

Introduction

1. The incorporation of the European Convention of Human Rights and Fundamental Freedoms making Convention rights directly effective in the domestic law of England and Wales via Human Rights Act 1998 heralded the potential for a shift away from duty – based law to rights - based law.
2. The suggestion was that no longer may a citizen do what he likes unless what he proposed to do is unlawful (Dicey¹) but, alternatively, why should the State interfere with the citizen's rights? Enjoyment of rights under the Convention would prevail unless interference by the State could be justified².
3. This paper seeks to review the effect of the Human Rights Act 1998 in aspects of medical law and cases involving injury or death to demonstrate its effectiveness, to consider its limitations and to identify how this fundamental development in English law may affect practitioners in the future.

The position before the HRA 1998

4. The European Convention for the Protection of Human Rights and Fundamental Freedoms was drafted post – war in the late 1940s by the newly created Council of Europe and was ratified in 1953. All Council of Europe member states are parties to the Convention and new members are expected to ratify it at the earliest opportunity.
5. It is opportune to mention that the drafting of the Convention might rightly be regarded as benefitting from a peculiarly British contribution. Drawing on the Universal Declaration of Human Rights (drafted by a Canadian, John Peters Humphrey, a noted human rights proponent of the time) in the aftermath of the Second World War, the Chair of the Committee given the task of drafting the European version of fundamental rights was a British lawyer and Conservative politician, Sir David Maxwell – Fyfe, a prosecutor at the Nuremberg trials. Maxwell - Fyfe was a proponent of the death penalty for Nazi war – criminals and, as Home Secretary, later refused to commute the death penalty against Derek Bentley³.
6. Notwithstanding his potential for somewhat hardline leadership, Maxwell Fyfe presided over the drafting of a document that was designed to incorporate civil liberties in order to secure "effective political democracy", from the strongest

¹ A.V. Dicey: "An introduction to the Study of the Law of the Constitution" 1885, the father of the principles of parliamentary Supremacy and the person who popularised the phrase "the rule of law"

² "The traditional freedom of the individual under an unwritten constitution to do himself that which is not prohibited by law gives no protection from misuse of power by the state, nor any protection from acts or omissions of public bodies which harm individuals in a way that is incompatible with their human rights under the convention. Our legal system has been unable to protect people in the 50 cases in which the European Court has found a violation of the convention by the United Kingdom. That is more than any other country except Italy. The trend has been upwards. Over half the violations have been found since 1990". Lord Irvine of Lairg, Hansard 3.11.97 Vol 582 cc 1227 - 312

³ also Recorder of Oldham before WWII and Later Lord Kilmuir, Lord Chancellor

traditions in the United Kingdom, France and other member states of the newly – formed Council of Europe. The aim was to provide a set of fundamental freedoms aiming at a “lowest common denominator” and to provide a framework of basic and fundamental rights that the individual should enjoy.

7. The Convention was opened for signature on 4 November 1950 in Rome and the United Kingdom was one of the earliest signatories in 1951. It was ratified and entered into force on 3 September 1953. It provided for a Court within which cases involving Convention Rights could be heard (the European Court of Human Rights in Strasbourg) such that any person within a Member State could have recourse to the Court where their rights according to the Convention had been violated. Thus, individuals now had a forum on the international stage, whereas previously only States could operate in international law.
8. However, despite the fundamental contribution made by the UK, the Convention was not incorporated directly into domestic law for the next 50 years.
9. The effect of this was that whereas a ratified treaty imposes binding obligations on the UK in international law, ratification is insufficient for the treaty obligations to become effective in the domestic law. In line with the doctrine of Parliamentary sovereignty, the provisions of a treaty will only form part of English law if Parliament gives effect to them through legislation. Thus, while international law required that the Convention was binding on all signatories, the domestic Court took no such simple approach.
10. Accordingly, the Convention had no direct effect on the implementation of law within the UK either vertically (between the State and the individual) or horizontally (between individuals). While the courts accepted that it was occasionally appropriate to have regard to unincorporated treaties to resolve ambiguity in existing statutes⁴, to make clearer the rules of the common law⁵ or to assess the rationality of a minister’s acts⁶, the position was that treaty obligations do not create individual rights justiciable in the domestic court unless incorporated into the law.
11. The attitude of the Courts by the end of the mid – 70s can be exemplified by Lord Denning: “The Convention is not part of our law, but ... we will always have regard to it. We will do our best to see that our decisions are in conformity with it. But it is drawn in such wide terms that it can be used for all sorts of unreasonable claims and provoke all sorts of litigation”⁷, a begrudging - bordering on decidedly cool - assessment of the Convention’s usefulness.
12. In essence, the Courts had to do no more than “have regard” to the Convention when interpreting ambiguous statutes, the presumption being that Parliament

