# Drawing the line

*How far does a state's obligation to protect someone from the risk of suicide extend?* ***Lucy Wilton*** *investigates*

It is well-established that Art 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms can impose positive obligations on the state and its emanations to safeguard life. However, the scope of those obligations and what might constitute a violation of them has become a much-vexed issue for both the domestic courts and the European Court of Human Rights (ECtHR), particularly when it comes to protecting against the risk of suicide.

The potential implications of over-extending the scope of this particular obligation were neatly summarised by Lord Rodger in *Savage v South Essex Partnership NHS Foundation Trust* [2009] 1 All ER 1053. He observed that if there were to be a general legal duty on the state to prevent everyone within its jurisdiction from committing suicide, "… town and countryside might have to be littered with fences, guard rails, netting and so forth to try to thwart attempts at [this]". Where then are the lines to be drawn?

### Keenan

The starting point, so far as European jurisprudence is concerned, is *Keenan v United Kingdom* [2001] ECHR 27229/95. This case arose from the death of the applicant's son in prison, where he had been serving a sentence for assault. The deceased's medical history included symptoms of paranoia, aggression, violence and self-harm. After being segregated in the prison's punishment block, after having assaulted two officers, he hanged himself in his cell using a bed sheet.

The applicant contended that the prison authorities had failed to protect her son's life contrary to art 2. The ECtHR held that this article could impose a positive obligation to take preventive measures to protect against the risk to life posed by suicide, where the authories knew or ought to have known that the deceased was at a real and immediate risk. The obligation would be breached where the authorities failed to do all that reasonably could have been expected of them to prevent that risk from materialising.

### Savage

This authority was applied in the context of NHS hospital care in *Savage*, which involved the suicide of a woman who had absconded from a hospital at which she was detained under the Mental Health Act 1983 (MHA 1983). Her daughter brought an action under the Human Rights Act 1998 (HRA 1998) claiming that the relevant NHS trust had violated art 2.

Echoing the judgment in *Keenan*, the House of Lords held that where there was "a real and immediate risk" of a detained patient committing suicide, art 2 imposed an operational obligation on the medical authorities to do all that could reasonably be expected of them to prevent it.

In his leading judgment, Lord Rodger emphasised that "patients who have been detained because their health or safety demands that they should receive treatment in the hospital are vulnerable… not only by reason of their illness…but also because they are under the control of the hospital authorities".

Baroness Hale also referred in her judgment to the fact that patients "have been deprived of their liberty" and "are under the control of the hospital" in justifying the imposition of a protective duty for patients detained under the MHA 1983. However, she questioned whether it was possible "to draw any distinction between the state's protective duties towards all mental patients, whether *de iure, de facto* or potentially deprived of their liberty", or those who are detained but who are given leave of absence to go home.

### *Rabone*

Baroness Hale concluded that it was not necessary for the House to answer those queries in the *Savage* case. However, it was not long before they were required to do so, in *Rabone and another v Pennine Care NHS Foundation Trust* [2012] UKSC 2, in which judgment was given by the Supreme Court on 8 February 2012.

The case arose from the death of a woman who had hanged herself from a tree while on two days' home leave from a hospital at which she was undergoing treatment for a depressive illness. She was a voluntary patient, ie, she had not been detained under MHA 1983. Nevertheless, she had been acknowledged upon admission to be at high risk of suicide, having made an attempt to take her life in the recent past.

Rabone's parents brought an action alleging violation of their daughter's right to life. In the court's leading judgment, Lord Dyson opined that the differences between detained and voluntary psychiatric patients "are in many ways more apparent than real", pointing out that voluntary patients may be treated in a secure environment and require medication which affects their ability to decide to remain in hospital. Their capacity to make a rational decision as to whether to take their own life could also be impaired.

The court held that the trust owed a duty to the deceased to take reasonable steps to protect her against the real and immediate risk of suicide that she presented. Again, emphasis was placed on the patient's vulnerability and upon the fact that the risk of suicide was the very reason she was admitted in the first place. The court held that this risk was ongoing at the time the decision was made to allow Rabone home leave; that the trust was aware of this risk; and that it had failed to do all it reasonably could to prevent suicide occurring.

Rabone's parents had already settled a claim for compensation arising from her death, after the trust admitted that its staff had been negligent. They nevertheless continued the action for the alleged breach of art 2, which the trust denied, claiming that they were victims of the state's unlawful act.

In her judgment on the case, Lady Hale observed that. "…the ordinary law of tort does not recognise or compensate the anguish suffered by parents who are deprived of the life of their adult child". It is such parents, together with other family members excluded from the categories of claimants entitled to bereavement or dependency damages under the Fatal Accidents Act 1976, who are the true benefactors of the decision in *Rabone*.

### *Reynolds*

The effects of *Rabone* have already been felt beyond the hospital setting. In *Reynolds v United Kingdom* [2012] All ER (D) 176 (Mar), an application was made to the ECtHR by a woman whose son had fallen from a sixth floor window to his death while being treated as a voluntary patient at an "Intensive Support Moving On Scheme Unit" run by the local authority. Interestingly, the verdict at the inquest into his death had not even been that of suicide, the coroner having found that there was insufficient evidence that the deceased intended to kill himself.

The court found that there was an arguable breach of art 2 and that there was no effective mechanism available to the applicant whereby civil liability could be determined for the allegedly negligent care that her son received and by which she could be compensated for her loss. She would not be entitled to damages for loss of dependency or bereavement and the most she could recover at common law would be funeral expenses on behalf of her son's estate. The court held that she therefore "had no prospect of obtaining adequate compensation for the non-pecuniary damage suffered by her as a result of the death of her child" and awarded her €7,000.

### Practice points

Practitioners dealing with cases of alleged suicide in the types of circumstances referred to above will need to advise their clients as to the possibility of pursuing a claim under HRA 1998 as well as, or even in place of, an action founded on negligence. They will also, of course, need to be conscious that the limitation period for claims under HRA 1998 is shorter than the usual three-year period for personal injury claims and will generally expire one year from the date of the act complained of.

Practitioners should also be aware that *Rabone* may affect the scope of any coroner's inquest into the death. In usual circumstances, a coroner will not attribute blame to any person or organisation which may have been involved in someone's death. However, where there has been an arguable breach of art 2, the state must carry out a thorough investigation into the cause of death and who or what is responsible for this. If it fails to do so, eg, by making appropriate inquiries at the inquest, this could in itself constitute a breach of art 2.

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