HOUSE OF LORDS SESSION 2008–09

[2008] UKHL 74

on appeal from:[2007] EWCA Civ 1375

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Savage (Respondent) *v* South Essex Partnership NHS Foundation Trust (Appellants)

Appellate Committee

Lord Scott of Foscote
Lord Rodger of Earlsferry
Lord Walker of Gestingthorpe
Baroness Hale of Richmond
Lord Neuberger

Counsel

Appellants:
Edward Faulks QC
Angus McCullough
(Instructed by Bevan Brittan LLP)

First Interveners
Bhatt Murphy
Dinah Rose QC
Richard Hermer
Paul Bowen
(Instructed by Inquest, Justice, Liberty and Mind)

Respondent:
Philip Havers QC
Jenni Richards
(Instructed by Bindmans LLP)

Second Interveners
Department of Health
Nigel Giffin QC
Cecilia Ivimy
(Instructed by Secretary of State for Health)

Hearing dates:

27 and 28 OCTOBER 2008

ON
WEDNESDAY 10 DECEMBER 2008

HOUSE OF LORDS

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT IN THE CAUSE

Savage (Respondent) *v* South Essex Partnership NHS Foundation Trust (Appellants)

[2008] UKHL 74

LORD SCOTT OF FOSCOTE

My Lords,

1. I have had the advantage of reading in draft the opinions on this appeal of my noble and learned friends Lord Rodger of Earlsferry and Baroness Hale of Richmond and am in full agreement that, for the reasons they give, this appeal should be dismissed. There are two matters, however, on which I want to add a few words of my own. In doing so I gratefully adopt and need not repeat Baroness Hale's outline of the facts and of the relevant legislative background to the issues.

2. The first matter on which I want to comment is the *locus standi* of the respondent, the adult daughter of Mrs Savage, the deceased, to have instituted the action that has led to this appeal. Following Mrs Savage's self-inflicted death, an inquest was held into the causes and circumstances of her death. The inquest was held in public, the investigation by the coroner into the circumstances and causes of the death was a full one – no one has suggested that it was in any respect inadequate – and the coroner's and the coroner's jury's conclusions were made public. It is accepted that these conclusions do not warrant the commencement of criminal proceedings against anyone. The jury concluded that

> "…the precautions in place [at Runwell Hospital] on 5 July 2005 to prevent Mrs Savage from absconding were inadequate"

and thereby exposed publicly the potential liability of the Hospital and its staff to the compensation remedies available in a civil court under ordinary domestic law.

3. There are two remedies under the ordinary domestic law which, following the inquest, could have been sought from the Hospital and its staff. The Hospital and its staff would, of course, have owed Mrs Savage the common law duty of care, a duty inherently flexible that imposes a standard of care dependant on the circumstances of each individual case. The jury's verdict at the inquest would have justified the commencement of an action in negligence on behalf of Mrs Savage's estate, pursuant to the Law Reform (Miscellaneous Provisions) Act 1934, to recover damages for any pain and suffering caused to Mrs Savage by the Hospital's failure to accord her the standard of care that it owed, assuming, of course, that that failure could be established in the action. The jury's verdict would have justified, also, the institution of an action under the Fatal Accidents Act 1976 on behalf of any dependants of Mrs Savage who had suffered financial loss on account of her death. Either or both of these actions, to which the NHS Trust would have been the defendant, would, if successful, have established in a court of law that the care taken of Mrs Savage at Runwell Hospital had fallen below the standard to which she had been entitled under ordinary domestic law. But her husband, Mr Savage, who, as the person presumably entitled to her estate, could have instituted an action under the 1934 Act and who may also have been a dependant of his wife for the purposes of the 1976 Act, was not willing to institute either action.

4. The respondent, being neither entitled to bring an action on behalf of her mother's estate nor having been a dependant of her mother for the purposes of the 1976 Act, would have lacked *locus standi* under domestic law to institute either action. She commenced instead an action under section 7 of the Human Rights Act 1998, based on what she alleges to have been a breach of her mother's rights under article 2(1) of the European Convention on Human Rights, incorporated into our domestic law by the 1998 Act. Article 2(1) guarantees the right to life:

> "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally …".

It is, of course, not contended by the respondent that the NHS Trust, or any of its staff at Runwell Hospital, intentionally deprived Mrs Savage of her life. It is common ground, however, that article 2(1) requires the

State not only to refrain from the intentional and unlawful taking of life (the negative obligation) but also to take appropriate steps to safeguard the lives of those within its jurisdiction (the positive obligation). And, additionally, the jurisprudence of the European Court of Human Rights (the Strasbourg court) has developed article 2(1) so as to require the State to provide an effective investigation into the circumstances of a death where agents of the State have played, or appear to have played, a part (see *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653 and the Strasbourg court cases there cited). It is accepted that the investigative duty has, in the present case, been fully discharged by the coroner's inquest. So it is a breach of the positive obligation that is relied on by the respondent. It is alleged that the article 2(1) positive obligation required the Hospital to take adequate steps to protect Mrs Savage from the risk that she would abscond and come to serious harm or harm herself and that the Hospital failed to take those steps.

5. One problem, and it seems to me a major problem, with the respondent's claim is that a claim under section 7 of the 1998 Act may only be brought by a "victim" of the unlawful act or omission relied on (sections 7(1) and (7)). I can well understand how a member of a deceased's family may be regarded as a "victim" for the purposes of the article 2(1) investigative obligation. An 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. It would follow that a close family member, such as a daughter of the deceased, could properly be regarded as a "victim" of a failure by the State to discharge its investigative obligation. But I am quite unable to understand how a close family member can claim to be a "victim" in relation to an act, in breach of the article 2(1) negative obligation, or in relation to an omission, in breach of the article 2(1) positive obligation, that had led to the death. The domestic law of a country may, as the domestic law of this country does, provide a remedy to the estate of the deceased and to the dependants of the deceased in any case where an act or omission unlawful under civil law has caused death. But I do not see it as any part of the function of article 2(1) to add to the class of persons who under ordinary domestic law can seek financial compensation for a death an undefined, and perhaps undefinable, class composed of persons close to the deceased who have suffered distress and anguish on account of the death. To do justice to the respondent, I do not imagine that her purpose in bringing the action was, or is, to obtain financial benefit for herself. She wants, I imagine, the consolation of a formal vindicatory recognition that Runwell Hospital had failed in its duty to her mother. But that recognition has already been afforded by the verdict of the coroner's jury. What vindicatory improvement is this action expected to

produce? For my part, I doubt very much the legitimacy of the respondent's prosecution of this action.

6. Be that as it may, the *locus standi* of the respondent to bring this action, which could have been a short preliminary point of law potentially dispositive of the action, is not the preliminary issue that is the subject of this appeal. The parties' have preferred to raise as a preliminary issue the determination

> "… of the following point of law …., namely the proper test in law in order to establish a breach of Article 2 of the Convention on the basis of the facts set out in the Particulars of Claim".

The provenance of this preliminary issue appears to be a perceived conflict between two lines of authority emanating from the Strasbourg court. The evident intention of the preliminary point is that the court should indicate into which line of authority the present case should be regarded as falling.

7. One line of authority relates to the death by suicide of those who were at the time of the suicide in the custody of the State. *Keenan v United Kingdom* (2001) 33 EHRR 38 was such a case. My noble and learned friend Baroness Hale has, in paragraph 81 of her opinion, dealt with Keenan and cited the Strasbourg court's formulation of the test to be applied to decide whether there had been a breach by the United Kingdom of the article 2(1) positive duty owed to Keenan. I need not repeat her citations. She has cited also (in para 82 of her opinion) *Kilinç v Turkey*, an unreported decision of the court, in which the test formulated in *Keenan* was repeated.

8. The other line of Strasbourg authority stems, particularly, from *Powell v United Kingdom* (2000) 30 EHRR CD 362, dealt with by my noble and learned friend in paragraphs 89 and 90 of her opinion. *Powell* was a case of alleged medical negligence in which a young boy had died in an NHS hospital. His parents said that his death had been caused by the negligence of the hospital and that therefore it "must be concluded that there was a breach of the State's obligation to protect life." The Strasbourg court rejected that conclusion, at p 364:

> "… it cannot accept that matters such as error of judgment on the part of a health professional or negligent co-ordination among health professionals in the treatment of a particular patient are sufficient of themselves to call a Contracting State to account from the standpoint of its positive obligations under Article 2 of the Convention to protect life."

9. *Powell*, therefore, is authority for the proposition that, in the context of care of patients in hospitals, something more will be required to establish a breach of the article 2(1) positive obligation to protect life than, simply, a failure on the part of the hospital to meet the standard of care of the patient required by the common law duty of care. *Keenan*, on the other hand, and the other "custody" cases referred to by my noble and learned friend, show that where individuals are in custody and are, or ought to be, known to pose a "real and immediate" suicide risk, the article 2(1) positive obligation requires the authorities to take "reasonable steps" to avert that risk. My Lords, I do not accept the starkness of the contrast between these two lines of authority on which the submissions that have been presented to your Lordships appear to be based. The standard of care required by our domestic law to be shown in order to discharge the common law duty of care is a flexible one dependent upon the circumstances of each individual case. The same must be true of the standard of protection required by article 2(1) to be extended by the State and State agents to individuals within the State's jurisdiction whose lives are in danger. That circumstances alter cases is as true, in my opinion, of the State's article 2(1) positive obligation as it is of the standard of care required by the common law duty.