⁴ *Salomon –v- Commissioners of Customs and Excise* [1967] AB 116

⁵ *Derbyshire County Council –v- Times Newspapers* [1992] 1 QB 770

⁶ *R –v- Secretary of State for the Home Department ex parte Launder* [1997] 1 WLR 839

⁷ *Ahmed –v- ILEA* (1978) QB 36

intended to legislate in conformity with the Convention (*Ex parte Brind*⁸). Even with the advent of the Human Rights Act on the horizon, courts were reluctant to hear Convention points until enactment. Thus, in *Daniels –v- Walker* in May 2000, a case concerning the use of a single joint expert, reference to the HRA 1998 and concepts such as a right of access to a court were rejected in trenchant terms as being premature⁹.

13. So, why the groundswell in favour of incorporation at all? One has to recall the radically new political climate that pertained in the late 1990s not simply domestically but globally. The Soviet Union had fallen apart, the Berlin Wall was down, South Africa's apartheid system was dismantled with free elections in 1994 and the formation of a Constitution giving rights to all in 1996.
14. Also influential were political developments closer to home, most pertinently the creation of devolved government in Scotland. With the Scotland Act 1998 resulting in devolution in 1999, our Gaelic neighbours pipped England and Wales to the post in incorporating the Convention and their Act provides *additional* protection for Convention rights with two important effects, first, because the Scotland Act came into force earlier than the Human Rights Act in the UK, allowing claims concerning executive acts to be made from May 1999 (the date on which prosecution functions were devolved to the Lord Advocate in Scotland) and claims concerning Acts of the Scottish Parliament to be made from 1 July 1999 (the date on which legislative power was devolved to the Scottish Parliament); second, and in the long term more important, the Scotland Act gives the courts more power over executive action and can invalidate Acts of the Scottish Parliament¹⁰ (as opposed to the HRA which can only make a declaration of incompatibility).
15. Therefore, there was a strong feeling that the UK was outmoded and decidedly last – century in its outlook in this new era of rights as we came to the end of the first millennium. This led to a political will by New Labour to “bring rights home”¹¹. In a paper¹² published shortly before his untimely death, Lord Bingham reflected that as early as 1992 in an interview for the radio he had identified the giving of domestic effect to the European Convention on Human Rights as the “single change he would most like to see” in the law and the failure to do so was a “glaring defect in our law”. He pointed to the arguments, all of which will sound familiar: how destructive it was of confidence in our domestic law if it was thought that there was a “superior brand” of justice available in

⁸ (1991) 1 All ER 720: concerning freedom of expression and restrictions on TV and radio interviews with members of the IRA and other extremist groups which prevented the reporting of direct statements of terrorists.

⁹ Lord Woolf MR: it was “undesirable” for the consideration of issues in civil proceedings to be complicated by the injection of arguments based on Article 6 and it was hoped that judges would be “robust” in resisting such arguments, the court should not be taken down “blind alleys” it being the obligation of the Courts under the CPR 1998 to deal with cases justly, thus, Art 6 “could not possibly have anything to add to this appeal”.

¹⁰ Section 29(2)(d): an Act of the Scottish Parliament is outside its competence if it is incompatible with Convention rights.

¹¹ Rights Brought Home: The Human Rights Bill (1997) CM 3782

¹² “The Human Rights Act” EHRLR 2010 No 6 page 568

Strasbourg, the fact that UK government's success rate in resisting claims in the Strasbourg Court would probably be improved if there was an overt consideration of Convention principles when making decisions in the domestic courts, litigants should be saved the expense and delay of litigating in Strasbourg and, if such rights were, as claimed, basic and fundamental, what possible reason could a modern, developed legal system have for not giving them due priority.

16. Thus, once the Act was in force and Lord Woolf notwithstanding¹³, it was clear that the courts would have to grasp the nettle, it being "plain that the incorporation of the ECHR in our domestic law will subject the **entire legal system to a fundamental process of review and, where necessary, reform** by the judiciary" [my emphasis]¹⁴

Key developments in the last 10 years: the HRA and medical law

17. In ways that are now familiar to the practitioner, the HRA provided for the observance of Convention rights by various mechanisms:
- the requirement to take account of Strasbourg jurisprudence (s.2),
 - a mandatory obligation to interpret domestic legislation (primary and secondary) in accordance with the Convention wherever possible (s.3), and the power to declare domestic legislation incompatible with the Convention (s.4) and a power to take remedial action in that respect (s.10)
 - an obligation on public authorities to respect Convention rights, such that the failure to do so is unlawful (s.6)
 - a mechanism for proceedings by which breaches of human rights can be litigated in the domestic courts (s.7)
 - remedies in the form of damages and any other "just and appropriate" relief (s.8) for human rights breaches
18. As noted by Lord Bingham, a new field of legal study has "sprung into existence" with the advent of the Act and it has spawned many and varied learned texts on the subject¹⁵. It is right to say that considerations of breaches of human rights connote a more evaluative approach by the courts than the more traditional application of legal criteria to establish tortious liability for example. Thus, the types of question in the medical sphere involving arguments about human rights that the courts have been called upon to consider include:

¹³ although, despite his view in *Daniels -v- Walker*, he seems to have had a change of heart, describing the Act at one point as one which will "revolutionise our legal world"

¹⁴ *R -v- Ex parte Kilbene* [1999]3 WLR 972.

¹⁵ Amongst the most accessible being: *Human Rights in the UK: an introduction to the Human Rights Act 1998* by John Rowe QC (formerly of Byrom Street Chambers) and David Hoffman, now in its second edition.

- Can the HRA assist third parties: whether the interference in family life to remove a child from its parents' care is necessary and justified in a democratic society and the failure to afford the parents a domestic remedy in that respect is a breach of their human rights;
- Whether a breach of a tortious duty of care amounts to a breach of human rights;
- What amounts to a proper investigation into a person's death?
- Whether a right to a fair trial is compromised in circumstances where a professional regulatory body is both prosecutor and judge;

19. The case of *JD & Ors*¹⁶ gives a useful illustration of the HRA in action in an innovative way which served to explode at least one aspect of one legal behemoth, namely the doctrine of precedent in English law. Three cases were involved:

JD: the mother of a severely allergic child whose paediatrician (Dr Southall) believed that she had Munchausen Syndrome by proxy and involved social services. Throughout the social services investigation, the child remained in the care of his mother. The child did in fact have severe allergy.

RK and AK: parents of a baby who suffered a spiral fracture of her femur. The child was taken away from the care of her parents following a "diagnosis" that the injury was non - accidental and was only returned to her parents' care when a second fracture led to tests which revealed brittle bone disease (which could have been earlier diagnosed if the doctors and social workers had implemented appropriate tests);

MAK and RK: the father (MAK) of a young girl (RK) was falsely accused of sexual abuse and publicly barred access to her in hospital when in fact the suspicious bruises on her inner thighs were a dermatological condition. RK (a minor) was subjected to a medical examination in the absence of any valid consent from herself or her parents.

20. The cases were litigated separately at first instance. All the facts giving rise to the cases arose before the HRA came into force but were litigated afterwards. Section 22(4) of the HRA provided for a retrospective effect of the Act but only in the limited circumstances, where proceedings were brought by or at the instigation of a public authority i.e. a litigant could rely on Convention rights as a defence to an action by a public authority whenever the acts complained of took place, but could not use the Act to found a claim¹⁷ in relation to acts pre - dating it coming into force. That the HRA does not create a retrospective right of action was put beyond doubt in *Wainwright*¹⁸.

¹⁶ *JD -v- East Berkshire Community Health NHS Trust* [2003] EWCA and [2005] UKHL

¹⁷ "as a shield but not a sword"

¹⁸ *Secretary of State for the Home Department -v- Wainwright & Anor* The Times, 4 January 2002

21. Operative in all cases was the House of Lords case of *X (minors) -v- Bedfordshire County Council*¹⁹ which rejected, on policy grounds, a common law duty of care owed to either parents or children by professionals involved in child protection (e.g. doctors or social workers).
22. In the absence of these two features, namely, a common law duty owed to child and parents in respect of child protection procedures and the inability to litigate the concomitant alleged interference with the parents and child's family life under the HRA, there was no domestic legal forum within which either parent or child could complain about their alleged negligent treatment and its dramatic effects on their family life.
23. What was particularly interesting about this situation was that it revealed a lacuna in the drafting of the HRA. Article 13 of the Convention provides for a right to an effective remedy before national authorities and yet here was a situation where neither child nor parent had any right to bring a complaint before the English Courts in relation to an alleged breach of their human rights, because the facts giving rise to that breach pre-dated the HRA and the HRA was not retrospective in the required sense.
24. It is without doubt that this lacuna was deliberate, or else evidence of dramatic and, presumably, unusual incompetence on the part of the Parliamentary draftsmen. Review of the Hansard debates on the Human Rights Bill demonstrate that both Lord Lester and Lord Ackner were concerned at the absence of Article 13 from the Bill, notwithstanding the then Lord Chancellor, Lord Irvine of Lairg's assertion that "People will be able to argue for their rights and claim their remedies under the Convention in any court of tribunal in the United Kingdom"²⁰.
25. The practical effect of this situation was that in all of the cases described, the First Instance courts struck out each of the claims as disclosing no cause of action in English Law. Note that in *RK and AK*²¹, the Defendant had agreed that the facts of the case engaged Article 8 and it had been specifically pleaded on the Claimants' behalf that to strike out the pleading would amount to a breach of Article 13. Simon J's repose was to strike out the action, observing that the Claimants had a right of action in Strasbourg.
26. The three cases were joined for the purposes of an appeal to the Court of Appeal²². The Court of Appeal held that the blanket policy preventing children bringing claims in tort as per the House of Lords decision of *X -v- Bedfordshire* could not withstand the bringing into force of the Human Rights Act 1998, thus causing some degree of comment in academic circles as the Court of Appeal overturned a House of Lords decision.

