IN THE EAST SUSSEX CORONER'S COURT

IN THE MATTER OF INQUESTS TOUCHING THE DEATHS OF:

KENUGEN SATHTHIYANATHAN
KOBIKANTHAN SATHTHIYANATHAN
NITHARSAN RAVI
INTHUSHAN SRISKANTHARASA
GURUSHANTH SRITHAVARARJAH

NOTE ON BEHALF OF ROTHER DISTRICT COUNCIL
ON THE LEGAL FRAMEWORK
PROVIDED BY THE CIVIL LAW AND THE CRIMINAL LAW

Introduction

1. Rother District Council ("RDC") is a creature of statute created by the Local Government Act 1972. Like all local authorities, it does not enjoy infinite financial resources. It is democratically accountable to the local electorate. In addition, it is legally accountable in the sense that it is obliged to comply with the civil and criminal law of England & Wales.

2. RDC fully recognises that it is not the purpose of the inquests to make findings of civil liability or criminal liability. However, that does not mean that the inquests take place in a legal vacuum.

3. The purpose of this Note is to summarise all aspects of the legal framework provided by the civil and criminal law that are potentially relevant to the safety of bathers[1] at Camber Sands. We invite the Coroner to direct the other Interested Persons to provide him with written submissions indicating the extent, if any, to which they disagree with the analysis set out in this Note.

4. At the PIR which took place on 14 March 2017, Mr Roche (Lead Counsel for the families) submitted that the inquests should consider whether RDC was "to blame in an inquest sense" for the deaths.

[1] Within this Note, the phrase "bathers" is used as a shorthand for persons within the sea off Camber Sands who either entered the sea from the beach at Camber Sands or who were on the beach and, as the tide came in, remained in the sea rather than immediately exiting the sea and making their way to a dry area on the beach.

5. It is submitted that it is neither possible nor appropriate for the inquests to approach the question of whether any organisation was "to blame" for the deceased's deaths from a direction that bypasses the relevant legal framework. Indeed the starting point of any analysis of which, if any, organisation might be "to blame" can only be a consideration of each potentially relevant organisation's legal status, duties and powers. How else can one begin to decide which of the following organisations (listed below in alphabetical order) might be "to blame"?

- Department for Communities and Local Government
- Department for Transport
- East Sussex County Council
- East Sussex Fire & Rescue Service
- Maritime and Coastguard Agency
- Rother District Council
- RNLI
- Sussex Police

Background matters

6. The precise facts of how the deceased came by their deaths are, of course, matters to be explored and determined at the full inquest hearing. For the purposes of this Note, the following facts are assumed.

7. The deceased were all adults who were, at all material times, of sound mind and capable of making rational decisions and choices[2].

8. On 24 August 2016, the deceased travelled together to Camber by car and parked in the Camber Western car park. They then gained access to the beach by walking along the walkway through the dunes which emerges onto Camber Sands at red Zone C.

9. A triangular Primary Entrance sign was positioned at the side of the walkway from the Camber Western car park to the beach at Camber Sands. This sign adopted the design

[2] The possibility that Nitharsan Ravi was suffering from the effects of traumatic brain injury is accordingly not addressed in this Note.

standardised by the RNLI in "A Guide to beach safety, signs, flags and symbols" version 2: 2007[3].

10. One panel of the triangular sign stated amongst other things: "Caution. There is no lifeguard service operating." This is the standard wording recommended by the RNLI for informing beach users that lifeguards are not present on the beach[4].

11. "A Guide to beach safety, signs, flags and symbols" states that:

> "There is room for up to four hazard symbols and four prohibition symbols to be displayed. The symbols should be ordered according to risk, with hazards displayed first as shown. Please choose appropriate symbols for your beach from the Symbols directory at the back of this document."[5]

12. Another panel of the triangular sign identified 4 hazards. They were listed (in English with an accompanying pictorial hazard symbol) in the following order:

- Beware of inflatables
- Beware of fast moving tides
- Beware of sand bars
- Beware of strong winds

13. Throughout the period between the deceased's arrival at Camber Sands and the drowning incidents which resulted in their deaths there was an incoming tide.

14. Throughout the period between the deceased's arrival at Camber Sands and the drowning incidents which resulted in their deaths the weather conditions at Camber Sands were benign[6].