10. Every patient who enters hospital knows that he or she may be at risk of medical error. We know that these things happen. Sometimes the error constitutes medical negligence, sometimes it does not. *Powell* shows that provided that there is no serious systemic fault and provided, in the event of death, that there is a proper investigation of the causes, a negligent medical error will not necessarily be enough to constitute a breach of the article 2(1) positive obligation. The case would, in my opinion, be no different if the patient who had died were an inmate in a prison hospital or a mentally ill patient who had been sectioned under section 3 and transferred to the hospital wing of the mental hospital on account of some medical condition. If, however, the conditions in the prison hospital or the hospital wing had been markedly inferior to those in an ordinary hospital and had contributed to the patient's death, the article 2(1) positive obligation might well be engaged.

11. As to persons known to be a suicide risk, the State has no general obligation, in my opinion, either at common law or under article 2(1), to place obstacles in the way of persons desirous of taking their own life. The positive obligation under section 2(1) to protect life could not, for example, justify the removal of passport facilities from persons proposing to travel to Switzerland with suicidal intent. Children may need to be protected from themselves, so, too, may mentally ill persons but adults in general do not. Their personal autonomy is entitled to respect subject only to whatever proportionate limitations may be placed by the law on that autonomy in the public interest. The prevention of suicide, no longer a criminal act, is not among those limitations.

12. Persons in police custody or in prison are in a different situation. Their personal autonomy has been lawfully restricted by action taken against them by the State. The restrictions imposed may, for some, bring about depression, feelings of hopelessness and thoughts of suicide. Such a state of mind, if apparent to those who have charge of the person concerned, would constitute, in my opinion, a circumstance highly relevant to the standard of protection required by the positive obligation under article 2(1). The *Keenan* test refers to a "real and immediate" risk of self-harm known, or that ought to be known, to the custodial authorities. Such a knowledge would plainly constitute a very significant circumstance.

13. Mentally ill patients detained under section 3 are in a position in some respects similar to, but in other respects very different from, the position of those in police custody or in prison. Their position is similar in that they are detained by law. Some sectioned mental patients may be content with their lot but others will not be. It appears from the number of times Mrs Savage attempted to abscond that she fell into the latter class. Their position is dissimilar in that they are detained, as Baroness Hale has said, for their protection and not as a punishment. This is a distinction that some mentally ill patients may be unable to appreciate but it has an important consequence in the attitude to these patients to be expected of the hospitals or institutions in which they find themselves. The patients will be there for their protection, not as a punishment, and, unless protection of the public from them is one of the reasons for their having been sectioned, it would behove the hospital or institution to respect their personal autonomy and to impose restrictions on them to the minimum extent of strictness consistent with the need to protect them from themselves. Runwell Hospital could have kept Mrs Savage in a locked ward, instead of an open acute ward, could have subjected her to checks on her whereabouts every 15 minutes instead of the 30 minute checks that were prescribed at the time of her fatal absconding on 5 July

2004, and, no doubt, could have imposed other restrictions that would have made it virtually impossible for her to abscond. However the hospital were, in my opinion, entitled, and perhaps bound, to allow Mrs Savage a degree of unsupervised freedom that did carry with it some risk that she might succeed in absconding. They were entitled to place a value on her quality of life in the Hospital and accord a degree of respect to her personal autonomy above that to which prisoners in custody could expect.

14. The question whether there was on 5 July 2000 a "real and immediate" risk of Mrs Savage committing suicide that was known, or ought to have been known, to the Hospital must be decided at a trial. The hurdle is a stiff one particularly in the absence of evidence of any previous suicide attempt by Mrs Savage. If there was such a risk, the question whether the "reasonable steps" that the Hospital should have taken to protect her included placing further restrictions on her freedom and personal autonomy than were in place on 5 July must be decided at a trial. So, too, must be the question whether the respondent has *locus standi* to maintain this action. I would dismiss this appeal.

LORD RODGER OF EARLSFERRY

My Lords,

15. In July 2004 Mrs Carol Savage, who was suffering from paranoid schizophrenia, absconded from Runwell Hospital where she was being treated as a detained patient in an open acute psychiatric ward. She walked two miles to Wickford Station and there committed suicide by throwing herself in front of a train. Her husband has raised no action in respect of her death, but her adult daughter, Anna Savage, has brought the present proceedings alleging that the South Essex Partnership NHS Foundation Trust violated Mrs Savage's article 2 Convention right to life by allowing her to escape from the hospital and kill herself. The claimant says that as a result of her mother's death she suffered distress, anxiety, vexation, bereavement, loss and damage. She claims just satisfaction for the violation of article 2, including damages. She also alleges that the Trust breached her article 8 Convention right – but, for present purposes, no separate issue arises under that article.

16. The Trust successfully applied to Swift J for a question of law to be determined as a preliminary issue. The question related to the proper test for establishing a breach of article 2 of the Convention on the basis of the facts set out in the particulars of claim. The Trust, with the support of the Secretary of State, contended that the extent of the obligations of health authorities to protect a patient's life in a case like the present is to be found in the decision of the European Court in *Powell v United Kingdom* (2000) 30 EHRR CD362. The claimant argued, on the basis of *Osman v United Kingdom* (1998) 29 EHRR 245, that a duty to take steps to prevent a particular patient from committing suicide arises if the authorities know or ought to know that there is a real and immediate risk of her doing so. Swift J accepted the argument for the Trust and struck out the action. The Court of Appeal (Sir Anthony Clarke MR, Waller and Sedley LJJ) allowed the claimant's appeal and ordered a trial. The Trust appeals to this House.

17. The appeal must fail. The fundamental error in the approach of the Trust and the Secretary of State is to conceive of *Powell* and *Osman* as laying down two mutually exclusive approaches, only the first of which could ever apply to the acts and omissions of medical staff. The case law of the European Court contains not a hint of such an approach. On the contrary, the principles represented by *Powell* and *Osman* relate to different aspects of the article 2 obligations of health authorities and their staff to protect life. The obligations are not alternative but complementary. In order to explain the position in relation to detained patients, I must look at a variety of other situations where obligations under article 2 arise. Nothing I say is intended to have any application to the article 2 procedural obligation, which the House has examined in a number of cases, including, most recently, *R (L) v Secretary of State for Justice* [2008] UKHL 68.

The Positive Obligations to Protect Life

18. Article 2 declares that "Everyone's right to life shall be protected by law." In the 1980s, principally in a line of cases arising out of the violence in Northern Ireland, the Commission recognised that article 2 could give rise to positive obligations on the part of a State to protect life. But this did not mean that a positive obligation to exclude all possible violence could be deduced from the article. See, for example, *W v UK* (application no 9348/81) (1983) 32 DR 190, 200, para 12; DJ Harris, M O'Boyle, C Warbrick, *Law of the European Convention on Human Rights* (1995), p 39.

19. Fundamentally, article 2 requires a State to have in place a structure of laws which will help to protect life. In *Osman v United Kingdom* 29 EHRR 245, 305, para 115, the European Court identified the "primary duty" of a State under the article as being:

> "to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions."

But, as the parties in *Osman* recognised, the State's duty goes further, and article 2:

> "may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual."

20. As support for this interpretation of article 2, the Court referred to its earlier decision in *LCB v United Kingdom* (1998) 27 EHRR 212. The applicant's father had been present on Christmas Island during the British nuclear tests in 1957 and 1958. In 1970 she was diagnosed as suffering from a particular form of leukaemia. She claimed that, by reason of the positive obligation under article 2 to protect her life, the United Kingdom authorities had been under an obligation to warn her parents of the risks associated with her father's exposure to radiation and to monitor her health. The Court held that the applicant had not proved that her father had actually been exposed to radiation, but nevertheless considered the position as if he had been.

21. The Court identified the issue as being "whether, given the circumstances of the case, the State did all that could have been required of it to prevent the applicant's life from being avoidably put at risk": 27 EHRR 212, 228, para 36. The Court's answer, at p 229, para 38, was that:

> "the State could only have been required *of its own motion* to take these steps [i e provide advice to her parents and monitor her health] in relation to the applicant if it had appeared likely at that time that any such exposure of her father to radiation might have engendered a real risk to her health" (emphasis added).

Having reviewed the evidence, at p 229, para 41, the Court did not find it established that:

> "given the information available to the State at the relevant time concerning the likelihood of the applicant's father having been exposed to dangerous levels of radiation and of this having created a risk to her health, it could have been expected to act *of its own motion* to notify her parents of these matters or to take any other special action in relation to her" (emphasis added).

22. The Court proceeded on the basis that article 2 imposed on the United Kingdom authorities a general obligation to take appropriate steps to protect the lives of those within their jurisdiction. But the applicant was asserting that they had been obliged, of their own motion, to do something specific in respect of her, viz to warn her parents and monitor her health. The problem was that she was just one of millions of people within the jurisdiction of the United Kingdom. Resources are finite. The authorities could not have been expected to monitor the health of each and every individual. How to choose? The Court held that the authorities would have been under this special obligation, of their own motion to advise the applicant's parents and to monitor her health, if it had appeared likely that any exposure of her father to radiation might have engendered "a real risk" to her health. The trigger for the obligation would have been the authorities' awareness of the "real risk". On the facts, the Court held that the obligation had not been triggered in respect of the applicant. In view of the Trust's argument in the present case, it is worth noticing, however, that the decision in *LCB* suggests that, if triggered, the duty would have applied to the medical authorities, just as much as to any other public authorities.

23. In *Osman v United Kingdom* there was, of course, no doubt that the police authority was under a general duty to protect the lives of people in its area. This duty could be derived from the State's primary duty under article 2 to have in place law enforcement machinery for the

prevention, suppression and "sanctioning" of breaches of the criminal law. But, as in *LCB*, the applicant was claiming that the police had been obliged, of their own motion, to take special measures in respect of himself and his father. What the European Court had to identify were the circumstances in which police authorities, though faced with a multitude of calls on their time and resources, would come under an obligation to single out particular individuals and take special measures to protect them from some threat to their lives.