¹⁹ [1995] 3 WKR 152

²⁰ Hansard debate 3 November 1997 at 1227 - 312

²¹ *RK and AK -v- Oldham NHS Trust and Dr B Lloyd's* Law Report Medical [2003]1.

²² *JD & Ors -v- East Berkshire Community Health NHA Trust & Ors* [EWCA] Civ 1151

27. The Court's reasoning in this regard is instructive in how flexibly the Court has sought to use the Convention if so minded. Lord Phillips pointed to the requirement of the Human Rights Act to have regard to Strasbourg jurisprudence where, in several cases²³, local authorities had been found liable for breaches of Convention rights in relation to action (or inaction) as regards alleged child abuse. He concluded that the circumstances of such claims would, necessarily be a claim by a child rather than a parent as the parent would be under suspicion. Further, where such a case involved a breach of Article 8, the court would have to consider whether the action had been "necessary in a democratic society".
28. Thus, factual enquiries in cases of child protection would be necessary where local authorities were involved because of the requirement of the local authority to respect a child's Convention right and thus the policy reasons for the failure to permit a duty to the child would cease to apply. In essence, a duty of care to the child would permit of the same enquiry as was necessary where a Convention right was under scrutiny, as it would be now that the HRA was in force.
29. However, while the children were now afforded a right of action, the parents' similar claim to a right of action failed because of apparent "conflict" between a parent accused of abuse and the rights of the abused child, a conflict which had to be resolved in favour of the child for policy reasons. A duty to exercise due skill and care in the investigation of suspected abuse was therefore partially established and the Article 13 point on behalf of the parents was not resolved.
30. On appeal to the House of Lords²⁴ the House of Lords upheld the Court of Appeal decision by a 4:1 majority. Given his commitment to human rights, it is perhaps not surprising that Lord Bingham of Cornhill gave the dissenting opinion, couching his dissension in both the language of human rights and the development of the law of tort, whilst roundly identifying and exploding each policy ground relied upon by the Respondents as mitigating against a duty of care to parents:

"...there is a difficult line to tread between taking action too soon and not taking it soon enough. The truth of this may be readily accepted. It is however a standard function for any professional to assess what may be a fraught and difficult situation. That is not generally treated as a reason for not requiring the exercise of reasonable skill and care in the task. The professional is not required to be right, but only to be reasonably skilful and careful. If such skill and care are required in relation to the child, there is no reason why this consideration should preclude a duty to the parent.

.... To accept as arguable a claim by parents on facts such as give rise to these appeals involves no massive extension of a prima facie duty. It is not unimportant, for it accommodates what Lord Goff of Chieveley in *White v Jones* [1995] 2 AC 207, 260, called "the strong impulse for practical justice". But **in legal terms it is a small, analogical, incremental development.**

It is important to be clear on the scope of the duty which the appellants seek to be allowed to try

²³ e.g. *Z -v- UK* and *E -v- UK*: para 79

²⁴ *JD, MAK & RK & Anor -v- East Berkshire Community Health NHS Trust & Ors* [2005] UKHL 23

and establish as owed by the healthcare professionals. It is a duty not to cause harm to a parent foreseeably at risk of suffering harm by failing to exercise reasonable and proper care in the making of a diagnosis of child abuse. This is in substance, the appellants contend, the same duty as the healthcare professionals already owe to the child. The duty to the child is breached if signs of abuse are overlooked which a careful and thorough examination would identify, and the obvious risk then is that abuse which would otherwise be stopped is allowed to continue. But this would be a breach of the duty if owed to a normal parent, whose interest would be the same. It would be no different if a parent were the abuser, since the duty of the healthcare professional is to serve the lawful and not the criminal interests of the parent; in any event, an undetected abuser could never be heard to complain. If a diagnosis of child abuse were made when the evidence did not warrant it (which is the factual premise of all three appeals) there would be a breach of duty to the child, with separation or disruption of the family as possible or likely consequences. But this would be a breach of the duty owed to the parents also, and the consequences are not suffered by the child alone. In *Hungerford v Jones* 722 A. 2d 478, 480 (1998) the US District Court for New Hampshire referred to "the potentially devastating consequences stemming from misdiagnosis", and Gray J in the Supreme Court of South Australia spoke to similar effect in *CLT v Connon* [2000] SASC 223, (2000) 77 SASR 449, 459: "Devastating consequences can follow an incorrect finding that a child has been sexually abused. Those consequences flow not only to the person against whom the findings are made, but also to the child and the family." The appellants do not argue for a duty to serve any interest of the parents save their interest in a skilful and careful diagnosis of the medical condition of their child".