15. The deceased all either entered the sea from the beach at Camber Sands or were on the beach and, as the tide came in, remained in the sea rather than immediately exiting the

[3] see pages 10-11

[4] see "A Guide to beach safety, signs, flags and symbols" page 17

[5] Page 16

[6] See the report of Dr Richard Wild dated 3.3.17

sea and making their way to a dry area on the beach. The deceased therefore all fell within the definition of "bathers" used in this Note – see footnote 1.

16. The deceased drowned in the foreshore area – i.e. in an area of Camber Sands above the low-water mark of ordinary tides but below the high-water mark of ordinary tides.

17. As a general rule, the foreshore in England & Wales is owned by the Crown and managed by the Crown Estate Commissioners. However, the foreshore at Camber Sands has at all material times been leased by RDC from the Crown Estate Commissioners.

18. At all material times in 2016, RDC employed a Coast Control team which patrolled the beach. RDC did not employ lifeguards nor did it engage a contractor to provide lifeguarding services. The duties of the Coast Control team did not include providing lifeguarding services to persons in the sea at Camber Sands who were drowning or in difficulties.

The legal framework

19. This Note will address the following issues.

(1) Liability for pure omissions at common law;
(2) The extent, if any, to which RDC owed common law duties to take steps to prevent persons drowning at Camber Sands by reason of its local authority status;
(3) The relevance, if any, of the concept of assumption of responsibility;
(4) The extent, if any, to which RDC owed common law duties to take steps to prevent persons drowning at Camber Sands because it had leased the foreshore from the Crown Estate Commissioners;
(5) The substantive duties imposed by Article 2 ECHR;
(6) The duty imposed on RDC by the criminal law under section 3 of the Health and Safety at Work etc. Act 1974 ("HSWA").

(1) Liability for pure omissions at common law

20. In Home Office v Dorset Yacht Co Ltd [1970] AC 1004, Viscount Dilhorne considered the classic passage in Lord Atkins' speech in Donoghue v Stevenson [1932] AC 562 and stated that Lord Atkin:

"cannot have meant that a person is liable in negligence if he fails to warn a person near by whom he sees about to step off the pavement into the path of an incoming vehicle or if he fails to attempt to rescue a child in difficulties in a pond." (at 1042G-H)

21. Whilst Viscount Dilhorne dissented in the result in Dorset Yacht, this statement of principle was consistent with the approach of the majority – see Lord Diplock's speech at 1060B-H.

22. Viscount Dilhorne's statement remains good law. The fundamental principle is, as stated by Lord Goff in Smith v Littlewoods [1987] AC 241, that the common law does not impose liability for what are called pure omissions (at 271B-H).

23. In Gorringe v Calderdale MBC [2004] 1 WLR 1057, which is analysed in detail in section (2) below, Lord Hoffmann stated:

"Reasonable foreseeability of physical injury is the standard criterion for determining the duty of care owed by people who undertake an activity which carries a risk of injury to others. But it is insufficient to justify the imposition of liability upon someone who simply does nothing: who neither creates the risk nor undertakes to do anything to avert it." (at para 17)

24. Accordingly a "failure" (more accurately an omission) (i) to take any steps to prevent persons drowning in the sea or (ii) to take any steps to rescue persons who are drowning or in difficulties would represent a pure omission. Such an omission would not give rise to liability at common law unless there were some additional factual feature such as to bring it within a recognised exception to the general rule that the common law does not impose liability for omissions.

(2) Common law duties arising from local authority status

25. RDC is a local authority. RDC's functions are governed by statutory provisions. It is necessary to draw a distinction between RDC's duties and its powers. RDC is obliged to carry out duties imposed upon it by statute. Where RDC has been granted a power to act in a particular way, it has discretion as to whether or not to exercise that power. It is not obliged to exercise it; Stovin v Wise [1996] AC 923.

26. At all material times, RDC was under no statutory duty to take any steps to prevent persons drowning in the sea at Camber Sands or to take any steps to rescue persons who were drowning or in difficulties.

27. In the interests of completeness, it should be noted that section 231 of the Public Health Act 1936 (as amended) provides that:

> "(1) A local authority may make byelaws with respect to public bathing, and may by such byelaws – (aa) prohibit or restrict public bathing at times when and places as respects which warning is given, by the display of flags or by other means specified in the byelaws, that bathing is dangerous."

And that section 82 of the Public Health Acts Amendment Act 1907 provides that:

> "The local authority for the prevention of danger, obstruction, or annoyance to persons using the sea-shore may make and enforce byelaws to – (4) provide for the preservation of order and good conduct among persons using the seashore."