24. Drawing on *LCB v United Kingdom*, the Court held, 29 EHRR 245, 305-306, para 116, that an "operational" obligation to take these measures would be triggered if there were a "real and immediate risk" to the life of particular individuals:

> "In the opinion of the Court where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their above-mentioned duty to prevent and suppress offences against the person, it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual 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. The Court does not accept the Government's view that the failure to perceive the risk to life in the circumstances known at the time or to take preventive measures to avoid that risk must be tantamount to gross negligence or wilful disregard of the duty to protect life. Such a rigid standard must be considered to be incompatible with the requirements of Article 1 of the Convention and the obligations of Contracting States under that Article to secure the practical and effective protection of the rights and freedoms laid down therein, including Article 2. For the Court, and having regard to the nature of the right protected by Article 2, a right fundamental in the scheme of the Convention, it is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge. This is a question which can only be answered in the light of all the circumstances of any particular case" (internal citations omitted).

In brief, the obligation to take additional steps to protect the lives of particular individuals arises when the police authorities - who are, admittedly, under a general duty in terms of article 2 to protect life - know or ought to know of a "real and immediate" risk to the individuals' lives from the criminal acts of third parties.

Duty to Protect against Suicide: Prisoners

25. In this country attempted suicide is not a crime. No one suggests that the United Kingdom is, on that account, in breach of its article 2 obligation to protect everyone's right to life. So the primary article 2 duty to have in place and enforce criminal law sanctions to deter threats to life cannot be the source of any obligation on the part of the United Kingdom authorities to take appropriate steps to protect people from the threat to their lives posed by their own desire to commit suicide. And, of course, under the domestic law of the United Kingdom there is no general legal duty on the State to prevent everyone within its jurisdiction from committing suicide. If the position were otherwise, town and countryside might have to be littered with fences, guard rails, netting and so forth to try to thwart attempts at suicide, especially at favourite suicide spots such as Beachy Head and Salisbury Crags. Police forces might also have to be increased to keep a routine lookout for potential suicides. The loss of amenity and the intrusion into people's lives would be equally unwelcome.

26. Nevertheless, the European Court has recognised that, in certain circumstances, the State's duty under article 2 does indeed include a duty to take steps to prevent people from killing themselves. The Court first adopted that interpretation of article 2 in *Keenan v United Kingdom* (2001) 33 EHRR 913, a case involving a young man who had committed suicide while in custody in Exeter prison. The obligations on the prison authorities which the Court identified were adaptations of the obligations which it had expounded in *Osman*, starting with a high-level general duty and working down to an operational duty.

27. Given that there was no obligation on a State under article 2 to take specific steps to prevent suicides in the population at large and given that there was also no question of preventing the commission of a crime, the European Court had to identify some other basis for holding that article 2 imposed these obligations, both general and operational, to prevent suicides among prisoners. The Court found the requisite basis in its previous - very brief - holding in *Salman v Turkey* (application no

21986/93) 27 June 2000, para 99, that "Persons in custody are in a vulnerable position and the authorities are under a duty to protect them." Referring back to that passage, the Court said in *Keenan* 33 EHRR 913, 958, paras 90-91:

> "90. In the context of prisoners, the Court has already emphasised in previous cases that persons in custody are in a vulnerable position and that the authorities are under a duty to protect them. It is incumbent on the State to account for any injuries suffered in custody, which obligation is particularly stringent where that individual dies. It may be noted that this need for scrutiny is acknowledged in the domestic law of England and Wales, where inquests are automatically held concerning the deaths of persons in prison and where the domestic courts have imposed a duty of care on the prison authorities in respect of those in their custody.
>
> 91. The Government have argued that special considerations arise where a person takes his own life, due to the principles of dignity and autonomy which should prohibit any oppressive removal of a person's freedom of choice and action. The Court has recognised that restraints will inevitably be placed on the preventive measures taken by the authorities, for example in the context of police action, by the guarantees of Articles 5 and 8 of the Convention. The prison authorities, similarly, must discharge their duties in a manner compatible with the rights and freedoms of the individual concerned. There are general measures and precautions which will be available to diminish the opportunities for self-harm, without infringing on personal autonomy. Whether any more stringent measures are necessary in respect of a prisoner and whether it is reasonable to apply them will depend on the circumstances of the case."

28. When the Court said that prisoners are in a vulnerable position, it was only stating the obvious: unable to get away, they are vulnerable to being assaulted or even murdered by a fellow inmate (e g, *Edwards v United Kingdom* (2002) 35 EHRR 487), to being bullied, to being blackmailed, to being subjected to sexual abuse etc. Usually, the danger will come from other prisoners but, sometimes, it will be from rogue prison officers. The situation is aggravated by the fact that many

prisoners suffer from some form of mental disorder which may affect their ability to look after themselves. Moreover, while the prison authorities are not obliged to regard all prisoners as potential suicide risks (*Younger v United Kingdom* (2003) 36 EHRR CD252, 268), the risk of suicide is known to be higher among prisoners than among the equivalent population at large. Indeed in *Tanribilir v Turkey* (application no 21422/93) 16 November 2000, the European Court went further and indicated, at para 74, that, by its very nature, any deprivation of physical liberty carries with it a risk of suicide, against which the authorities must take general precautions:

> "La Cour rappelle que toute privation de liberté physique peut entraîner, de par sa nature, des bouleversements psychiques chez les détenus et, par conséquent, des risques de suicide. Les systèmes de détention prévoient des mesures afin d'éviter de tels risques pour la vie des détenus, comme le dépôt des objets coupants, de la ceinture ou des lacets."

The Court repeated this passage in *Akdoğdu v Turkey* (application no 46747/99) 18 October 2005, para 47.

29. Therefore, the duty of prison authorities to take steps to prevent suicides derives from their wider duty to protect prisoners who are in a vulnerable position and for whom they are responsible.

30. Although, in para 88 of its judgment in *Keenan* 33 EHRR 913, the European Court recites the high-level general duty of the State to put in place effective criminal law sanctions to deter the commission of offences against prisoners, this is really just part of the tralatician jurisprudence of the Court on positive obligations under article 2. It actually has little or no relevance to cases of suicide. More relevantly, there is a lower-level, but still general, duty on a State to take appropriate measures to secure the health and well-being of prisoners. Cf *Slimani v France* (2004) 43 EHRR 1068, 1080, para 25, quoted at para 19 below. Indeed, in England, section 249(1) of the National Health Service Act 2006 requires the relevant NHS bodies and the prison service to co-operate with a view to securing and maintaining the good health of prisoners. So far as the risk of suicide itself is concerned, under article 2 there is a general duty on the prison authorities to take measures and precautions which can diminish the opportunities for self-harm, without infringing the prisoners' personal autonomy: *Keenan*, 33

EHRR 913, 958, para 91; *Renolde v France* (application no 5608/05) 16 October 2008, para 83. The practical example of that duty given in *Tanribilir*, para 74, and *Akdoğdu*, para 47, is removing things, such as sharp objects, belts or laces, which prisoners could use to harm themselves. A rather more elaborate general precaution of this kind is the wire netting which, for well over a century, has been stretched between the first floor landings of traditional British prisons to catch prisoners who might try to commit suicide by jumping from an upper landing.

31. If the authorities failed to put in place appropriate general measures to prevent suicides among the prisoners in a particular prison and, as a result, a prisoner was able to commit suicide, there would be a breach of article 2. If, on the other hand, the authorities had employed properly trained staff and taken all the relevant general precautions, but a prisoner none the less succeeded in committing suicide because of the casual negligence of a member of the prison staff, the prison authorities would be vicariously liable for that negligence, but there would be no violation of article 2.

32. The last sentence in para 91 of the European Court's judgment in *Keenan* envisaged that more stringent measures in respect of a prisoner might be necessary and appropriate, depending on the circumstances. The Court went on, 33 EHRR 913, 958, para 92, to identify the ultimate question in that case as being:

> "whether the authorities knew or ought to have known that Mark Keenan posed a real and immediate risk of suicide and, if so, whether they did all that reasonably could have been expected of them to prevent that risk."

This describes the separate "operational" obligation on the prison authorities to take specific steps, of their own accord, to prevent the suicide of a particular prisoner when there is a "real and immediate" risk of that happening. Even if the authorities had fulfilled all their other obligations, their failure to fulfil this obligation would have been liable to result in a violation of article 2. The influence of *Osman* is plain.

Duty to Protect Other Detainees

33. The European Court has applied the same general approach in relation to people who are in some other form of detention. In *Slimani v France* 43 EHRR 1068, a Tunisian, who had been committed to a psychiatric hospital on several occasions, died while he was being detained in an administrative detention centre to await deportation from France. The applicant complained that there had been a violation of article 2 on two grounds: the detention centre had not been equipped with the necessary medical facilities and the doctors had failed to administer the appropriate treatment. The substantive complaint was rejected on the ground of non-exhaustion of the available domestic remedies. In outlining the general principles, however, the European Court made the familiar point that article 2 obliged a State to take appropriate steps to safeguard the lives of those within its jurisdiction and added, at p 1079, para 24:

> "The obligations on Contracting States take on a particular dimension where detainees are concerned since detainees are entirely under the control of the authorities. In view of their vulnerability, the authorities are under a duty to protect them."

The Court went on to say, at p 1080, para 25, that:

> "besides the health of prisoners, their well-being also has to be adequately secured, given the practical demands of imprisonment. In this context account has to be taken of the particular vulnerability of mentally ill persons. These guarantees must, by analogy, benefit other persons deprived of their liberty, such as persons placed in administrative detention."

The Court has returned to address the vulnerability of persons suffering from mental illness in other judgments, such as *Rivière v France* (application no 33834/03) 11 July 2006, para 63, and *Renolde v France* (application no 5608/05) 16 October 2008, para 84.