But the question does arise whether the law of tort should evolve, analogically and incrementally, so as to fashion appropriate remedies to contemporary problems or whether it should remain essentially static, making only such changes as are forced upon it, leaving difficult and, in human terms, very important problems to be swept up by the Convention. I prefer evolution. [my emphasis]

31. The effect of the House of Lords majority was, indeed that the matter was left to be swept up by the Convention. In two out of the three cases, the Strasbourg court eventually found in favour of the parents. Interestingly, the one case regarded as inadmissible by the Strasbourg was that of JD, who was the only parent whose child had remained in her care. In those circumstances, the ECHR held that there was no potential breach of Article 8 and thus the Convention was not engaged.
32. By contrast, in *RK and AK -v- United Kingdom*²⁵ the ECHR found that Article 8 was engaged but there was in fact no breach because the child had been accommodated within her extended family with access permitted to her parents. There was, however, a breach of Article 13 in the State's failure to accord the parents a means by which they could litigate their action within the domestic jurisdiction. The parents were awarded 10,000 Euros each and costs for the breach of their human rights.
33. In *MAK and RK*²⁶, the ECHR found both a breach Article 8 and Article 13 of the Convention. RK (the daughter) was awarded 4,500 Euros and MAK (the father) was awarded 2,000 Euros plus costs.

²⁵ Application No 38000/05

²⁶ Application Nos 45901/05 and 40146/06

34. There remains no duty in English law owed to parents accused as a result of negligent medical decision of the abuse of their children, therefore the only possible avenue for parents in similar circumstances to RK, AK and MAK is to bring a claim under the HRA 1998. Failure to permit such a claim to be litigated is a breach of Article 13 and the Defendant's only argument would be that a Convention right is not engaged i.e. the circumstances of the case do not reach the threshold for a Convention right to be engaged. This must always be a matter for argument, although the experience of *JD & Ors* demonstrates that where the child remains accommodated with its parents or has access to them, a breach of Article 8 may be unlikely.
35. The question is whether this situation has any wider applicability outside the sphere of child protection. The simple answer is that it could do, where a family's Convention rights have been affected by the negligent treatment of a child: one immediately thinks of parents and siblings whose family life is intrinsically altered by the presence of a severely injured child in the family. The parent (and other third parties such as siblings) have no remedy in existing tort law nor any forum in which to argue about any interference with their Convention rights, say to family life, save through the Human Rights Act. For my part, given the distinction apparently drawn between JD, RK/AK and MAK/RK, it is likely that only cases where family life has been essentially been destroyed that an argument for breach would be likely to succeed. It is certainly not outside the bounds of possibility that such cases exist.²⁷

Article 2 in the domestic jurisdiction: Savage, Rabone and Humberstone

36. The importation of Convention principles into domestic law through the Human Rights Act has had a definite impact on how the investigation of deaths through the inquest system is approached with a concomitant effect on tort law. Ten years ago, the concept of a narrative verdict or "systemic failings" would have had little purchase on the legal mind of the ordinary practitioner, yet both are now a familiar part of the legal lexicon. Further, there have been concerted efforts to import those developments into actions for damages.
37. The position 10 years ago was that the ECHR recognised that it could not exclude the fact that acts and omissions of healthcare authorities may, in certain circumstances, engage the State's responsibility to safeguard life under Article 2. However, where a Contracting State had made provision for securing high professional standards and had in place systems for the protection of patients, it did not accept that matters such as error of judgement on the part of a health professional or negligent coordination amount health professionals in the

²⁷ e.g. a mother, who through the failure of the hospital to accurately record the very good organ compatibility between her and her child, was denied the opportunity to donate a kidney to her child and, as a result, a less – good cadaver kidney match was transplanted which failed. The effect was that the child was sensitised by the cadaver organ to the mother's kidney, making a further transplant impossible. Or a sibling who, due to the behaviour of a brain – damaged sibling has to be accommodated outside of the immediate family.

treatment of a patient were sufficient of themselves to amount to a breach of Article 2 (Powell).²⁸ In essence, simple negligence in hospital would not be enough to engage Convention rights.