28. At all material times in 2016, the beach safety measures put in place by RDC at Camber Sands were carried out pursuant to the general power provided to local authorities by section 1(1) of the Localism Act 2011 which provides that:

> "A local authority has power to do anything that individuals generally may do."

29. The lifeguarding service which RDC is putting in place for the 2017 summer season will also be carried out pursuant to RDC's general power under s. 1(1) Localism Act 2011.

30. Public bodies generally owe no duty at common law to answer calls for help or to rescue persons in difficulty. No such duty is owed by a fire brigade; Capital & Counties plc v Hampshire County Council [1997] QB 1004, CA. More pertinently, no such duty is owed by coastguards responding to an emergency at sea; OLL Ltd v Secretary of State for Transport [1997] 3 All ER 897, May J. In Kent v Griffiths [2001] QB 36, the Court of Appeal held, as an exception to this general principle, that an ambulance service, which had accepted a call to attend the claimant's home but had not arrived within a reasonable time, owed a duty of care to the claimant. Capital & Counties and OLL Ltd were discussed by Lord Woolf MR in his judgment (at para 41). There was no

indication in his judgment that he considered them to have been incorrectly decided. In Sandhar v Department of Transport [2005] 1 WLR 1632, May LJ (with whom Thomas LJ agreed) stated that Kent v Griffiths was an exception to the general principle exemplified by Capital & Counties and OLL Ltd; see the discussion at paras 46-48. In Michael v Chief Constable of South Wales Police [2015] 2 WLR 343, Lord Toulson JSC, giving the majority judgment, referred to Capital & Counties and OLL Ltd without criticising them and noted that in Van Colle and Smith [2009] AC 225 Lord Bingham was alone in criticising them; see paras 79-80.

31. The leading cases on the circumstances in which public law duties and powers give rise to parallel duties of care at common law are Stovin v Wise and Gorringe.

32. In Stovin v Wise, Mrs Wise emerged from a side road and ran down Mr Stovin because she was not keeping a proper look-out. Norfolk County Council was joined as a third party to the subsequent claim by Mr Stovin. The case against the council was that visibility at the intersection was poor and that the council should have done something to improve it. The council had statutory powers which would have enabled the necessary work to be done and there was evidence that the relevant officers had decided in principle that it should be done, but they had not got round to doing it.

33. The House of Lords held, by a majority, that the council owed no private law duty to road users to do anything to improve the visibility at the intersection. The statutory power could not be converted into a common law duty.

34. Lord Hoffmann noted that the council had done nothing which, apart from statute, would have attracted a common law duty of care. It had done nothing at all. The only basis on which it was a candidate for liability was that Parliament had entrusted it with general responsibility for the highways and given it the power to improve them and take other measures for the safety of their users.

35. Lord Hoffmann observed:

> "In summary, therefore, I think that the minimum preconditions for basing a duty of care upon the existence of a statutory power, if it can be done, at all, are, first, that it would in the circumstances have been irrational not to have exercised the power, so that there was in effect a public law duty to act, and secondly, that there are

exceptional grounds for holding that the policy of the statute requires compensation to be paid to persons who suffer loss because the power was not exercised." (at 953D-E)

36. In Gorringe, Mrs Gorringe drove her car head-on into a bus which was hidden behind a sharp crest in the road until just before she reached the top. It was common ground that the bus driver was in no way to blame for the accident. She claimed that the council caused the accident by failing to give her proper warning of the danger involved in driving fast when you could not see what was coming. She relied on the fact that the word "SLOW" had at one time been painted on the road surface at some point before the crest but that the marking had disappeared, probably when the road was mended some years earlier.

37. Section 39 of the Road Traffic Act 1988 provided that each local authority must prepare and carry out a programme of measures designed to promote road safety. Mrs Gorringe argued that the council was in breach of that duty. She conceded that she could not bring a private law claim for breach of statutory duty. Her contention was that section 39 could nonetheless be used to jack up the council's common law duty of care to a standard sufficient to enable the failure to provide suitable signage to constitute a breach of the common law duty of care; see para 54.

38. The House of Lords unanimously rejected this submission. Section 39 was couched in the broadest of terms and involved the kind of target duty that gives rise to no right to damages for its breach even when the breach of duty takes the form of the negligent failure of the local authority to take the appropriate measures to prevent accidents; see Lord Rodger at para 90.