Duty to Protect against Suicide: Conscripts

34. The European Court has recognised that a somewhat similar duty to take steps to prevent suicide arises when a State conscripts young people into its armed forces. The duty was first given effect in the Court's short admissibility decision in *Álvarez Ramón v Spain* (application no 51192/99) 3 July 2001. The applicant's son hanged himself while doing his national service. The European Court recognised that article 2 required an independent investigation to be held in a case, like the one before it, where agents of the State might possibly be held responsible ("où les agents de l'Etat peuvent éventuellement être considérés comme responsables"). The court did not explain further why the military authorities might have been under this article 2 duty to take steps to prevent the conscript's suicide.

35. Despite this, in *Kılınç v Turkey* (application no 40145/98) 7 June 2005, para 41, the Court simply referred to *Álvarez Ramón* as showing that it was "incontestable" (sans conteste) that the duty to prevent suicides applied in the case of conscripts:

> "Cette obligation, qui vaut sans conteste dans le domaine du service militaire obligatoire, implique avant tout pour les Etats le devoir primordial de mettre en place un cadre législatif et administratif visant une prévention efficace. S'agissant du domaine spécifique en cause, ce cadre doit de plus réserver une place singulière à une réglementation adaptée au niveau du risque qui pourrait en résulter pour la vie non seulement du fait de la nature de certaines activités et missions militaires mais également en raison de l'élément humain qui entre en jeu lorsqu'un Etat décide d'appeler sous les drapeaux de simples citoyens.
>
> Pareille réglementation doit exiger l'adoption de mesures d'ordre pratique visant la protection effective des appelés qui pourraient se voir exposés aux dangers inhérents à la vie militaire et prévoir des procédures adéquates permettant de déterminer les défaillances ainsi que les fautes qui pourraient être commises en la matière par les responsables à différents échelons" (internal citations omitted).

36. Again, this judgment makes it clear that the relevant authorities have two general obligations under article 2. The first is to put in place a

legislative and administrative framework which will make for the effective prevention of suicides. The second is to ensure that practical measures are adopted ("l'adoption de mesures d'ordre pratique") to protect conscripts who could be exposed to the dangers inherent in military life.

37. To judge from the rest of para 41 of the judgment, for the Court, there appear to be two particular factors which create the (increased) risk of suicide among conscripts, which in turn means that article 2 requires the State to guard against that risk. First, there is the nature of some of the military activities and assignments in which the recruits will have to engage. Secondly, there is the "human element" which comes into play when a State calls up ordinary citizens. The reference to the nature of the military activities and assignments is a little unclear, but the Court may have had in mind, for instance, the situation of conscripts who have to participate in stressful anti-terrorist operations. In the later case of *Ataman v Turkey* (application no 46252/99) 27 April 2006, para 56, the Court referred to the need to supervise soldiers to whom weapons were entrusted and to prevent suicides. Since the carrying of weapons was involved, the authorities could be expected to show particular diligence and adopt a suitable system for dealing with the matter in the case of soldiers with psychological problems.

38. In *Kılınç v Turkey* the Court found that the conscript's death had been caused by the failure to establish proper systems. So the question of the operational obligation to deal with an immediate and real risk of suicide did not arise. But in *Ataman v Turkey*, para 54, under reference to *Tanribilir v Turkey*, para 70, the Court held that this operational obligation would indeed apply in the case of conscripts:

> "La Cour estime également que l'article 2 peut, dans certaines circonstances bien définies, mettre à la charge des autorités l'obligation positive de prendre préventivement des mesures d'ordre pratique pour protéger l'individu contre autrui ou, dans certaines circonstances particulières, contre lui-même" (citation omitted).

The Court went on to hold that the authorities had failed to fulfil this operational obligation in the case of Mr Ataman.

The Nature of the Duties

39. The cases on prisoners and conscripts suggest that the Court sees article 2 as imposing an obligation on the State to take appropriate practical measures to prevent them committing suicide because they are under the control of the State and placed in situations where, as experience shows, there is a heightened risk of suicide. Since, in other respects, the predicaments of the 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 the conscripts.

40. Article 2 requires the State to ensure that there is a legislative and administrative framework which will make for the effective prevention of suicides. The general practical precautions which article 2 requires the responsible authorities to put in place depend on the nature of the two operations - for example, removing belts etc from prisoners and keeping an eye on conscripts when they are given weapons. But, by the time the prison or military authorities are faced with the stark reality that one of their charges poses a real and immediate risk of suicide, the anterior reasons for imposing on the authorities the obligations (including the operational obligation) to try to prevent suicides lie very much in the background. In both situations the pressing practical problem for the authorities is essentially the same. So, too, is the operational duty: the authorities must do what can reasonably be expected of them in the circumstances to prevent the suicide.

41. The operational duty itself is not particularly stringent. But this House has been at pains to stress that the threshold (real and immediate risk to life) for triggering the duty is high: *In re Officer L* [2007] 1 WLR 2135, 2143H, para 20, per Lord Carswell. In *Van Colle v Chief Constable of the Hertfordshire Police* [2008] 3 WLR 593, the House endorsed Lord Carswell's approach, Lord Hope of Craighead commenting, at p 617H, para 66, that he read "his words as amounting to no more than a comment on the nature of the test which the Strasbourg court has laid down, not as a qualification or a gloss upon it."

42. It is indeed precisely because there is a "real and immediate" risk to life that article 2 is interpreted as imposing this operational duty which focuses on preventing the suicide. Of course, a duty on the authorities to do what can reasonably be expected of them allows for

competing considerations, such as the welfare of other prisoners and conscripts, or the demands of prison security or the military situation at the time, to be taken into account. And the need to respect the autonomy of prisoners remains. Nevertheless, so far as the individual prisoner or conscript is concerned, the immediacy of the danger to life means that, for the time being, there is, in practice, little room for considering other, more general, matters concerning his treatment. There will be time enough for them, if and when the danger to life has been overcome. In the meantime, the authorities' duty is to try to prevent the suicide.

43. I can now turn to the position in the present case where, at the time of her death, Mrs Savage was detained under section 3 of the Mental Health Act 1983. So far as relevant for present purposes, that section authorises admission to a hospital, and detention there, on the ground that the patient is suffering from mental illness of a nature or degree which makes it appropriate for her to receive medical treatment in a hospital and it is necessary for the health or safety of the patient that she should receive such treatment and it cannot be provided unless she is detained under the section. What obligations does article 2 impose on the State authorities in such a case?

The Duty to Protect the Lives of Hospital Patients

44. Mrs Savage was a detained patient, but first and foremost she was a patient in a hospital. And it has long been recognised that a State's positive obligations under article 2 to protect life include a "requirement for hospitals to have regulations for the protection of their patients' lives." See the opinion of the Commission in *Işıltan v Turkey* (application no 20948/92) 22 May 1995, DR 81-B, p 35, which the European Court relied on, for instance, in *Calvelli and Ciglio v Italy* (application no 32967/96) 17 January 2002, para 49. When referring to the State's obligations to protect life, the Court said:

> "Those principles apply in the public-health sphere too. The aforementioned positive obligations therefore require States to make regulations compelling hospitals, whether public or private, to adopt appropriate measures for the protection of their patients' lives" (internal citations omitted).

See also *Tarariyeva v Russia* (application no 4353/03) 14 December 2006, para 74, and *Dodov v Bulgaria* (application no 59548/00) 17 January 2008, para 80.

45. These passages show that a State is under an obligation to adopt appropriate (general) measures for protecting the lives of patients in hospitals. This will involve, for example, ensuring that competent staff are recruited, that high professional standards are maintained and that suitable systems of working are put in place. If the hospital authorities have performed these obligations, casual acts of negligence by members of staff will not give rise to a breach of article 2. The European Court put the point quite shortly in *Powell v United Kingdom* 30 EHRR CD362, 364:

> "The Court accepts that it cannot be excluded that the acts and omissions of the authorities in the field of health care policy may in certain circumstances engage [the State's] responsibility under the positive limb of Article 2. However, where a Contracting State has made adequate provision for securing high professional standards among health professionals and the protection of the lives of patients, it cannot accept that matters such as error of judgment on the part of a health professional or negligent co-ordination among health professionals in the treatment of a particular patient are sufficient of themselves to call a Contracting State to account from the standpoint of its positive obligations under Article 2 of the Convention to protect life."

See also *Dodov v Bulgaria*, para 82.

The Duty to Protect the Lives of Patients suffering from Mental Illness

46. The fact that patients are suffering from mental illness is also relevant to the authorities' obligations under article 2. As can be seen from passages already referred to, the vulnerability of people suffering from mental illness, and the consequential need to protect them, are themes that run through the case law of the European Court. So, in deciding what measures should be taken to protect the lives of patients in mental hospitals, or of patients in general hospitals who are suffering from mental illness, the authorities will have to take account of the

vulnerability of these patients – including a heightened risk they may commit suicide.

47. For the United Kingdom, at least, there is nothing new in this. Leaving aside any statutory provisions which might be relevant, at common law, "as a matter of general principle a hospital is under a duty to take precautions to avoid the possibility of injury, whether self-inflicted or otherwise, occurring to patients who it knows, or ought to know, have a history of mental illness": *Thorne v Northern Group Hospital Management Committee* The Times 6 June 1964, per Edmund Davis J. Hinchcliffe J followed that approach in *Selfe v Ilford and District Hospital Management Committee* The Times 26 November 1970. In neither case was the patient a detained patient. Similarly, the duty to have appropriate systems in place in case women in a maternity ward developed a mental illness and tried to harm themselves was assumed by Lord Cameron in *McHardy v Dundee General Hospitals' Board of Management* 1960 SLT (Notes) 19 (unreported on this point). Again, Mrs McHardy was not a detained patient.

