately deal with actions against public authorities where negative rights are concerned, it can create problems where there is a positive duty to act, as these obligations are different to those that exist between individuals.[43] The HRA 1998 imposes positive, as well as negative, obligations on to states and '[t]hese are based on the premise that the state has special responsibilities in virtue of its special role in society as authoritative manager of common resources.'[44] In contrast, tort law 'serves to resolve conflicts among right-holders.'[45] The obligations imposed on the state by the HRA 1998 also mean that the acts/omissions distinction in tort makes it less suitable for claims involving breaches of duties imposed on the state by the HRA 1998.[46] The ECHR places obligations on to the state and imposes liability where these obligations have been breached; in contrast negligence focuses on the liability of individuals and public authorities. Tension is created, however, as the HRA 1998 is based on the ECHR, but the obligations are imposed on public authorities and so they become individually liable for breaches, rather than the state as a whole being liable. As a result, the HRA 1998 can be likened more to the law of negligence rather than to ECHR law. Overall, the state has different responsibilities to individuals and so the liability of public authorities 'requires a different approach'.[47] This suggests that claims involving public authority liability are better dealt with separately to actions in tort, as the basis of liability is different to that of personal liability.

[42] Donal Nolan, Suing the State: Governmental Liability in Comparative Perspective' (2003) 67 MLR 843, 846.
[43] Du Bois (n 29) 603-604.
[44] ibid 604.
[45] ibid 602.
[46] ibid 606.
[47] ibid 606.

Furthermore, Nolan argues that to make the two actions more consistent the acts/omissions distinction would need to be 'abandoned' and that this would be 'problematic'.[48] He argues that this principle 'is foundational to the law of negligence… and the undermining of that distinction in public authority cases might therefore be expected to produce a degree of incoherence' as it would create different rules for public and private parties, introducing a new public/private distinction into tort law.[49] This demonstrates the problem that arises from public authority liability being built upon private law principles, as public and private law appear to require different approaches, which the HRA 1998 already allows for, suggesting that the two actions should remain separate. In addition, he suggests that commentators often overlook this acts/omissions distinction and '[focus] instead on what they perceive as policy objections to negligence liability in omissions cases, which they often wrongly describe as giving rise to an 'immunity', as though the public authority involved is being protected from a liability to which a private party would be subject.'[50] However, whilst there is some force to this argument as this does suggest that the two actions should be treated separately as different approaches are required for public and private liability, the courts do appear to more readily rely on public policy to deny a duty where certain public authorities are involved. For example, the House of Lords in *Brooks* simply upheld the policy reasoning used in *Hill* to deny a duty owed by the police and failed to distinguish the two cases on the grounds that whilst *Hill* was a third party liability case, *Brooks* involved 'straightforward misfeasance'.[51] This can be contrasted with the approach taken in *Phelps v Hillingdon LBC,*[52] where although

[48] Donal Nolan, 'Negligence and Human Rights Law: The Case for Separate Development' (2013) 76 MLR 286, 304.
[49] ibid 304.
[50] ibid 305.
[51] McIvor (n 28) 142.
[52] [2001] 2 AC 619.

it was said public policy could be taken into account, it did not prevent a duty being owed by a local education authority to pupils with special educational needs.

In addition, du Bois argues that the two are suited to different types of claims because of the different justifications behind each area of law.[53] The basis of tort law lies in corrective justice, as it aims 'at rectifying an injustice that has occurred between the doer and the sufferer of harm', and this affects the way in which tort approaches liability and determines the available remedies.[54] Du Bois argues that this also results in tort law being unsuitable for claims involving breaches of rights as using tort law to vindicate rights would risk turning it into a mechanism of achieving distributive justice.[55] Instead he argues that it is more suited to compensating for damage caused. As already noted, tort law draws distinctions between acts and omissions and also requires that there is a link between the claimant and the defendant, which is different to their relationship with the rest of society.[56] He argues that these main features of tort law are not suited to distributive justice, and so suggests that claims involving rights, and vindication of rights, are better dealt with under the HRA.[57] However, in practice these distinctions between corrective and distributive justice cannot be drawn as easily as Du Bois suggests. Whilst it is true that there are corrective justice aspects to tort law, and it does act to provide compensation for victims, there are also non-corrective justice aspects to tort law.

