[128]–[131]), which are not resolved in any detail. All these questions will no doubt have to be wrestled over in future appeals. Very much remains unclear following the Court of Appeal's decision.

What is apparent from *Clinton, Parker and Evans* is that the Court of Appeal did not think the sexual infidelity exception was drafted well, or with the real world in mind. This is problematic because the court makes clear that, in its opinion, the history of the "loss of control" defence does not provide useful interpretative guidance. The Law Commission's proposals, which led to the 2009 Act's reforms, differ too much from the eventual legislation to be helpful (at [3]). In fact, the Law Commission did not explicitly exclude sexual infidelity as a "qualifying trigger" in its proposals. It thought trial judges would necessarily withdraw the defence from the jury where sexual infidelity was the only "provocation" offered by the victim or, alternatively, that juries would not find that the defence was made out in those circumstances (*Partial Defences to Murder* (Law Com. No. 290, 2004), para. [3.145]; *Murder, Manslaughter and Infanticide* (Law Com. No. 304, 2006), para. [5.65]). The sexual infidelity exception appeared in the Government's Bill. Unfortunately, however, the legislative debates over the 2009 Act also failed to point the court in a clear direction (at [4]). The judges thus felt very much on their own. This is a sorry state for an aspect of the law on "loss of control" to be in, barely a year after it entered into force. And, as noted above, there are hints in Lord Judge C.J.'s opinion that other features of the 2009 Act might cause difficulties in the future. *Clinton, Parker and Evans* is thus no doubt the first of many appellate decisions on this partial defence. *Plus ça change, plus c'est la même chose*?

FINDLAY STARK

LIABILITY UNDER THE HUMAN RIGHTS ACT 1998: THE DUTY TO PROTECT LIFE, INDIRECT VICTIMS AND DAMAGES

IN *Rabone v Pennine Care NHS Trust* [2012] UKSC 2, [2012] 2 W.L.R. 381 the Supreme Court held: (1) that the Human Rights Act 1998 ("HRA") imposes a duty on public hospitals to take operational measures to protect the life of a voluntary psychiatric patient where the hospital is aware of a real and immediate risk of suicide; and (2) if that patient commits suicide consequent upon the hospital's breach of duty, the deceased's parents may recover HRA damages for their non-pecuniary loss.

Melanie Rabone had a history of attempting suicide. After her most recent attempt she agreed to informal admission to Stepping Hill

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Hospital. On admission she was assessed as suffering a severe depressive episode, psychosis, and high risks of deliberate self-harm and suicide. Just over a week after her admission the hospital granted Melanie two days of home leave, upon her request. Tragically, she committed suicide while on leave. Melanie's parents, Mr and Mrs Rabone, initiated legal proceedings against the relevant NHS Trust, claiming that the hospital's decision to grant leave was negligent at common law and breached Article 2 of the European Convention on Human Rights. The Trust settled the claim in negligence, brought by Mr Rabone on behalf of Melanie's estate, in the amount of £7,500.

The Supreme Court's decision concerned a claim by Mr and Mrs Rabone, in their own right, for damages under the HRA in respect of the Trust's alleged violation of Article 2. They sought compensation for the non-pecuniary loss they had suffered as a result of Melanie's death. Contrary to indications in previous domestic case law, the Court held that Melanie's parents were "victims" under section 7(1) HRA and therefore had standing on the basis of a consistent line of European Court of Human Rights cases in which that Court has repeatedly held that family members of the deceased can bring claims in their own right in respect of breaches of the obligations – investigative and substantive – under Article 2. It is, nonetheless, possible to lose victim status if the defendant authority has (1) afforded the victim "adequate redress", and (2) acknowledged, expressly or in substance, the Convention violation. The Supreme Court rejected the Trust's submission that the settlement had afforded Mr and Mrs Rabone adequate redress, given the settlement was reached with Melanie's estate in respect of her personal losses, and did not include redress for losses specific to Mr and Mrs Rabone. For similar reasons Mr Rabone could not be said to have renounced his and his wife's Article 2 claim by agreeing the settlement on behalf of Melanie's estate.