39. Lord Hoffmann stated that it was relevant to consider whether Parliament could be taken to have intended to create the contended for common law duty when enacting section 39. He analysed the example of the broad statutory duty (under the Housing Act 1985) to provide homeless people with accommodation considered in O'Rourke v Camden LBC [1998] AC 188. He stated:

> "In the absence of a right to sue for breach of the statutory duty itself, it would in my opinion have been absurd to hold that the council was nevertheless under a common law duty to take reasonable care to provide accommodation for homeless persons whom it could reasonably foresee would otherwise be reduced to sleeping rough. (Compare Stovin v Wise [1996] AC 923, 953-953.) And the argument would in my

opinion have been even weaker if the council, instead of being under a duty to provide accommodation, merely had a power to do so." (at para 25)

40. Lord Hoffmann considered that the majority in Stovin v Wise (which included himself) might have been ill-advised to speculate on the possibility that a statutory power or public duty might generate a common law duty. This comment had lead Lord Woolf CJ in Larner v Solihull MBC [2001] RTR 469 to state that he accepted that, so far as section 39 Road Traffic Act 1988 was concerned, there can be circumstances of an exceptional nature where a common law liability can arise.

41. Lord Hoffmann commented on the reasoning in Larner and Stovin v Wise as follows:

> "The majority [in Stovin v Wise] rejected the argument that the existence of the statutory power to make improvements to the highway could in itself give rise to a common law duty to take reasonable care to exercise the power or even not to be irrational in failing to do so. It went no further than to leave open the possibility that there might somewhere be a statutory power of public duty which generated a common law duty and indulged in some speculation (which may have been ill-advised) about what that duty might be. Speaking for myself, I find it difficult to imagine a case in which a common law duty can be founded simply upon the failure (however irrational) to provide some benefit which a public authority has power (or a public law duty) to provide." (at paras 31-32)

42. Lord Scott also addressed the exceptional nature scenario hypothesised by Lord Woolf CJ in Larner. He stated:

> "The enticing door left ajar by Lord Woolf CJ's reference to 'circumstances of an exceptional nature where a common law liability [based on a breach of section 39] can arise' ought in my opinion, in the interests of litigants generally, to be firmly shut." (at para 75)

43. In Furnell v Flaherty [2013] EWHC 377 (QB), Turner J reviewed Larner and Gorringe and summarised the state of the law as follows:

> "Although, their Lordships expressed their conclusions in different ways and with different shades of emphasis it should now be taken as settled law that no liability will arise in negligence out of a mere failure, without more, by a public body to confer a

benefit by its omission to fulfil a public statutory duty or to exercise a statutory power however irrational such failure may turn out to have been." (at para 51)

44. In summary, there is no statutory duty, statutory power or public law duty which would assist the families of the deceased in seeking to establish the existence of a common law duty of care owed by RDC to the deceased. The fact that RDC is a public body is, for the purposes of analysing the possible existence of a common law duty of care, legally irrelevant.

(3) Assumption of responsibility

45. There have been cases in which public authorities have actually done acts or entered into relationships or undertaken responsibilities which give rise to a common law duty of care to take positive steps; see Gorringe para 38.

46. This is not such a case. RDC had no prior relationship with the deceased. It had no relationship with them that it did not have with every other beach user at Camber Sands on 24 August 2016; see Gorringe (para 73) where the council had no relationship with Mrs Gorringe that it did not have with every other motorist driving on the stretch of road in question.

47. In the circumstances, the facts of this case are far removed from the situations in which the courts have held that a local authority owes a duty of care by reason of the principle of assumption of responsibility – see for example:

- Barrett v Enfield LBC [2001] 2 AC 550 – council assumed parental responsibilities over child taken into care;
- Phelps v Hillingdon LBC [2001] 2 AC 619 – educational psychologist employed by council had impliedly undertaken to exercise proper professional care and skill when examining child for purpose of diagnosing learning difficulties.

48. In short, RDC had in no way assumed responsibility for the safety of bathers at Camber Sands, including the deceased, on 24 August 2016.

(4) Occupier's Liability

49. The general rule at common law is that a private individual owes no duty of care to rescue another individual from drowning – see section (1) above.

50. The question whether the position is different when the person that omits to act is a local authority rather than a private individual has been addressed above in section (2). The exception to the general rule provided by the principle of assumption of responsibility has been addressed above in section (3). The question addressed in this section is whether it makes a difference in law if the private individual happens to be an occupier of the land on which the individual drowns.