Recently, it has been suggested that tort law also has a vindicatory function, which would suggest that the two actions can be developed together as there is less of a

[53] Du Bois (n 29) 597-600.
[54] ibid 597.
[55] ibid 598.
[56] ibid 599.
[57] ibid 599-600.

distinction between their functions than previously thought. Lord Scott expressed this view in *Ashley v Chief Constable of Sussex,*[58] citing Lord Hope's view in *Chester v Afshar* that '[t]he function of the law is to enable rights to be vindicated and to provide remedies when duties have been breached.'[59] In *Ashley* the victim was shot by the police and his relatives brought claims against the police in both negligence and assault and battery. The claim in negligence was settled, but the House of Lords allowed the claim in assault and battery to proceed, with Lord Scott expressing the view that damages could provide compensation as well as fulfilling 'a vindicatory purpose'.[60] Arden compares this to cases brought under the HRA 1998, where 'vindication is the very thing that the applicant really wants.'[61] In contrast, it was argued by Lord Brown in *Smith* that the sole purpose of civil actions is to 'compensate claimants for their losses', while Convention claims aim to 'uphold minimum human rights standards and to vindicate those rights.'[62] However, this view is too simplistic, in practice the two actions overlap more than Lord Brown suggests. Lord Scott's dicta in *Ashley* demonstrates that tort law also has a vindicatory purpose, and similarly claims under the HRA 1998 can also be used to achieve compensation.[63] This view in *Smith* provides a direct contrast with that expressed by Lord Scott in *Ashley*, suggesting that there is little clarity over the purposes of tort actions where human rights are involved.[64]

Steele argues that even where tort law is used to vindicate rights, there can still be a distinction between the two actions as the definition of vindication can vary: it can

[58] [2008] UKHL 25.
[59] [2004] UKHL 41 [87] (Lord Hope).
[60] *Ashley* (n 58) [22] (Lord Scott).
[61] Arden (n 10) 152.
[62] *Smith* (n 1) [138] (Lord Brown).
[63] Tettenborn (n 14) 329.
[64] Steele (n 34) 629.

mean 'vindication of the claimant's right for the claimant's benefit; or vindication of the "right", for the purpose of securing that right in the public interest.'[65] On this understanding, vindication in tort law is focused on the rights of the individual and ensuring that they do not suffer a loss or detriment, however, where actions under the HRA 1998 are concerned vindication is for social, rather than individual, purposes. Yet this emerging vindicatory function of tort law suggests that the two actions should be developed together, as although Article 2 can operate in a wider social sense to uphold rights in general, where individual cases are concerned it is likely that the reason behind the claim is 'the desire for a proper investigation into what went wrong, with the possibility of a public condemnation at the end'.[66] This would suggest that both actions can operate to vindicate individual rights, but whilst the ECHR operates in a wider sense, tort is focused on the individual. As a result, it will be argued that two actions should be more consistent at the duty stage because there are similarities that exist between them. However, there are also substantial differences, which mean that they should remain separate where breach and remedies are concerned.

Section Three: Suggestions for Development of the Law

Arden has argued that although it was mainly Lord Scott in *Ashley* expressing the view that tort law can also be used to vindicate rights, this demonstrates the impact that human rights law has had upon the common law and suggests that there may be development of the common law in the future.[67] This could open the possibility that whilst the two areas of law remain separate, areas of the common law could be developed to become more consistent with human rights law. The decision in *Smith*

[65] ibid 618.
[66] Spencer (n 25) 26-27.
[67] Arden (n 10) 152.

appears to have curtailed this as the majority expressed the view that not only should the common law remain separate to human rights law, the former should not be developed alongside human rights law either.[68] However, Lord Bingham's dissent could perhaps provide an opportunity for such development in the future.