38. Since the Human Rights Act 1998 was enacted, Hospital Trusts and Claimants alike have been grappling with the idea of when Article 2 would be engaged and what would amount to a breach. In medical law at least, there is a wide – spread view that there should be some level of conduct that “triggers” the consideration of State action. This is contrary to the approach that the engagement of rights – based law is a natural result of the State’s intervention in an individual’s life (with the then separate and different question as to whether the rights have been breached).
39. The idea that Convention principles are engaged by the mere fact of State involvement has not found favour. In the case of *Humberstone*²⁹ at first instance, Mr Justice Hickinbottom took the view that any death of a person while under medical supervision, such as in custody or in a state hospital, the State’s duty to investigate a death under Article 2 will arise, whether or not there is any reason to believe that state agents have failed to perform the primary duty under Article 2. He did not limit this duty to detained patients or any particular type of patient, nor was the issue of negligence, simple, gross, serious or otherwise relevant, at least so far as the requirement to investigate a death was concerned. Indeed, he took the view that the investigation was necessary, precisely in order to investigate issues that *might give rise* to systemic failings or negligence.
40. In the Court of Appeal, however, the Court corrected this approach and reiterated the view that it was only where there were possible systemic failures that the wider enquiry would be legitimate. Moreover, though it was not always easy to say whether there were systemic failures at the outset, the court warned against “dressing up” allegations of individual negligence as systemic failings.
41. In **Savage**³⁰, the application of Article 2, in particular the operational obligation to protect life imposed general obligations on the State, namely that the NHS should:
 - a. Employ competent staff trained to a high professional standard; and
 - b. Ensure they adopt systems of work that protect the lives of patients.
42. So, if a detained patient died due to negligent treatment in hospital, then, while it may be liable in damages in negligence for the acts/omissions of its medical

²⁸ *Powell –v- United Kingdom* 30 EHRR CD 362

²⁹ R (on the application of Claire Humberstone) –v- Legal Services Commission & HM Coroner for South Yorkshire (interested party) 13 April 2010 EWHC 760: an unrepresented mother would be questioned by representatives of other professional parties who would be likely to deflect criticism of their own failures by underlining her failures.

³⁰ *Savage –v- South Essex NHS Trust* [2008] UKHL 74

personnel, the hospital will not be in violation of Article 2, provided it can show that it had employed competent and trained staff and had appropriate systems in place.

43. The court found a further specific obligation which arises if the staff knew or ought to have known that a particular patient present a “real and immediate risk” of suicide, and in those circumstances, Article 2 would require hospitals to do all that was reasonably expected to prevent a patient committing suicide.
44. What Savage left open was whether a same or similar obligation would attach to voluntary patients, as well as detained patients, who are identified as presenting a real and immediate risk of suicide.
45. In *Rabone*³¹ at first instance, Mr Justice Peregrine Simon declined to extend the positive operational obligation under Article 2 to non – detained patients. He felt that there were good reasons for drawing a distinction and imposing a greater obligation once a patient was deprived of their personal liberty. The reason for this was because a person who is detained is subject to coercive powers which a non – detained person is not and he echoed comments by Baroness Hale in *Savage* that : “... involuntary patients are deprived of their liberty and other Convention rights, and cannot choose their own treatment. In contrast ... voluntary mental health patients can leave when they want, are not deprived of any Convention rights and have input in their own medical treatment”.
46. The judge made three further findings which are of importance as practice points for the future, to which I will return below. First, the Claimants’ status as victims was considered, second, the limitation period was considered and third, he indicated what level of damages he would have considered appropriate for a breach of Article 2, had it been found and concluded that bereavement damages under the Fatal Accidents Act would not be an appropriate guide (he considered a “modest £1500” would be sufficient in circumstances of an Article 2 breach).
47. In the CA, Lord Justice Jackson went further: health trusts did not have an Article 2 obligation to voluntary patients in hospital who were suffering from physical or mental illness, even where there was a real and immediate risk of death. Unless the patient was detained, the appropriate action was in negligence alone.
48. *Rabone* is therefore a significant case for several reasons:
 - a. it continues to limit the operational obligation to safeguard life as to detained individuals and not to patients and hospitals generally.

³¹ *Rabone –v- Pennine Care NHS Foundation Trust* [2009] EWHC 1827 QB and [2010] EWCA Civ 698.