48. Accordingly, if it turned out that the hospital authorities had not had in place appropriate systems, say, for preventing patients, who were known to be suffering from mental illness, from committing suicide, not only would the authorities be potentially liable under domestic law for any resulting suicide, but they would also have violated one of their positive obligations under article 2 to protect their patients' lives.

The Duty to Protect Detained Patients' Lives

49. The fact that Mrs Savage was not only a patient, but a detained patient, is also relevant to the authorities' obligations under article 2. Any auction in the comparative vulnerability of prisoners, voluntary patients, and detained patients would be as unedifying as it is unnecessary. Plainly, patients, who have been detained because their health or safety demands that they should receive treatment in the hospital, are vulnerable. They are vulnerable not only by reason of their illness which may affect their ability to look after themselves, but also because they are under the control of the hospital authorities. Like anyone else in detention, they are vulnerable to exploitation, abuse, bullying and all the other potential dangers of a closed institution. Mutatis mutandis, the principles in the case law which the European Court has developed for prisoners and administrative detainees must

apply to patients who are detained. As explained in *Herczegfalvy v Austria* (1992) 15 EHRR 437, 484, para 82:

> "The Court considers that the position of inferiority and powerlessness which is typical of patients confined in psychiatric hospitals calls for increased vigilance in reviewing whether the Convention has been complied with."

The hospital authorities are accordingly responsible for the health and well-being of their detained patients. Their obligations under article 2 include an obligation to protect those patients from self-harm and suicide. Indeed, as explained at para 28 above, the very fact that patients are detained carries with it a risk of suicide against which the hospital authorities must take general precautions: *Tanribilir v Turkey* (application no 21422/93) 16 November 2000, para 74, and *Akdoğdu v Turkey* (application no 46747/99) 18 October 2005, para 47.

50. I am accordingly satisfied that, as a public authority, the Trust was under a general obligation, by virtue of article 2, to take precautions to prevent suicides among detained patients in Runwell Hospital. So the Trust had, for example, to employ competent staff and take steps to see that they were properly trained to high professional standards. The hospital's systems of work - and, doubtless, also its plant and equipment - had to take account of the risk that detained patients might try to commit suicide. When deciding on the most appropriate treatment and therapeutic environment for detained patients, medical staff would have to take proper account of the risk of suicide. But the risk would not be the same for all patients. Those who presented a comparatively low risk could be treated in a more open environment, without the need for a high degree of supervision. Those who presented a greater risk would need to be supervised to an appropriate extent, while those presenting the highest risk would have to be supervised in a locked ward. The level of risk for any particular patient could be expected to vary with fluctuations in his or her medical condition. In deciding what precautions were appropriate for any given patient at any given moment, the doctors would take account of both the potentially adverse effect of too much supervision on the patient's condition and the possible positive benefits to be expected from a more open environment. Such decisions involve clinical judgment. Different doctors may have different views.

The Dispute in this Case

51. Things can go wrong, however. As the Trust and the Secretary of State accepted, if a member of staff negligently decided to put a detained patient into an open ward and she escaped and killed herself, in an appropriate case the member of staff would be liable in damages and the hospital authorities would be vicariously liable for his negligence. But in such a situation, as explained in *Powell v United Kingdom* 30 EHRR CD362, 364, there would be no violation of article 2 on the part of the hospital authorities since they would have performed the general obligations which the article imposed on them.

52. Mr Havers QC, for the respondent, submitted that, besides having these general obligations under article 2 to protect detained patients' lives, the hospital authorities will come under an "operational" obligation to take steps to prevent the suicide of a detained patient who, they know or ought to know, presents a real and immediate risk of suicide. The Trust and the Secretary of State contended that any such duty would have to be developed by analogy with the operational duty recognised by the Court in *Osman* and that the decision in *Powell v United Kingdom* showed that the reasoning in *Osman* is not to be applied to the care of hospital patients.

53. As part of his argument for the Trust, Mr Faulks QC submitted that, in the light of *Powell*, the European Court had been wrong in principle when it said, in *Tarariyeva v Russia* (application no 4353/03) 14 December 2006, para 74:

> "Furthermore, where a hospital is a public institution, the acts and omissions of its medical staff are capable of engaging the responsibility of the respondent State under the Convention."

That submission cannot be accepted.

54. It is obvious, for example, that articles 2 and 3 must provide protection against assaults on patients, life-threatening and otherwise, by members of staff. Moreover, the passage in *Tarariyeva v Russia*, to which Mr Faulks took exception, is simply one of several statements by the European Court to the same effect. Perhaps the clearest is actually to

be found in a sentence in *Powell v United Kingdom* (2000) 30 EHRR CD362, 364, which bears repetition:

> "The Court accepts that it cannot be excluded that the acts and omissions of the authorities in the field of health care policy may in certain circumstances engage [the State's] responsibility under the positive limb of Article 2."

See also *Glass v United Kingdom* (2003) 37 EHRR CD66, para 1, and *Kılınç v Turkey* (application no 40145/98) 7 June 2005, para 42, citing *Powell*. In *Herczegfalvy v Austria* 15 EHRR 437, where it was alleged that the applicant had been subjected to treatment by doctors which violated article 3, the Court said, at p 484, para 82:

> "While it is for the medical authorities to decide, on the basis of the recognised rules of medical science, on the therapeutic methods to be used, if necessary by force, to preserve the physical and mental health of patients who are entirely incapable of deciding for themselves and for whom they are therefore responsible, such patients nevertheless remain under the protection of Article 3, the requirements of which permit of no derogation."

The same must apply to article 2.

55. It is, of course, the case that in *Powell* the European Court rejected the attempt of the applicants to use the approach in *Osman* as a base on which to erect an operational duty which would have applied to the hospital authorities in the situation in that case. But this does not mean that the Court would also have ruled out an operational duty on the part of those authorities, in well-defined circumstances, to prevent a patient from committing suicide.

56. In *LCB v United Kingdom* 27 EHRR 212, the applicant complained of a risk to her life which, she said, had been created by the United Kingdom authorities exposing her father to radiation. In *Osman*, the complaint was of a failure to protect the applicant and his father from criminal threats to their lives coming from a specific third party. In the line of suicide cases, the complaint was of a risk to the

individual's life arising out of his desire to kill himself. In all these instances, the obligation of the public authorities to take special steps to protect the individual's life was to be triggered by a real and immediate risk arising out of some action or proposed action by the authorities, by a known third party or by the individual himself.

57. By contrast, in *Powell v United Kingdom* the applicant's son was simply suffering from Addison's disease, which had occurred naturally and from which he eventually died. The applicants did not allege that the medical authorities had failed in their general duty to make adequate provision for securing high professional standards among the medical staff concerned. So, if it had turned out that the applicants' son's treatment had been negligent, the medical staff and the relevant health authority would have been potentially liable under English domestic law - but there would have been no violation of any substantive obligation under article 2.

58. On the other hand, the applicants did allege that, if their son had been treated more promptly when Addison's disease was suspected, his life might have been saved. So they were, in effect, arguing that, when the condition was suspected, the medical authorities were faced with a real and immediate risk to the boy's life and so were under a duty, analogous to the operational duty under *Osman*, to do what they reasonably could to save his life. The European Court rejected the analogy. The doctors and other medical staff were already engaged in treating the boy and were, of course, under the general article 2 duty to protect his life. The Court did not consider that, when Addison's disease was suspected, this triggered an operational obligation on the staff concerned to do something other than treat him appropriately – which was what they were bound to do in any event.

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

60. Mr Faulks also relied on the judgment of the European Court in *Dodov v Bulgaria* (application no 59548/00) 17 January 2008, but it does not help either. The applicant's mother, who was suffering from Alzheimer's disease, was resident in a nursing home where she needed constant supervision. On the day in question, she had been left alone in

the courtyard of the home and had disappeared, never to be found, despite a search by the nursing home staff and by the police. On the facts, it appeared that there had been negligence on the part of the member of staff who had left her unattended. The applicant complained to the prosecutor's office about the conduct of the member of staff, but the criminal investigation was eventually discontinued. The prosecutor's office refused to open proceedings against the police. The applicant took civil proceedings against those who were responsible for the nursing home and against the Minister of the Interior, as the authority responsible for the police, but the proceedings dragged on and, by the time the case was heard in Strasbourg, they were still at an early stage.

61. So far as the nursing home was concerned, although the applicant criticised the relevant regulations, he appears to have done so within the context of a complaint that there had been a violation of the procedural obligation in article 2(1), since the Bulgarian legal system had not provided an adequate mechanism for holding members of staff responsible for his mother's disappearance. In dealing with that complaint, the Court, it seems, proceeded on the basis that the applicant's real complaint was that his mother's disappearance had been due to casual negligence by a member of the nursing home staff. This would not, itself, have given rise to a violation by the State authorities of any obligation under article 2.

62. The Court had, however, to see whether there had been a violation of the duty of the State under article 2 to provide civil, criminal or disciplinary mechanisms for enabling the liability of the staff to be established. Having looked into these aspects, the Court concluded that this procedural obligation had indeed been violated.

63. The focus of the complaint relating to the nursing home was on the procedural obligation. There is no indication that the applicant suggested that the disappearance of Mrs Stoyanova had been due to a violation of an operational obligation on the nursing home authorities to take steps to protect her from a real and immediate risk to her life. This is entirely understandable since she actually disappeared because the member of staff left her unsupervised. So this part of the decision says nothing about the applicability of an *Osman*-style operational obligation in an appropriate situation.

64. On the other hand, in the case of the police authorities the applicant did indeed complain that, in responding to the disappearance

of his mother, they had been in breach of just such an operational obligation. The Court did not require, however, to "determine the modalities of the application" of the *Osman* principles to situations where an individual in ill health goes missing, since it was satisfied that, on any view, the police response had been adequate: see para 101. All that can be taken from this aspect of the judgment is that the Court considered that the *Osman*-style operational obligation could apply to the police in that situation.