It is argued that due to these similarities, the law on the liability in negligence for breach of a positive duty should be developed so that the duty stage is more consistent with that in actions under the HRA 1998 and that '[a] claim in negligence should, on the appropriate facts, have regard to the duties imposed and standards required by Article 2 of the Convention'.[69] In *Smith,* when giving his dissent Lord Bingham argued in favour of the 'liability principle' under which a duty would be owed if 'a member of the public (A) furnishes a police officer (B) with apparently credible evidence that a third party whose identify and whereabouts are known presents a specific and imminent threat to his life or physical safety, B owes A a duty to take reasonable steps to assess such threat and, if appropriate, take reasonable steps to prevent it being executed.'[70] Although the majority rejected it, this principle would operate in a similar way to the *Osman* test and would provide more consistency between the two actions at the duty stage.[71] A test of duty based on human rights jurisprudence would ensure consistent protection of rights under the common law as well, whereas at present the chances of a duty being found seems to depend on which claim is brought. For example, the Court of Appeal in *Smith* acknowledged that 'the assumed facts arguably demonstrate a breach of Article 2 of the European Convention

[68] *Smith* (n 1) [136] (Lord Brown).
[69] *Smith v Chief Constable of Sussex* [2008] EWCA Civ 39 [55] (Pil LJ).
[70] *Smith* (n 1) [44] (Lord Bingham).
[71] Williams (n 5) 268.

on Human Rights',[72] yet the House of Lords denied a common law duty.[73] This decision in *Smith* has resulted in the common law test of duty being set at a very high threshold, where the police are the public authority involved. By denying a duty of care the judgment appeared 'to leave no scope for protection of the individual within the framework of negligence'[74] as the principle from *Hill* was applied to prevent a duty from arising. Yet at the same time, the conjoined decision in *Van Colle* affirmed that the *Osman* test is very hard to satisfy, but still appears to easier to satisfy than that under the common law.[75] However, there is no logical reason for such a disparity between the two tests as where duty is concerned the two claims 'rely on the same facts and, essentially, the same considerations arise'.[76]

Where health authorities are involved, the duty under the HRA 1998 would be to do all reasonably possible to protect victims from a real and immediate risk to life that they knew, or ought to have known of, for example a risk from a third party threat or from self-harm. In contrast, the duty under the common law would be to do take all necessary steps to prevent reasonably foreseeable harm being caused to a victim that was known to them. Nolan, however, argues that the two actions differ significantly where the content of this duty is concerned. He argues firstly that these actions in negligence are concerned the risk that is required only needs to be from personal injury, but Article 2 requires a risk of death before the duty is engaged.[77] Consequently, if the two are merged then this would result in 'introducing what

[72] *Smith* (CA) (n 69) [48] (Pil LJ).
[73] Whilst this is not to argue that a breach would have been found if the claim had been brought under the HRA 1998 instead of in negligence, it is perhaps more likely that on the facts a duty would have been found.
[74] Gordon Anthony, 'Positive Obligations and Policing in the House of Lords' (2009) 4 EHRLR 538, 546.
[75] ibid 546.
[76] *Smith* (CA) (n 69) [56] (Pil LJ).
[77] Nolan, 'Negligence and Human Rights Law' (n 48) 309.

would at the duty stage be an alien distinction between threats to life and threats of personal injury.'[78] However, although at present the duty under Article 2 only applies where there is a risk to life, it has been argued in Chapter Three that the duty should also apply where serious injuries have been sustained and there has been a threat to life, even if this threat has not materialised. If the Article 2 duty were developed in this way then the difference between this and the duty under the common law would be lessened. In addition, Nolan argues that claims brought under Article 2 do not require actionable damage, whilst claims brought under the common law do.[79] He points out that under Article 2 compensation can be sought 'for forms of harm which are not themselves actionable in negligence, such as distress, anxiety, inconvenience and feelings of injustice, helplessness or humiliation.'[80] Meanwhile, the common law only allows claims to be brought for recognised psychological harm in exceptional circumstances, and even then only allows claims to be brought for recognised psychiatric illnesses.[81] The remit of what exactly can be claimed for under the common law is beyond the remit of this thesis, as the primary concentration is on the operational duty, however, it is acknowledged that this could result in difficulties in merging the two actions. It is perhaps arguable, however, that these differences can be dealt with at the remedies stage, however, as where Article 2 is concerned this damage is the result of a risk to life, and not the sole reason for the claim being brought.