51. As stated above, RDC at all material times leased the foreshore at Camber Sands from the Crown Estate Commissioners. RDC was accordingly an occupier of the foreshore for the purposes of the Occupiers' Liability Act 1957 and the Occupiers' Liability Act 1984. For the purposes of this Note it is assumed that the 1957 Act applies although no formal concession is made to that effect. Under the 1957 Act an occupier owes its visitors the common duty of care. Section 2 of the 1957 Act states that:

> "The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there."

52. In Darby v National Trust [2001] EWCA Civ 189, a claim was brought under the Occupiers' Liability Act 1957 after Mr Darby drowned in a pond in the grounds of Hardwick Hall. Miss Kirkwood, a Water and Leisure Safety Consultant to the Royal Society for the Prevention of Accidents, gave expert evidence. In her opinion, the pond was particularly unsuitable for swimming. The water was deep in the middle and generally murky. The claimant also pointed to the risk of immersion in cold water and the difficulties posed by mud or sludge on the bottom of the pond.

53. The Court of Appeal held that there was no breach of the Occupiers' Liability Act duty. May LJ stated:

> "In my judgement the risks to competent swimmers of swimming in this pond from which Mr Darby so unfortunately succumbed were perfectly obvious. There was no relevantly causative special risk of which the National Trust would or should have been aware which was not obvious." (at para 26)
>
> "In my judgement there was no duty on the National Trust on the facts of this case to warn against swimming in this pond where the dangers of drowning were no other or greater than those which were quite obvious to any adult such as the unfortunate deceased." (at para 27)

54. As to the risks associated with swimming in the sea, May LJ added:

> "It cannot be the duty of the owner of every stretch of coastline to have notices warning of the dangers of swimming in the sea. If it were so, the coast would have to be littered with notices in places other than those where there are known to be special dangers which are not obvious." (at para 27)

55. Jones v Sunworld Ltd [2003] EWHC 591 (QB) concerned a death by drowning in a lagoon in the Maldives. The Judge found that the pool in which Mr Jones drowned had a maximum depth of between 6ft 6in and 8ft. The sides were such that within a pace or two Mr Jones found himself unexpectedly in water up to around his chin. His increased buoyancy at this depth unsteadied him and caused him to panic so that he failed to swim to shallower water but instead drowned (para 18).

56. The claim was brought in contract and under the Package Holiday Regulations. However, the following passages in the judgment of Field J remain relevant.

> "In my opinion, adult holiday makers like Mr and Mrs Jones must be taken to know that the sea-bed is not even and that there is nothing unusual about changes in depth. They accordingly must be taken to appreciate that the sea is capable of springing surprises such as the pool in which Mr Jones died, a pool of calm, clear warm water which did not drop vertically but which shelved down in a way that meant that a person entering it could find himself after a further pace or two in water than had risen from between his chest and his navel to about his chin or slightly above." (at para 35)
>
> "After anxious consideration, I find that the circumstances were such that even if the defendant had made itself aware of the characteristics of the pool, those characteristics were not such that it would have been under a duty to warn Mr and Mrs Jones about the pool's existence." (at para 37)

57. The rationale behind these decisions was put on a more principled intellectual basis in the landmark decision of the House of Lords in Tomlinson v Congleton BC [2004] 1 AC 46. As will be seen, following Tomlinson the scope for a finding of occupiers' liability, in circumstances in which a person voluntarily engages in recreational activities on another's land, is severely limited.

58. Tomlinson concerned a claimant who dived into a lake on the defendant's land and broke his neck when he struck his head on the bottom. The claim was dismissed by the trial judge, allowed by a majority of the Court of Appeal, but ultimately dismissed unanimously by the House of Lords.

59. Mr Tomlinson's incident occurred on 6 May 1995. By 1995, the council's officers had been recommending for some years that additional safety measures be introduced (paras 17-22). When it came to the 1995 budget round, the officers presented a strongly-worded proposal which included the statement that:

> "We have on average three or four near-drownings every year and it is only a matter of time before someone dies. The recommendation from the National Safety Water Committee, endorsed by county councils, is that something must now be done to reduce the 'beach areas' both in size and attractiveness. If nothing is done about this and someone dies the borough council is likely to be held liable and would have to accept responsibility." (at para 23)

60. The council found this persuasive and, in 1995, £5,000 was allocated to the scheme but the work had not yet begun when Mr Tomlinson had his accident (para 24).