65. Neither *Powell* nor *Dadov* provides any basis whatever for the proposition that, as a matter of principle, medical staff in a mental hospital can never be subject to an "operational" duty under article 2 to take steps to prevent a (detained) patient from committing suicide - even if they know or ought to know that there is a real and immediate risk of her doing so. The obvious response to that proposition is: Why ever not? What else would they be supposed to do? Article 2 imposes on the hospital authorities and their staff an obligation to adopt a framework of general measures to protect detained patients from the risk of suicide. Why should they not be under the usual complementary operational obligation to try to prevent a particular suicide in the appropriate circumstances?

66. The only reason suggested by counsel was that it would conflict with the other obligations of the medical staff to their patients. That is hardly so. The operational obligation simply means that, in these critical circumstances, priority has to be given to saving the patient's life. That is only practical common sense, since nothing else can be done to assist the patient or to promote her recovery unless her life is saved. In any event, given the high threshold, a breach of the duty will be harder to establish than mere negligence - and no one disputes that, in an appropriate case, the medical authorities can be held liable for a suicide that is made possible by staff negligence. In my view, it is abundantly clear that, where there is a real and immediate risk of a patient committing suicide, article 2 imposes an operational obligation on the medical authorities to do all that can reasonably be expected of them to prevent it.

Summary

67. It may be useful to summarise the relevant obligations of health authorities like the Trust and to note the way they relate to one another.

68. In terms of article 2, health authorities are under an over-arching obligation to protect the lives of patients in their hospitals. In order to fulfil that obligation, and depending on the circumstances, they may require to fulfil a number of complementary obligations.

69. In the first place, the duty to protect the lives of patients requires health authorities to ensure that the hospitals for which they are responsible employ competent staff and that they are trained to a high professional standard. In addition, the authorities must ensure that the hospitals adopt systems of work which will protect the lives of patients. Failure to perform these general obligations may result in a violation of article 2. If, for example, a health authority fails to ensure that a hospital puts in place a proper system for supervising mentally ill patients and, as a result, a patient is able to commit suicide, the health authority will have violated the patient's right to life under article 2.

70. Even though a health authority employed competent staff and ensured that they were trained to a high professional standard, a doctor, for example, might still treat a patient negligently and the patient might die as a result. In that situation, there would be no violation of article 2 since the health authority would have done all that the article required of it to protect the patient's life. Nevertheless, the doctor would be personally liable in damages for the death and the health authority would be vicariously liable for her negligence. This is the situation envisaged by *Powell*.

71. The same approach would apply if a mental hospital had established an appropriate system for supervising patients and all that happened was that, on a particular occasion, a nurse negligently left his post and a patient took the opportunity to commit suicide. There would be no violation of any obligation under article 2, since the health authority would have done all that the article required of it. But, again, the nurse would be personally liable in damages for the death and the health authority would be vicariously liable too. Again, this is just an application of *Powell*.

72. Finally, article 2 imposes a further "operational" obligation on health authorities and their hospital staff. This obligation is distinct from, and additional to, the authorities' more general obligations. The operational obligation arises only if members of staff know or ought to know that a particular patient presents a "real and immediate" risk of suicide. In these circumstances article 2 requires them to do all that can

reasonably be expected to prevent the patient from committing suicide. If they fail to do this, not only will they and the health authorities be liable in negligence, but there will also be a violation of the operational obligation under article 2 to protect the patient's life. This is comparable to the position in *Osman* and *Keenan*. As the present case shows, if no other remedy is available, proceedings for an alleged breach of the obligation can be taken under the Human Rights Act 1998.

Disposal

73. For these reasons, and in agreement with Baroness Hale of Richmond, I would dismiss the appeal. It will be for the trial judge to apply the law to the facts as established by the evidence.

LORD WALKER OF GESTINGTHORPE

My Lords,

74. I have had the great advantage of reading in draft the opinions of my noble and learned friends Lord Rodger of Earlsferry and Baroness Hale of Richmond. I agree with them, and for the reasons which they give I would dismiss this appeal.

BARONESS HALE OF RICHMOND

My Lords,

75. On 5 July 2004, Mrs Carol Savage walked out of the hospital to which she had been compulsorily admitted under section 3 of the Mental Health Act 1983 over three months earlier. She walked about two miles to a railway station and jumped in front of a train which killed her. An inquest jury concluded that she had killed herself while suffering from paranoid schizophrenia. They also considered that the precautions taken to prevent her from absconding from the hospital were inadequate. Her husband was so distraught at this tragedy that he could not contemplate taking proceedings for negligence either on his own behalf or on behalf

of his wife's estate. Her daughter has brought these proceedings under the Human Rights Act 1998 alleging that the hospital has violated her mother's right to life under article 2 of the European Convention on Human Rights. For the purpose of the preliminary issue before us, it is not suggested that Miss Savage is not a victim within the meaning of the Convention. Nor is it necessary for us to say anything more about the very distressing facts of the case as these will be thoroughly explored if the case goes for trial.

76. The issue before us is the scope of the state's obligation to protect life under article 2.1. The material part of article 2.1 reads as follows: "Everyone's right to life shall be protected by law. No-one shall be deprived of his life intentionally . . ." It is now well established that this imposes three different duties upon the state. The first is the negative duty to refrain from taking life, save in the exceptional circumstances catered for by article 2.2. It is not suggested that this duty was broken in this case. The second is an implied positive duty properly and openly to investigate deaths for which the state might bear some responsibility. There is not much point in prohibiting police and prison officers, for example, from taking life if there is no independent investigation of how a person in their charge came by her death. It is not disputed that this obligation applies in this case, but it is not suggested that it was broken. There has been a proper investigation. The third duty goes further than this. The state must not only refrain from taking life but also take positive steps to protect the lives of those within its jurisdiction. This case is about the scope of this last obligation. In particular, when does it extend beyond the primary duty, to have proper systems in place for protecting life, into an operational duty to protect this particular life? This issue has been very little explored in our domestic case law to date, most of which has been concerned with the nature and scope of the duty to investigate (see, eg, *R (Amin) v Secretary of State for the Home Department* [2003] UKHL 51, [2004] 1 AC 653; *R (Middleton) v West Somerset Coroner* [2004] UKHL 10, [2004] 2 AC 182; *R (Sacker) v West Yorkshire Coroner* [2004] UKHL 11, [2004] 1 WLR 796; *R (Goodson) v Bedfordshire and Luton Coroner* [2004] EWHC 2931 (Admin), [2006] 1 WLR 432; *R (Takoushis) v Inner North London Coroner* [2005] EWCA Civ 1440, [2006] 1 WLR 461).

77. The principal component of the duty to protect life is the duty to have an effective system of criminal law to deter people from taking other people's lives and to punish those who do. But it goes further than that. As the European Court of Human Rights put it in *Osman v United Kingdom* (1998) 29 EHRR 245, para 115:

> "It is common ground that the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions."

It was accepted by the parties in *Osman* that article 2:

> ". . . may also imply in certain well defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual."

78. The question was how far that positive protective obligation went. The Court took into account "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" (para 116). Not every claimed risk to life entailed a duty to prevent its materialising. The police had also to exercise their powers in a way which fully respected due process and other guarantees contained in the Convention. Hence the Court defined the level of risk which would trigger the obligation in this way, at para 116:

> ". . . it must be established . . . that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party . . . "

It has been said that this criterion "is not readily satisfied: in other words, the threshold is high": see *Re Officer L* [2007] UKHL 36, [2007] 1 WLR 2135, para 20, per Lord Carswell. But this is a comment, not an additional test. As Lord Bingham of Cornhill observed in *Van Colle v Chief Constable of the Hertfordshire Police* [2008] UKHL 50, [2008] 3 WLR 593, para 30, " . . . the test formulated by the Strasbourg court in *Osman* and cited on many occasions since is clear and calls for no judicial exegesis".

79. Having identified the trigger, the European Court went on to express the protective obligation like this, also in para 116:

> ". . . that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk."

After rejecting as too rigid the Government's argument that the failure "must be tantamount to gross negligence or wilful disregard of the duty to protect life" the Court summed up the situation thus, still in para 116:

> ". . . it is sufficient for an applicant to show that the authorities did not do all that could reasonably be expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge."

For reasons which will appear, if there is any difference between the Court's two formulations of the duty, in my view this latter statement is more apposite to the sort of tragedy we have in this case.

80. In both the *Osman* and *Van Colle* cases, the complaint was that the police had not protected the deceased from a murderous attack. After a close examination of the events leading up to the fatal shooting of Mr Ali Osman and the wounding of his son Ahmet by Mr Paget-Lewis, a teacher who had become obsessed with Ahmet, the European Court concluded that "the applicants have failed to point to any decisive stage. . . when it could be said that the police knew or ought to have known that the lives of the Osman family were at real and immediate risk from Paget-Lewis" (para 121). Nor could it be said that the missed opportunities to neutralise that threat would in fact have succeeded in doing so. In *Van Colle*, this House also decided that it could not reasonably have been concluded from the information available to the police that there was a real and immediate risk to the life of the deceased. In other words, in both cases, the threshold was not crossed.

81. The *Osman* principle covers more than the protection of individuals from attack by third parties. In certain circumstances it extends to the protection of individuals from harming themselves. In *Keenan v United Kingdom* (2001) 33 EHRR 913, a mentally ill young man hanged himself while serving a sentence of imprisonment. The

European Court had to consider to what extent the *Osman* principle applied where the risk to a person derived from self harm (para 89) and concluded, at para 90:

> "In the context of prisoners, the Court has had previous occasion to emphasise that persons in custody are in a vulnerable position and that the authorities are under a duty to protect them. It is incumbent on the State to account for any injuries suffered in custody, which obligation is particularly stringent where that individual dies" (the footnote refers to *Salman v Turkey*, Comm. Rep. 1.3.99, para 99).