However, although there are some similarities between the two actions, there are also important differences. The difference in functions, highlighted above, suggests that a

[78] ibid 309.
[79] ibid (308).
[80] ibid 308.
[81] *Page v Smith* [1996] AC 155, 171 (Lord Jauncey).

degree of separation between the two actions is still necessary. In order to satisfy the differing functions and purpose both the breach stage and the available remedies should remain different. Where breach is concerned the two actions should remain separate due to the differing functions of each action. As already suggested, actions under the HRA 1998 seek to vindicate individual rights, but also act to uphold and vindicate rights in the general sense,[82] whereas actions in tort are individual in nature. As a result, a distinction should be maintained between the two actions where breach of duty is concerned as different considerations are involved in each. Where HRA 1998 claims are concerned, and the rights of society are being protected, there must be a wider consideration of others factors when determining breach. The *Osman* test already allows for such consideration by including a proportionality test to determine breach, however, in contrast, the test in negligence only requires consideration of the reasonableness of the defendant's behaviour.

Again, where remedies are concerned the distinction should also be maintained. Steele has criticised the functional justifications for maintaining the distinction given in *Smith* for being too 'simplistic'.[83] In making this argument, she was primarily focused on remedies in tort and under the HRA 1998 and what is remedied by both actions. However, as she acknowledges, different issues are involved where remedies are concerned.[84] This suggests that the focus on functions is perhaps more relevant where substantive issues, such as duties, are concerned but where remedies are concerned there does need to be a difference between the two types of claims.[85] She argues that the remedies available under the HRA 1998 and those available in

[82] Steele (n 34) 618.
[83] ibid 608.
[84] ibid 609.
[85] ibid 609.

common law claims need not be the same because the 'mirror principle' does not apply to remedies as 'it has not been suggested that the main business of [the ECtHR] is to determine uniform levels of compensation that should be secured in domestic law toward those whose rights have been violated by a public authority'.[86] In addition, although Steele criticises it as being too 'simplistic',[87] the functional differences of the two actions also provides a reason for maintaining a distinction between the two where remedies are concerned. These differences mean that there are different considerations when determining remedies: one aim of tort law is to provide compensation and so the remedies available are 'modelled on the loss, damage or violation suffered by the claimant or, where appropriate, on the sum required to "punish" the defendant', whereas 'awards of damages under the Convention (and thus under the HRA) [depend] on a much broader range of factors'.[88]

Furthermore, claims brought under the two actions have different aims, suggesting that a distinction should be, in part, maintained. These differing functions are easier to address at the breach stage, rather than at the duty state, as the different approaches to breach allow for different considerations to be taken into account, and so different aims can be fulfilled by each. This suggests that when considering breach the two actions should remain separate. Tettenborn argues that 'the tort of negligence, being bound to provide a general protection, must aim within reason at universality and consistency', whilst 'the fault-based remedies as demanded by art. 2 of the ECHR are essentially gap-filling and exceptional: here, the need to provide a seamless law of negligence as a whole is hardly relevant.'[89] On this argument, tort law needs to

[86] ibid 611-612.
[87] ibid 608.
[88] ibid 617.
[89] Tettenborn (n 14) 330.

provide certain standards for determining whether a duty of care existed that can be applied to every case 'and if a remedy is denied in one case and given in another, there must be a plausible reason to distinguish between them.'[90] Tettenborn suggests that ECHR law, in contrast, does not need to operate in quite the same way.[91] However, ECHR law does still need to ensure consistency, but whilst tort is individual and aims to achieve consistent treatment of individuals, the ECHR needs to achieve a general consistency of protection of rights and in doing so each case will not be treated in the same way as the considerations for each will vary depending upon the facts. This is perhaps most relevant where remedies are concerned: Steele argues that tort law 'remedies rights violations for the benefit of the individual claimant, while the HRA is interpreted as vindicating and protecting "Convention rights" in a more general sense.'[92] This suggests that where remedies are concerned, the two actions do need to remain separate as they aim to achieve different things.

