

Inquests Following Deaths in the Community



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Presenters

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Deaths in the Community: Relevant Inquest Law and Procedure

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Deaths in the Community: Article 2 ECHR and the relevant legal principles

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Deaths in the Community: (Chair) Practical Examples/ Practical Points



Introduction

- Webinar Structure;
 - Introduction to relevant inquest law and procedure
 - Discuss the key principles of Article 2 and the authorities regarding the extension of the principles into deaths in the community.
 - Examples
 - Practical Points.
 - Concluding remarks.
 - Questions?

When will an inquest take place?

Coroners and Justice Act 2009, Section 1:

- (1) A senior coroner who is made aware that the body of a deceased person is within that coroner's area must as soon as practicable conduct an investigation into the person's death if subsection (2) applies.
- (2) This subsection applies if the coroner has reason to suspect that—
 - (a) the deceased died a violent or unnatural death,
 - (b) the cause of death is unknown, or
 - (c) the deceased died while in custody or otherwise in state detention.

'Reason to suspect' and 'unnatural death'

- 'Reason to suspect'

- *R (Canning) v HM Coroner for the County of Northampton* [2006] EWCA Civ 1225 [3]

- Low threshold

- Does not require prima facie case

- What is an 'unnatural death'?

- *R (Touche) v Inner London North Coroner* [2001] 3 WLR 148

Article 2: Why is it important?

- Article 2 European Convention on Human Rights - Right to Life
 - Article 2(1): “Everyone’s right to life shall be protected by law”
- *R (Middleton) v West Somerset Coroner and another* [2004] 2 AC 182
 - Enhanced investigation - "in what circumstances" did deceased come to their death [35]
 - Expanded form of narrative conclusion rather than a short form conclusion [36]

Article 2: When is it engaged?

- The enhanced Article 2 obligation arises in one of two ways:
 - Automatically (usually) for inquests into deaths which took place in state custody
 - Where it is arguable on the evidence that substantive duties under Article 2 have been breached in relation to the death

Article 2: What are the 'substantive duties'?

• The substantive duties placed on member states are (*Rabone v Pennine Care NHS Trust* [2012] 2 AC 72 [12]):

- 1) A negative obligation to refrain from taking life
- 2) A positive obligation to take appropriate measures to safeguard life

Article 2: 'Operational duty'

- This provides that an authority has a positive obligation to protect an individual whose life is at risk, provided the following requirements are met (*Osman v. United Kingdom* [2000] 29 EHRR 245 [116]):
 - The authorities knew or ought to have known, of a real and immediate risk to the life of an individual; and
 - Failed to take measures within the scope of their power which, judged reasonably, might have been expected to avoid that risk.

Article 2: Introduction to the 'systemic duty' and concept of arguable breach

- Systemic Duty – Obliges the UK government to have in place systems or regulations to safeguard against certain risks - *Oneryildiz v Turkey* [2005] 41 EHRR 325 [89]
- Arguable breach - "anything more than fanciful" - *R(AP) v HM Coroner for Worcestershire* [2011] EWHC 1453 (Admin) [60]

What is a death in the community?

- As we have seen the usual question in respect of the enhanced investigative duty is whether there is an arguable breach of one of the substantive duties under article 2.
- Archetypal case is killing by a state agent or an 'unnatural' death in detention.
- Detention cases include deaths of patients detained under the Mental Health Act 1983 (involuntary patients) as well as prisoners and other detainees.
- Deaths in the community = all other deaths where there is state involvement giving rise to arguments about article 2.

The systemic duty

- Positive obligations, including the systemic duty, apply in the context of any activity, whether public or not, in which the right to life may be at stake.
- Obligation is to establish a framework of laws, precautions, procedures and means of enforcement which will, to the greatest extent reasonably practicable, protect life.
- This has been held (in different contexts) to include the obligation to employ and train competent staff and to adopt safe systems of work; to provide adequate protective equipment; to ensure adequate planning, equipment and deployment; to have in place systems which will detect and remedy individual failings; to ensure the effective functioning of the regulatory framework.

The operational duty: when might it arise?

- Operational duty has been held to apply in a wide range of circumstances
- However, the existence of a real and immediate risk to life of which the authorities are or ought to be aware is a necessary but not sufficient condition for the operational duty to arise.
- In particular, the requisite risk is often present in the context of (physical) healthcare but the requirements of article 2 in this context have developed separately – see next slide.
- Outside this context the question whether the operational duty is owed in novel situations will be fact-specific and the factors identified in the case of *Rabone* will be relevant.

Article 2 in 'medical cases'

- ❁ ***Powell v UK*** – where adequate provision is made for securing high professional standards among health professionals and protection of lives of patients, matters such as error of judgment or negligent coordination in the treatment of a patient will not engage state responsibility under article 2.
- ❁ ***Lopes de Sousa Fernandes v Portugal*** – article 2 may be breached in respect of acts and omissions of health care providers only in very exceptional circumstances: (i) knowing denial of access to life-saving emergency treatment; and (iii) systemic or structural dysfunction resulting in denial of access to life-saving emergency treatment.
- ❁ ***Parkinson*** – (following *Lopes de Sousa*) the crucial distinction is between cases where there may have been a systemic failure and "ordinary" cases of medical negligence.
- ❁ ***Maguire*** – no operational duty owed to vulnerable woman subject to DoLS authorisation in respect of medical care provided to her.