The investigative obligation clearly applies. But the Court went further, at para 91:

> "The Government has argued that special considerations arise where a person takes his own life, due to the principles of dignity and autonomy which should prohibit any oppressive removal of a person's freedom of choice and action. The Court has recognised that restraints will inevitably be placed on the preventive measures by the authorities by, for example in the context of police action, the guarantees of article 5 and 8 of the Convention. The prison authorities, similarly, must discharge their duties in a manner compatible with the rights and freedoms of the individual concerned. There are general measures and precautions which will be available to diminish the opportunities for self harm, without infringing personal autonomy. Whether any more stringent measures are necessary in respect of a prisoner and whether it is reasonable to apply them will depend upon the circumstances of the case."

So the Court went on to pose the following test for itself at para 92:

> "whether the authorities knew or ought to have known that Mark Keenan posed a real and immediate risk of suicide and, if so, whether they did all that reasonably could have been expected of them to prevent that risk."

Having examined the facts in some detail, the Court concluded that the risk was real but that it was not immediate throughout his detention. Careful monitoring to detect deterioration was required (para 95). On the whole, however, the authorities' response to his conduct was reasonable. There was nothing to alert them on the day that he was in a disturbed state of mind rendering an attempt at suicide likely (para 98). So the Court found no breach of article 2, although it later went on to find that there had been a breach of article 3. In the course of doing so, it pointed out that "the authorities are under an obligation to protect the health of persons deprived of liberty" (para 110).

82. The extension of the *Osman* principle to self harm by people for whose welfare the state is responsible has since been applied to military conscripts who kill themselves. In *Kilinç v Turkey*, unreported, app no 40145/98, judgment of 7 June 2005, a mentally disordered young man who was doing his compulsory military service was placed on guard duty with a loaded gun and killed himself with it. The Court repeated the *Osman* principle, at para 43:

> "In the present case, faced with the allegation whereby the military authorities failed in their positive obligation to protect the right to life of Mr Kilinç, the Court must examine, according to its constant jurisprudence, whether the military authorities knew or ought to have known that there was a real and immediate risk that he would commit suicide and, if so, whether they had done everything that could reasonably be expected of them to prevent that risk." (*Unofficial translation*)

Although the references are to *Tanribilir v Turkey*, app no 21422/93, judgment of 16 November 2000, para 72, and to *Keenan*, para 92, rather than to *Osman* itself, the court was clearly applying the *Osman* principle in the context of self harm.

83. The Court then concluded that the authorities should have known that Mr Kilinç might commit suicide (para 49). They had not done all that could reasonably be expected of them to prevent the risk. The existing regulatory framework had failed in the case of the military medical authorities who had not properly assessed and followed up his mental state, thus creating uncertainty as to what sort of tasks he could be given (para 56). There was no regulatory framework governing the

supervision of conscripts who suffered from mental illness, thus leading the commander to put him on guard duty and give him a gun, even though it was not clear that he was fit to do it (para 54).

84. To same effect was the Court's decision in *Ataman v Turkey*, unreported, app no 46252/99, judgment of 27 April 2006. Particular diligence was expected when dealing with mentally ill conscripts and the state had not taken the obvious step of preventing the deceased having access to deadly firearms (para 61).

85. The *Osman* principle has also been extended to the health care given to prisoners and other detainees. In *Slimani v France* (2004) 43 EHRR 1068, it was held that the duty to protect the health and well-being of people deprived of their liberty and to account for deaths and injuries in custody applies to administrative detainees as well as to ordinary prisoners. The deceased had been detained pending deportation but had died as a result of a serious breakdown in the medical services available at the detention centre. The complaint that the authorities had failed in their positive obligation to protect the life of the deceased was rejected because the applicant had not exhausted all her domestic remedies. So we do not know what, if anything, the Court would have made of it. But the complaint that she had been excluded from the inquest succeeded. The Court concluded its account of the general principles as follows, at p 1080:

> "As a general rule, the mere fact that an individual dies in suspicious circumstances while in custody should raise an issue as to whether the State has complied with its obligation to protect that person's right to life".

This does suggest that the Court would have been willing to look at individual as well as systemic failures.

86. The complaint that the authorities had failed in their duty to protect a prisoner's life succeeded in *Tarariyeva v Russia*, unreported, app no 4353/03, judgment of 14 December 2006. The authorities had him in their custody for two years and knew all about his health problems. But he was not properly examined and treated in the penal colony to which he was sent. When he presented with acute pain, he was diagnosed with a perforated ulcer and peritonitis and promptly transferred to a civilian hospital. The surgery performed there was

defective. The civilian hospital authorised his discharge to the prison hospital knowing of post-operative complications requiring further surgery. They withheld crucial details of this from the prison. So the prison hospital treated him as an ordinary post-operative patient rather than an emergency case. The further surgery was performed too late and the patient died. This is an example of the Court examining the individual operational failings of the health care given to prisoners, and not simply whether there were proper systems in place. There has been an even more recent example in *Renolde v France*, unreported, (Application No 5608/05), judgment of 16 October 2008.

87. In the light of all this, Mr Philip Havers QC, who appears for Miss Savage, argues that it is but a small step to extend the *Osman* principle to a mentally ill person who commits suicide while compulsorily detained in hospital under the Mental Health Act 1983. Ms Dinah Rose QC, who appears for the interveners, Inquest, Justice, Liberty and Mind, argues that this is not an extension at all. The principle which applies to mentally ill people in prison must apply *a fortiori* to mentally ill people detained in hospital. They are in an even more vulnerable position than prisoners, because they have not only been deprived of their liberty but are more completely under the control of the hospital authorities, not least because they can be given most forms of medical treatment for their disorder against their will. She cites the well-known case of *Herczegfalvy v Austria* (1992) 15 EHRR 437, where the Court noted "that the position of inferiority and powerlessness which is typical of patients confined in psychiatric hospitals calls for increased vigilance in reviewing whether the Convention has been complied with" (para 82).

88. Mr Edward Faulks QC, for the NHS Trust which runs the hospital, accepts that if the *Osman* principle applies to this case, then it must go to trial. But he, together with Mr Nigel Giffin QC who appears for the Secretary of State for Health, argues that the *Osman* principle has no application in the field of health care and so there should be summary judgment in the Trust's favour. The Trust succeeded before Mrs Justice Swift, who held that the test was "at the least gross negligence of a kind sufficient to sustain a charge of manslaughter", which was not alleged in this case: [2006] EWHC 3562 (QB), para 48. The Trust failed in the Court of Appeal, which held that the *Osman* test applied: [2006] EWCA Civ 1375. The Trust now appeals to this House.

89. Mr Faulks relies principally on the admissibility decision in *Powell v United Kingdom* (2000) 30 EHRR CD 362. The applicants' son

had died of Addison's disease. The parents believed that the doctors could have saved his life and brought a civil action in negligence against the health authority which they settled. Their main complaints in Strasbourg were that the doctors had falsified the records. But it appears, see p 363, that they also complained that "since their son's death was caused by the negligence of State agents, it must be concluded that there was a breach of the State's obligation to protect life".

90. The applicants relied upon the *Osman* principle but the Court pointed out that this was in the context of protecting life from the criminal act of a third party. (It will be recalled that *Keenan* and the later cases had yet to be decided.) It continued, at p 364:

> "The Court accepts that it cannot be excluded that the acts and omissions of the authorities in the field of health care policy may in certain circumstances engage their responsibility under the positive limb of Article 2. However, where a Contracting State had made adequate provision for securing high professional standards among health care professionals and the protection of the lives of patients, it cannot accept that matters such as error of judgment on the part of a health professional or negligent co-ordination among health professionals in the treatment of a particular patient are sufficient of themselves to call a Contracting State to account from the standpoint of the positive obligations under Article 2 of the Convention to protect life."

Thus the Court rejected the positive protective obligation in that context, although it went on to consider the case from the point of view of the investigative obligation, which it considered did apply in that case. But because the parents had not pursued their NHS complaints against the doctors or their negligence claim against the health authority, they could not claim to be victims. Hence their complaint was inadmissible on this (and indeed any other) ground.

91. Thus ordinary medical negligence, which results in the death of the patient, is not in itself a breach of the state's obligations under article 2. The state's obligations are discharged by having appropriate systems in place and effective investigatory machinery. In *Tarariyeva* (above, para 86), the Court stated the obligations in the health care sphere thus, at para 74:

> "The positive obligations require States to make regulations compelling hospitals, whether private or public, to adopt appropriate measures for the protection of patients' lives. They also require an effective independent judicial system to be set up so that the cause of death of patients in the care of the medical profession, whether in the public or the private sector, can be determined and those responsible made accountable (see *Vo v France* (2005) 40 EHRR 259, para 89, *Cavelli and Ciglio v Italy*, app no 32967/96, judgment of 17 January 2002, para 49, and *Powell v United Kingdom*). Furthermore, where a hospital is a public institution, the acts and omissions of its medical staff are capable of engaging the responsibility of the respondent State under the Convention (see *Glass v United Kingdom* (2004) 39 EHRR 341, para 71)."