Where health authorities are concerned different considerations may arise to those in cases involving other public authority defendants. *Smith* was a case involving the police and the policy considerations that prevented liability were in part specific to the police and the functions that they perform. The majority affirmed the concern in *Brooks* that imposing a duty would result in defensive practice amongst the police meaning that they would not carry out their functions as efficiently.[93] Concerns over defensive practice have also been raised in cases involving health authorities; however, these concerns have been dismissed, as health authorities can already be

[90] ibid 330.
[91] ibid 330.
[92] Steele (n 34) 608.
[93] *Brooks* (n 12) [30] (Lord Steyn).

liable in negligence.[94] Where health authorities are the defendants, factors affecting breach are more likely to affect which claim is made. For example, if the claim is brought under the HRA 1998 then the court will have to consider wider factors such as other Convention rights and the proportionality of the defendant's actions, whereas if the claim is brought in negligence then only the reasonableness of the defendant's actions will be considered. It has been argued that breach of Article 2 will therefore be harder to show than negligence, making it easier for the defendants.[95] However, there are also benefits to bringing an action against a health authority under the HRA 1998, for example a wider class of victims can now claim. This can be particularly beneficial for claimants, as it was in *Rabone,* as it allows parents of an adult child to make a claim, which they would not be able to do in negligence.[96]

It is, nonetheless, acknowledged that even if the two actions were developed to become more consistent there will still be benefits to pursuing one action over the other. For example, there is a shorter limitation period for actions brought under the HRA 1998,[97] but at the same time a wider class of victims can claim under the HRA 1998 than in negligence.[98] It was argued in *Smith* that the common law should not be developed to become more consistent with ECHR law because any 'perceived shortfall in the way that is [the common law] deals with cases that fall within the threshold for the application of the *Osman* principle can now be dealt with in domestic law under the 1998 Act'.[99] However, at present where some claims are concerned there is no real choice between actions, for example if an action against the

[94] *Savage* (n 30) [100] (Baroness Hale).
[95] Neil Allen, 'First do no Harm, Second Save Life?' (2009) Win JMHL 180, 185.
[96] Tettenborn (n 14) 329.
[97] See Section One.
[98] See Chapter Two.
[99] *Smith* (n 1) [82] (Lord Hope).

police was brought outside of the one-year limitation period of the HRA 1998 then the claimants would have no choice but to bring it under the common law only to face the 'longstanding policy arguments'[100] that continue to prevent claims against the police in negligence. If the law were developed, however, claimants would still have to determine which action would be best to claim under, however, having a consistent duty stage for each would provide the benefit of meaning that the claimant does not suffer simply because 'the claim is brought 10 months after or 14 months after the acts complained of.'[101]

Conclusion

In conclusion, the law currently maintains a distinction between actions under the HRA 1998 and those in negligence. This is in part based on functional differences between the two,[102] and also based on the procedural differences that exist between the two actions, for example differing limitation periods and remedies. However, it is argued that there are similarities between the two and that in order to provide better protection for claimants, the two should, in part, be developed together so that they are not contradictory. Whilst the functional differences mean that the breach stage and remedies should remain different, as substantive rights raise different issues to remedies,[103] where the duty stage is concerned the two should be more complimentary. In relation to the duties owed, regardless of which action is brought,

[100] Burton (n 9) 295.
[101] *Smith* (CA) (n 69) [58] (Pil LJ).
[102] Du Bois (n 29).
[103] Steele (n 34) 609.

'[t]he two rely on the same facts and, essentially, the same considerations arise'[104] and so there is little reason for maintaining such a distinction.

[104] *Smith* (CA) (n 69) [56] (Pil LJ).

CONCLUSION

The decision in *Rabone v Pennine Care NHS Trust*[1] has had a large impact on the law relating to the operational duty, especially where health authorities are concerned. The decision widened the duty by finding that it applies to voluntary, as well as detained, patients and also increased the class of victims that can claim under the duty. Critics have suggested that this decision will result in the duty applying too widely and will lead to an increase in litigation;[2] however, it has been argued that this is not necessarily true. While the operational duty has become wider following *Rabone* due to the focus on vulnerability, this decision should be welcomed as it provides greater protection for patients and removes these 'artificial'[3] distinctions between voluntary and detained patients. As critics have highlighted, vulnerability was not properly defined in *Rabone* and remains vague as a concept,[4] yet if it is defined properly then it can be applied specifically to health authorities and the duty can still be applied narrowly and effectively.