- b. It serves to underline for Trusts that for Claimants to demonstrate that the operational duty arises is more difficult than establishing 'simple' negligence a point made by the ECHR in Powell, that the House of Lords had made in Savage and now reiterated in Humberstone;
- c. the "real and immediate risk" test is indeed difficult for Claimants to satisfy i.e. both limbs are required. What seems clear, however, is that this test will depend upon the facts of each case.
- d. It is also worth bearing in mind that alternative forms of redress the claimant has received will be taken into account, both in terms of the legitimacy of the claim under the HRA and in relation to limitation issues.

49. It is to be hoped that Rabone will be heard by the Supreme Court. The number of interveners is some measure of the importance of this case: Justice, Liberty, MIND and Inquest
50. Moreover, as Rabone amounts to treating detained and non – detained patients differently from each other, in the sense of giving one group specific protection under the convention that the other does not enjoy, then this could, prima facie, amount to discrimination of the less – advantaged group. If so, then it is capable of amounting to a breach of Article 14. Clarification of a grey area in law has already been provided so far as whether mental illness came within the grounds cited in Article 14 ECHR is concerned. Article 14 states: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, political or other opinions, national or social origin, association with a national minority, property, birth or other status.
51. The ECHR has already accepted that mental illness was a disability and came within the category of "other status" and thus people with mental illness are protected from discrimination by the ECHR. Refusing to provide treatment for a patient because of some personal characteristic, such as age, sexual orientation or physical or mental handicap is a breach of Article 14. It is now settled English law that poor mental health is a disability which amounts to "other status" and is included in Article 14 (**N&G -v- Secretary of State for Health & Nottinghamshire Healthcare Trust** (EHRC 3 August 2009). However, whether a distinction can be drawn between different categories of such patients is a rather different point.

Inquests and Article 2

52. So far as inquests are concerned, the advent of the Human Rights Act has wrought significant change in both law and procedure, with the advent of the more wide – ranging enquiry into the circumstances surrounding the death being a direct effect of Convention principle.

53. It is likely, however, that the approach of Hickinbottom J in *Humberstone* at first instance will, in retrospect, be regarded as a high point in the attempt to apply the more wide – ranging enquiry to inquests where the organs of the State are involved. Two cases serve to demonstrate a narrowing of the scope of Article 2 to inquests: *Lewis*³² and the decision of the Supreme Court in *Smith*³³.
54. In *Lewis*, it was held that Article 2 was not prescriptive about either the precise scope or form of investigation needed to fulfil its obligations or the level of scrutiny regarded as necessary regarding matters which did not have a causal nexus to the death. In essence, there is no requirement for an inquest to consider matters which might cause/ contribute to deaths in similar circumstances in the future, if they did not do so in the particular case,
55. In *Smith*, the Court of Appeal held that an article 2 inquest was appropriate because a soldier dying of heatstroke in Iraq was within the jurisdiction of the United Kingdom (and thus subject to the Convention) when on active service. The Supreme Court acted to narrow down this principle, finding that unless a soldier were on a military base, they were not within the jurisdiction of the UK. Moreover, they found that the death of a serviceman, even if within the jurisdiction, did not automatically give rise to an Article 2 inquest, save for when there was a systems failure.
56. In summary, subject to *Rabone* and any distinction drawn between patients in the direct power of the State and otherwise, the major applicability of the HRA in injury cases now seems to be where systemic failings can be identified, whether by the local authority, a hospital or the British Armed forces.

Practical problems.

57. The responsibilities of the practitioner are undoubtedly more wide – ranging since incorporation of the Convention. Whereas previously we might have thought that Strasbourg jurisprudence was a body of law that existed for a small, specialist band of practitioners, we now all need more than a simple awareness of developments, but a reasonable working knowledge. Luckily, available resources online and in legal journals abound. As Lord Bingham put it³⁴: “the duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less”.
58. There are two main reasons why early consideration of human rights issues in cases is necessary: public awareness and the limitation period for claims under the HRA. It is sobering to reflect that of cases from the UK in 2009, 3% of them were inadmissible, something that would be unlikely to operate in the mind of a

³² [2009] EWHC 661

³³ [2009] EWCA Civ 441 and [2010] UKSC 29 (apparently the longest judgement of the Supreme Court so far at 342 paragraphs!).

³⁴*R (Ullah) -v- Special Adjudicator* [2004] 2 AC 323

person making an average enquiry. Moreover, changes in Strasbourg³⁵ mean that recourse to the ECHR will become more difficult:

- a. In future, a single judge, assisted by a non – judicial rapporteur, can strike out a case or declare it to be inadmissible (save that the single judge cannot apply this procedure in favour of the state in respect of which they were elected). The decision is final. This power was previously reserved to a 3 – judge committee.
- b. Judgements can be given by a 3 – judge committee, referral to the Grand Chamber is limited, and they can make a simultaneous decision on admissibility and merits where there is “established case law” (not defined);
- c. A new admissibility criterion: an application can be regarded as inadmissible if it considers that the applicant has not suffered a significant disadvantage (query what is meant by “significant” in this context).