92. The Court went on to discuss what was meant by an "effective independent judicial system". Sometimes this had to include recourse to the criminal law. But if death was not caused intentionally, this did not require a criminal law remedy in every case. "In the specific sphere of medical negligence, the obligation may for instance also be satisfied if the legal system affords victims a remedy in the civil courts . . . Disciplinary measures may also be envisaged." (para 75)

93. The principles stated in *Tarariyeva*, para 74, were repeated in the recent case of *Dodov v Bulgaria*, app no 59548/00, judgment of 17 January 2008, at para 80. The passage cited at para 90 above from *Powell* was repeated at para 82. The applicant's mother, Mrs Stoyanova, a sixty-three year old woman with Alzheimer's disease, was placed in the medical unit of a nursing home. She needed constant supervision and the staff were told not to leave her unattended. After being taken to see a medical specialist outside the home, she was left alone in the yard of the nursing home by a medical orderly. She disappeared and was never heard of again. Twelve years later, the Court was prepared to assume that she was dead. Her son complained that her life had been put at risk through the negligence of the nursing home staff, that the ensuing investigation had not resulted in any criminal or disciplinary sanctions, that he had not yet been able to obtain compensation in civil proceedings, and also that the police had not done as much as they should have done to search for his mother immediately after she disappeared.

94. The court examined "whether or not an issue of State responsibility under article 2 of the Convention may arise in respect of the alleged inability of the legal system to secure accountability for negligent acts that had led to Mrs Stoyanova's disappearance" (para 83). It found that despite the availability of criminal, disciplinary and civil redress, nothing effective had yet been achieved. The legal system, "faced with an arguable case of negligent acts endangering human life, failed to provide an adequate and timely response, consonant with the State's procedural obligations under article 2." (para 98).

95. The Court went on to examine the complaint against the police under the *Osman* principle. It was unnecessary to consider how the risk principle might apply when a person in ill health went missing. Although more could have been done in the present case, the question was whether their reaction was adequate in the circumstances, "having regard to the concrete facts and practical realities of daily police work" (para 102). Given that the nursing home staff, who knew what she looked like, had searched the area in vain, the Court was not convinced that the police reaction was inadequate.

96. In *Dodov*, therefore, the Court appears to have applied the *Powell* approach to the actions of the nursing home staff and looked for failings in the subsequent investigative machinery. And it applied the *Osman* approach to the actions of the police, and looked for failings in what they actually did. Understandably, Mr Faulks and Mr Giffin argue that the *Powell* approach should be applied to all cases of alleged negligence by health care professionals, even where this has resulted in the death of a detained patient. Mr Giffin argued that the *Powell* approach always applies in health care cases, even where prisoners were involved. If the *Powell* approach applies, the case should not proceed. There has been an adequate investigation and the ordinary law of negligence was perfectly capable of determining responsibility for Mrs Savage's untimely death and providing redress if anyone was at fault. The person entitled to invoke the ordinary law has decided not to do so but there is no systemic failure here such as to contravene article 2.

97. My Lords, it has at times been difficult to understand what we have been arguing about. As my noble and learned friend Lord Rodger of Earlsferry has also demonstrated, the positive protective obligation under article 2 is generally an obligation to have proper systems in place. But in some circumstances an operational duty to protect a particular individual is triggered. The latter duty is not engaged by ordinary medical negligence alone. Mr Havers is not arguing for any

less demanding test than the test derived from *Osman* and *Keenan*. He accepts that this is a different and more stringent test than ordinary medical negligence. For my part, I have little doubt that it is right in principle to apply the approach adopted in the *Osman* and *Keenan* to patients detained in hospital under the Mental Health Act as it applies to persons detained under other powers in other institutions. The Mental Health Act provides for the detention of people suffering from mental disorder of a nature or degree which makes it appropriate for them to be assessed and/or treated in hospital. In the case of patients admitted under the civil powers in Part II of the Act, this may be for the sake of their own health or safety or for the protection of other persons. Other patients are admitted on the orders of a criminal court or transferred from prison by the Secretary of State for Justice. All of these patients have been deprived of their liberty within the meaning of article 5 of the Convention. All are under the control of the hospital (or in the case of restricted patients, the Secretary of State). They may not leave when they wish to leave. Their visits and correspondence with the outside world may be controlled. They may be given most forms of treatment for their mental disorder without their consent (although special safeguards apply to some treatments). They may be detained in a wide variety of settings, ranging from high security institutions such as Broadmoor to open wards from which it is relatively easy to escape. But they cannot choose where they are placed. They cannot choose their doctors. They cannot choose their medical treatment. In short, although their circumstances may be a great deal pleasanter than those of other detainees, they are deprived of more of their ordinary civil rights than are other detainees. The Government, in its Response to the Joint Committee on Human Rights Third Report of Session 2004-05 on Deaths in Custody (HL Paper 15-I/HC 137-I), commented that "human rights come sharply into focus in the institutional setting where those detained are entirely dependent on their custodians not only to keep them safe but also to provide them with a humane, decent and caring environment": see Appendix to the Joint Committee's Eleventh Report of Session 2004-05 (HL Paper 69/HC Paper 416).

98. In *Keenan* 33 EHRR 913, para 110, and in many other cases, the Strasbourg Court has recalled that "the authorities are under an obligation to protect the health of persons deprived of liberty (*Hurtado v Switzerland*, Comm Rep 8 July 1993, para 79)". By this the Court does not mean simply an obligation to have systems in place to provide access to necessary health care, but an obligation actually to provide it, although of course the Court is alive to the practical demands of imprisonment. If that applies to protecting their health under article 3, it would be strange if it did not also apply to protecting their lives under article 2. *Tarariyeva* confirms that it does.

99. Mr Faulks argued that applying the *Osman/Keenan* approach to tragedies such as this would work to the detriment of patients. It would encourage hospitals to be too restrictive of their patients' liberty for fear that they might commit suicide or otherwise come to harm. Remarkably little is known about the effect of potential legal liability upon the actions of public authorities generally (see Law Commission Consultation Paper No 187, *Administrative Redress: Public Bodies and the Citizen*, Appendix B). But it is hard to understand how applying the *Osman/Keenan* approach in these cases can add to the hospitals' difficulties. They already face potential liability in negligence if they fail to take reasonable care of their patients. The *Osman/Keenan* test is different from and in practice more difficult to establish than negligence.

100. The trigger is a "real and immediate risk to life" about which the authorities knew or ought to have known at the time. That has rarely been shown. (See, for example, *Younger v United Kingdom* (2003) 33 EHRR CD 252, where it was not shown that the police should have known that their prisoner was a suicide risk.) If the duty is triggered, it is, as it was put in *Keenan* 33 EHRR 913, para 92, to do "all that reasonably could have been expected of them to prevent that risk". In judging what can reasonably be expected, the Court has shown itself aware of the need to take account of competing values in the Convention, in particular the liberty and autonomy rights protected by articles 5 and 8. The steps taken must be proportionate. If this is so in prison, it must be even more so in hospital, where the objectives of detention are therapeutic and protective rather than penal. Developing a patient's capacity to make sensible choices for herself, and providing her with as good a quality of life as possible, are important components in protecting her mental health. Keeping her absolutely safe from physical harm, by secluding or restraining her, or even by keeping her on a locked ward, may do more harm to her mental health. In judging what can reasonably be expected, the Court has also taken into account the problem of resources. The facilities available for looking after people with serious mental illnesses are not unlimited and the health care professionals have to make the best use they can of what they have. For all of these reasons, applying the *Osman/Keenan* approach in this context should not persuade the professionals to behave any more cautiously or defensively than they are already persuaded to do by the ordinary law of negligence.

101. There is one further point. For the reasons given earlier, it is difficult to distinguish between different classes of people deprived of their liberty by the state. Mental patients may or may not also be prisoners. But it could be said that it is also difficult to distinguish

between different classes of mental patients. Some patients, like Mrs Savage, are deprived of their liberty by the law. Some patients, like Mr L (see *R v Bournewood Community and Mental Health NHS Trust, ex p L* [1999] AC 458) are deprived of their liberty by their own condition. They may lack the capacity voluntarily to decide to be in hospital and may well be prevented from leaving should they wish to do so. These so-called "Bournewood" patients will shortly be protected by new procedures inserted in the Mental Capacity Act 2005 by the Mental Health Act 2007. Some patients, although they have entered hospital quite willingly, are well aware that they might be made the subject of compulsory powers at any time. This is in fact what happened with Mrs Savage, who entered hospital as an informal patient on 16 March 2004. The following day she was first detained under section 5(4), which allows a nurse to authorise the detention of an in-patient for up to six hours until a doctor can arrive, and then under section 3, which provides for detention on the application of two doctors for up to six months (and renewable thereafter). Is it possible, then, 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? And what about patients who are *de iure* deprived of their liberty but in fact given leave of absence to go home, as was Mrs Savage on several occasions during her time in hospital? Indeed, what is the extent of the state's duty to protect all people against an immediate risk of self-harm?

102. My Lords, we do not have to answer those questions today and in my view we should not try to do so. The possibility that they may arise in future should not deter us from following the clear thrust of the Strasbourg jurisprudence in the case which we do have before us, which concerns a patient who was compulsorily detained in a hospital under the Mental Health Act 1983.

103. For those reasons, I would dismiss this appeal and allow the action to go to trial. But I would phrase the question which the court should ask itself in the same language as the question asked by the Strasbourg Court in *Keenan* 33 EHRR 913, para 92, rather than in the language used by the Court of Appeal, which was derived from the first of the two *Osman* formulations. Insofar as there is any difference between them, it is clear that in the most closely analogous case of *Keenan* and also in the two conscript suicide cases the Strasbourg Court addressed its mind to the "all they could reasonably be expected to do" test.

104. My Lords, I drafted this opinion before having the opportunity of reading the opinion to be delivered by Lord Rodger. As our opinions are to the same effect, I suggested that I might withdraw my own. But he has urged me not to do so. We do cover somewhat different ground along the way. But on the main point, which is the test to be applied when this case goes to trial, we are *ad idem*.

LORD NEUBERGER OF ABBOTSBURY

My Lords,

105. I have had the great benefit of reading in draft the opinions of my noble and learned friends Lord Rodger of Earlsferry and Baroness Hale of Richmond. I agree with both opinions, and cannot usefully add anything to them. Accordingly, I too would dismiss this appeal.