The operational duty: factors identified in *Rabone*

- ❁ **Assumption of responsibility** by the state for an individual's welfare and safety (including by exercise of control). Paradigm example is detention by the state.
- ❁ **Vulnerability of the victim:** in circumstances of sufficient vulnerability the ECtHR has found a breach of the operational duty even where there has been no assumption of control by the state.
- ❁ **Nature of risk:** is it an "ordinary" risk of the kind that individuals in the relevant category should reasonably be expected to take or is it an exceptional risk?

A developing area

The jurisprudence of the operational duty is young. Its boundaries are still being explored by the ECtHR as new circumstances are presented to it for consideration. But it seems to me that the court has been tending to expand the categories of circumstances in which the operational duty will be found to exist. Rabone §25

What are the questions you should ask?

1. Has there been an assumption of responsibility by state for welfare and safety?
2. What is the vulnerability of the individual which may arise as a result of their status or situation in which they are placed?
3. What is the element of control by the state over the individual?
4. What is the risk to life?
5. Was the risk real and immediate?
6. What were the failures to take reasonable steps?

What situations might Art 2 arise in Community?

Mental Health Services

- Informal/ Voluntary Patients (Like Melanie Rabone).
- Inpatients on extended s.17 MHA leave from Hospital.
- Patients subject to a Community Treatment Order under the MHA
- Community Patients
- CAMHS

What situations might Art 2 arise in Community?

Deprivation of Liberty Safeguarding Orders (DOLS)

- No longer automatic Jury where deceased subject to a DOLS.
- Treatment for a physical illness even in critical care is not a deprivation of liberty as there is no ability for a hospital to refuse discharge.
- Death of a sedated patient in ICU is not a death "in state detention".
- See Chief Coroner's Guidance 16a.

What situations might Art 2 arise in Community?

Deceased (or Perpetrator) Release from Prison on Licence

- NPS (MOJ) has a duty to manage the risks presented by an offender on licence.
- If required to reside at an address by licence, subject to recall then they are under state "control".
- May be other state agencies involved (Police, Local Authority etc).
- *Griffiths v (1) Chief Constable of Suffolk Police (2) Norfolk and Suffolk NHS Trust* [2018] EWHC 2538 (QB) - Article 2 Op Duty extends to requiring state agents to take reasonable steps to protect society where an identifiable individual posed a threat to the public.



Is there an arguable Systems Duty? Drug Testing? MAPPA?

What situations might Art 2 arise in Community?

Deceased under care of Local Authority e.g.

- Looked after child
- Adult Safeguarding
- Specific facts where there is a known risk of self-neglect.

Practical Points

When to Raise?

- First opportunity on papers
- HMC should raise as standard part of Pre Inquest Review Hearing Agenda

How to Raise?

- In writing/ submissions
- Oral argument at PIRH if needed (may need to instruct Counsel)
- Request written ruling

Practical Points

What happens if refused?

- Shouldn't stop wide investigation according to scope
- Short form conclusions/ narrative – but cannot identify failings/ omissions
- Do you need advice on Judicial Review of Coroner's decision? (as soon as possible and in any event within 3 months of decision)

Funding

- Legal Help funding for solicitor assistance at inquest
- If Article 2 engaged then can make an application to the LAA for Exceptional Case Funding which can enable disbursements/instruction of Counsel.

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Conclusions

- Developing Area of Law.
- Fact sensitive.
- Difficulties in funding at early stages.

Questions?



Cases 1

Kolyadenko v Russia (2013) 56 EHRR 2

Lopes de Sousa Fernandes v Portugal (2018) 66 EHRR 28

Oneryildiz v Turkey (2005) 41 EHRR 325

Osman v. United Kingdom [2000] 29 EHRR 245

Powell v UK (2000) 30 EHRR CD32

Z v UK App No 29392/95 (10 May 2001)

Cases 2

R (Middleton) v West Somerset Coroner and another [2004] 2 AC 182

Rabone v Pennine Care NHS Trust [2012] 2 AC 72

Savage v South Essex Partnership NHS Foundation Trust [2009] AC 681

Smith and another v Ministry of Defence [2014] AC 52

R (Touche) v Inner London North Coroner [2001] 3 WLR 148

R (Maguire) v HM Senior Coroner for Blackpool & Fylde [2020] EWCA Civ 738

R(AP) v HM Coroner for Worcestershire [2011] EWHC 1453 (Admin)

R (Canning) v HM Coroner for the County of Northampton [2006] EWCA Civ 1225

R (Parkinson) v HM Senior Coroner for Inner London South [2018] 4 WLR 106

R(Lee) v HM Assistant Coroner for the City of Sunderland [2019] EWHC 3227 (Admin)

Thanks for watching!

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