That Mr and Mrs Rabone may seek damages in these circumstances might seem odd to an English tort lawyer, given the Trust owed no primary duty to Melanie's parents; any obligation under Article 2 was owed to Melanie. Perhaps, as Baroness Hale intimated, the looser rules of recovery are justifiable on the basis of the unique agony a parent suffers upon the wrongful death of their child. Such liability is not foreign to English law: the Fatal Accidents Act 1976 ("FAA") makes a conventional sum of bereavement damages available for specified relatives of the deceased in cases of wrongful death. Melanie's parents could only have recovered under the FAA if Melanie had been a minor, which she was not. In turn this raises the question of why a parent's ability to recover for bereavement where their child dies as a result of another's wrongful acts ought to depend on whether the claim is in tort or under the HRA? Further, according to Strasbourg jurisprudence the

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restrictions on which relatives may recover for bereavement under Article 2 are looser than those under the FAA. Perhaps the explanation for the more flexible criteria under Article 2 lies in the "vindicatory" function of human rights law; actions by relatives may be the only "vehicle" for achieving a public finding that the deceased's right to life was violated. This function of the law is further reflected in the Court's decision to extend the time for Melanie's parents to bring their claim, which was justified partly on the basis that fundamental rights ought to be vindicated, at [108].

Turning to the substance of the Article 2 claim, the obligation in issue was that established in *Osman v UK* (1998) 29 E.H.R.R. 245. In "certain well-defined circumstances" Article 2 imposes a positive obligation on authorities to take reasonable steps to avoid a real and immediate risk to the life of a specified individual where the authorities know or ought to know of that risk. The key question in *Rabone* was whether these "well-defined circumstances" include circumstances where a psychiatric patient, who is a known suicide risk, is voluntarily within a public hospital's care. The ECtHR had not determined the question (but now compare *Reynolds v UK* (13 March 2012) App.No. 2694/08). The Justices held that the obligation did arise by analogy with *Savage v South Essex Partnership NHS Foundation Trust* [2008] UKHL 74, [2009] A.C. 681, where the duty was held to arise in relation to a suicidal psychiatric patient detained in a public hospital pursuant to statutory powers. The Supreme Court considered that the difference between a detained patient and one who voluntarily submits to the hospital's care was one of "form, not substance". This conclusion was supported by a consideration of "indicia" in the ECtHR jurisprudence which helped to explain why the obligation arose in some circumstances and not others. These included the vulnerability of the victim, the nature of the risk, and any assumption of responsibility. Melanie was extremely vulnerable given her mental state, she was a real suicide risk, and the trust assumed responsibility for her welfare and safety: though she was not detained, Melanie was within the hospital's control and it was clear that, if she had insisted on leaving, the hospital could and should have detained her. The Court's reasoning is convincing: it would be artificial to maintain that the obligation arose in respect of patient X but not patient Y on the basis of the different manner in which each entered and remained within the hospital's care (*i.e.* voluntary or non-voluntary admission), where both were equally vulnerable, faced the same risk, and were within the hospital's control and dependent upon the hospital for their well-being.

The Court held that the Trust breached its duty. There was a real and immediate risk to Melanie's life; "real" because the suicide risk was

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substantial and significant, and "immediate" because the risk was present and continuing at the time of the alleged breach. There was no doubt that the Trust knew or ought to have known of the risk. The Trust failed to take all reasonable steps to prevent the risk eventuating: the decision to grant Melanie two days' leave was one no reasonable psychiatrist would have made, and there appeared to be no proper assessment of the risks before Melanie was granted leave nor proper planning for her care during leave.

It is interesting to observe similarities between the Article 2 obligation and the tort of negligence, such as the centrality of notions of "reasonableness" and the relevance of professional standards in assessing breach. However, there are differences. For example, the notion of "assumption of responsibility" appears to be used in a looser sense under Article 2 with "reliance" not identified as a formal requirement, concepts such as "actionable damage" do not feature in claims for breaches of positive duties under the Convention, while the Article 2 duty has been held to arise in factual circumstances similar to those where domestic courts have rejected the existence of equivalent duties in tort on the basis of policy considerations. Perhaps these differences again reflect the relatively stronger focus in human rights law on vindication and ensuring strong protection of the underlying fundamental interests.

The Court upheld a compensatory award of £5,000 each to Melanie's parents for non-pecuniary loss. It followed the "mirror" approach to HRA damages, applying the ECtHR's jurisprudence under Article 41 in assessing quantum, despite observations by some Justices that it was hard to divine guidance from ECtHR decisions (a view echoed in many lower court judgments). It is strongly arguable that domestic courts ought to abandon the mirror approach and draw on damages principles and levels of awards within tort law in order to fill in the detail and principle missing from the Strasbourg jurisprudence and ensure consistency across English law. Given the vindicatory nature of human rights law and the importance of the protected interests it is difficult to justify an approach which generally results in levels of awards lower than those made in the context of similar or lesser interests in tort. The HRA does not mandate a mirror approach, while the ECtHR has itself emphasised that it is a subsidiary institution that does not award compensation in a manner comparable to domestic courts and that domestic courts retain freedom to organise compensatory remedies consistently with their own legal system and traditions.

JASON N. E. VARUHAS

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