By removing the emphasis on control, it can be argued that the factors that trigger the duty should vary depending on the public authority and the function that they perform. The result is firstly that the duty will not apply to all public authorities, instead it will depend on their function and their relationship with victims. Secondly, it will mean that in cases involving other public authorities different factors will be

[1] [2012] UKSC 2.
[2] Andrew Tettenborn, 'Wrongful Death, Human Rights, and the Fatal Accidents Act' (2012) 128 LQR 327, 329.
[3] Jason NE Varuhas, 'Liability Under the Human Rights Act 1998: the Duty to Protect Life, Indirect Victims and Damages' (2012) 71 CLJ 263, 265.
[4] Tettenborn (n 22) 329.

important, for example where prison services are involved factors such as detention and control will be relevant, for example as in *Keenan v United Kingdom*,[5] but where health authorities are concerned vulnerability will be the important factor. The current jurisprudence on vulnerability comes from cases involving detention, for example *Keenan*, and so does not necessarily apply to vulnerability in the context of health authorities. Where these scenarios are concerned vulnerability can be defined more precisely as resulting from a psychical or psychiatric condition meaning that the patient cannot protect themselves, either from third-party harm or self-harm. Vulnerability is therefore coupled with a dependence upon the health authority for protection and these two factors together engage the operational duty. Once this first factor has been shown, the *Osman* test will then apply to determine if the duty is engaged. This will provide an additional control over the duty and will prevent it from applying too widely as it will be hard to show a real and immediate risk.[6] Finally, even if this is shown and the duty is engaged, the claimant will then have to prove breach of the duty, another high threshold for the claimant to pass.[7] When determining whether there has been a breach of the operational duty the courts will have to consider whether the public authority did all that they reasonably could to prevent the risk. This includes taking into consideration the available resources, [8] and other Convention rights. This requirement of proportionality prevents the duty from applying too widely and means that not every risk must be protected against and so avoids placing 'an impossible or disproportionate burden on the authorities.'[9]

[5] [2001] 33 EHRR 38.
[6] Claire McIvor, 'Getting Defensive about Police Negligence: the Hill Principle, the Human Rights Act 1998 and the House of Lords' (2010) 69 CLJ 133, 149.
[7] *Savage v South Essex Partnership NHS Foundation Trust* [2010] EWHC 865 (QB) [80].
[8] *Osman v United Kingdom* [2000] 29 EHRR 245 [116].
[9] *Osman* (n 8) [116].

The growth of the operational duty has also raised questions over the relationship between actions brought under the HRA 1998 and actions against public authorities for breach of a positive duty of care. The UK courts have maintained a distinct separation between the two, asserting that both fulfil different functions and so the common law does not need to be developed in line with ECHR law.[10] Rather than continue to maintain this rigid distinction, it is argued that the duty stage of actions against public authorities for breach of a positive duty of care should be developed to become more consistent with that under the HRA 1998, as there are already similarities between the two.[11] This would help to remedy the current inconsistencies that exist between the two actions, for example why a duty may be held to exist under the HRA 1998, but not at common law. It is acknowledged, however, that the differing functions and aims of each action mean that the two need to remain separate where the breach stages and remedies are concerned.

Finally, the relationship between the investigatory and operational duty has been considered, as there is currently a lack of clarity over the investigatory duty. The investigatory duty imposed by Article 2 is currently very vague as the duty has only been described in a very general way by the ECtHR. This has the benefit of flexibility and enables it to adapt to new scenarios, however, it does raise problems when the duty is implemented by member states and results in a disparity between the two. There is currently a lack of clarity over a number of issues; including what kind of investigation should be carried out and what results are required. The UK jurisprudence is somewhat clearer as the courts apply the duty specifically to public authorities, as organs of the state, yet there is still a lack of clarity over the scope of

[10] *Smith v Chief Constable of Sussex* [2008] UKHL 50.
[11] *Smith v Chief Constable of Sussex* [2008] EWCA Civ 39 [56] (Pil LJ).

the duty, what type of investigation should be carried out and what results are required. It is argued that the duty should be tailored to each public authority in order to provide more guidance on how it should be implemented. One way to do this would be to create a body within each public authority that would be responsible for discharging the duty, for example by beginning the investigation, reporting the death to the coroner and implementing any recommendations. This would help to remedy the ad hoc way in which the duty is currently carried out.

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