59. The aim of these reforms is to try and reposition the ECHR back into its role as a reviewing court, rather than a further court of appeal. Hand in hand with this is a re – affirmation of the contracting States to take appropriate measures to ensure that their own systems adequately protect Convention rights. Thus, the ECHR expects the State to put its own house in order and be able to police their own activities, with the implication that the ECHR will entertain only the most serious cases.

60. The practical difficulty is that many enquiries come to practitioners not just well after the limitation period for the HRA, but commonly close to or after expiry of the 3 – year limitation period for injuries. Whereas there is a discretion to extend the one – year time limit provided by section 7(5)(b), there is little assistance as to how this discretion would be exercised or what circumstances would be relevant. What is clear, however, that where a judge decides the action is “doomed to failure” (as Simon J did at first instance in *Rabone*) then the limitation period would not be extended. Some assistance is to be gained from Lord Justice Jackson’s approach in the court of appeal, where he indicated that the matters relied upon at first instance as justifying the extension of time mean he would have been “inclined” to extend time. Those matters lead to the following general conclusions, most of which will be familiar to all from section 33 of the Limitation Act:

- a. The court’s discretion to extend time is wide;
- b. The aim of Convention claims is to uphold minimum human rights standards³⁶, which is why time limits are markedly shorter (thus by virtue of the standard being a bare minimum means that it is all the more important which should allow some flexibility in the interpretation of time limits);
- c. The shorter the extension period being sought, the better;

³⁵ Protocol 14 in force from 1 June 2010.

³⁶ *R (Greenfield) –v- Secretary of State for the Home Department* [2005] UKHL 14

- d. The existence of contemporaneous records and the fewer matters in issue (such as between expert witnesses) the better;
 - e. Lack of prejudice
61. There is some degree of clarity as to what will amount to victim status under HRA: After weighing a number of Strasbourg decisions, as well as the trial of Savage (No 2)³⁷, LJ Jackson in Rabone (CA) decided that the parents of the deceased should not be treated as victims for the purpose of an Article 2 claim under the HRA. He identified a number of propositions:
- a. If an application is successful in the domestic court in respect of matters that form the basis of a Convention claim to the ECHR, he may lose victim status;
 - b. If the domestic proceedings do not afford effective redress for a Convention breach, however, victim status is more likely to be retained;
 - c. Important factors will be whether the State authority accepted the offending conduct, or a court found the offending conduct proved; if compensation falls substantially short of pecuniary losses suffered, that points away from the domestic award being “effective redress”;
 - d. If there is “effective redress” in the domestic sphere that has already been obtained, that will mitigate against victim status.
62. The domestic courts (if not the ECHR) are clearly keeping a tight rein on levels of damages, with awards being nominal as accompanying a finding of a breach of human rights. In effect, the remedy is the declaration of breach rather than the award of damages.
63. In summary, the Human Rights era in English law, at the best part of a decade is, in the scheme of things, still extremely short. In medical law, at least, there is an argument that the battlelines are still being drawn, but that the scope for argument is gradually reducing. That has to be balanced against the fact that the HRA and Convention principles are now embedded in our domestic law.
64. One can see from the difference in damages between RK/ AK and MAK/RK and the new admissibility criteria an increasing reluctance in the Strasbourg court to encourage or entertain cases, while at home, Rabone and the Court of Appeal in Humberstone would suggest a general resolve to keep the applicability of Convention principles in medical law as limited as possible and to emphasise the pre – eminence of the existing law of tort in terms of redress for injury.
65. However, the incorporation of human rights principles was never intended to be an “either/or” proposition and it would be unfair to suggest that this is the

³⁷ see paragraphs 87 – 107 Rabone e.g. *Edwards -v- UK* (2002) EHRR 19; *Powell -v- UK* (2000) 30 EHRR CD 362 and Mackay J: *Savage -v- South Essex Partnership NHS Foundation Trust (No.2)* [2010]EWHC 865;

position that has been reached after so relatively short a time after incorporation. Perhaps the final say should be with Lord Bingham:

“For the majority of ordinary people up and down the country, living law – abiding lives, going about their daily life and work, the re – calibration [of the relationship between individual and the State] is unlikely to register in any practical way. But is it not the ordinary, financially secure majority for whom human rights protection really matters, it is the vulnerable and outcast members of society who stand to gain ... for whom the state no doubt remains an amorphous and somewhat threatening body, but ... one which must respect certain important, enforceable, rights”.

MARY RUCK
20 January 2011
Byrom Street Chambers
Manchester