61. Lord Hoffmann, giving the leading judgment said that central to the appeal was the question of whether people should accept responsibility for the risks they choose to run (para 44). In considering this question, he said:

> "It will be extremely rare for an occupier of land to be under a duty to prevent people from taking risks which are inherent in the activities they freely choose to undertake upon the land. If people want to climb mountains, go hang gliding, or swim or dive in ponds or lakes, that is their affair." (at para 45)

"A duty to protect against obvious risks or self-inflicted harm exists only in cases in which there is no genuine and informed choice, as in the case of employees whose work requires them to take the risk, or some lack of capacity, such as the inability of children to recognise danger ..." (at para 46)

62. The parameters of the Tomlinson principle have been explored in subsequent civil cases at appellate level. Evans v Kosmar Villa Holidays Ltd [2008] 1 WLR 297 was a case arising out of a diving accident in a swimming pool in an overseas holiday resort. Richards LJ stated that the core of the reasoning in Tomlinson was that:

> "people should accept responsibility for the risks they choose to run and that there should be no duty to protect them against obvious risks, subject to Lord Hoffmann's qualification as to cases where there is no genuine and informed choice or there is some lack of capacity." (at para 39)

63. The Claimant sought to escape the operation of the Tomlinson principle by relying on the fact that (as the trial judge found) at the time that he dived into the pool, any prior and useful knowledge left him and he acted in a brief state of inadvertence. The possibility that a Claimant's forgetfulness of a risk of which he was previously aware could enable him to escape the operation of the Tomlinson principle was comprehensively rejected by the Court of Appeal. Richards LJ stated:

"42. Mr Saggerson submitted that this case should be about the need for prominent signage to reduce the risk of people in the claimant's position reaching a wrong conclusion as the claimant did. The point, in effect, was that it is not a matter of guarding against an obvious risk but of guarding against the possibility of a mistaken assessment of the risk. That is a clever way of seeking to meet the argument based on Tomlinson's case, but I would reject it. The risk in this case remained an obvious one of which the claimant himself was previously aware and should have been aware at the moment he dived. The fact that at that moment he acted thoughtlessly, in a brief state of inadvertence, is not a good reason for holding Kosmar to have been under a duty that it would not otherwise have owed him.

43. Accordingly I take the view that there was no duty to give the claimant any warning about the risk of diving into the pool, let alone to have better placed or more

prominent signs than those actually displayed, or to take any other step to prevent or deter him from using the pool or from diving into it."

64. In Poppleton v Trustees of Portsmouth Youth Activities Committee [2008] EWCA Civ 646, the claimant was rendered tetraplegic when he sustained a fall whilst using an indoor climbing wall at the defendants' premises. The trial judge held that the defendants were in breach of duty in failing to warn the claimant that thick safety matting did not make a climbing wall safe but might induce or encourage an unfounded belief that it did (para 9). The Court of Appeal, applying Tomlinson, allowed the defendants' appeal. May LJ stated:

> "The judge held in effect that the risk that the matting might not in every case protect a climber who fell from serious injury was not obvious. But I do not consider that this finding is sustainable ..." (at para 18)
>
> "There being inherent and obvious risks in the activity which Mr Poppleton was voluntarily undertaking, the law did not in my view require the appellants to prevent him from undertaking it, nor to train him or supervise him while he did it, or see that others did so." (at para 20)

65. In short, the effect of the Tomlinson principle would be to defeat any claim brought against RDC for breach of the Occupiers' Liability Act.

(5) Article 2 EHCR

66. The substantive right provided by article 2 has two distinct components. First, a general duty to put in place systems to protect life. Secondly, a separate *Osman* operational duty which arises in some, but not all, cases of a real and immediate risk to life.

67. An example of the general duty was given in Mitchell v Glasgow City Council [2009] 1 AC 874. Lord Rodger said:

> "Mr Mitchell lived in the area covered by the Strathclyde Police Force. They were the public authority with the duty, and with the resources, to prevent criminal violence there. It was undoubtedly their duty to have in place appropriate systems for preventing criminal violence in Mosspark." (para 68)

68. It is submitted that the State's general duty towards persons at risk of drowning is satisfied by the existence and work of HM Coastguard and the police services. The "Strategic Overview of Search and Rescue in the UK"[7] states that they are the two authorities with responsibility for the response and co-ordination of national Search and Rescue ("SAR") in the UK. Of HM Coastguard, it states amongst other things:

> "Through its fully integrated and flexible network of nine Operations Centres (and London Coastguard) around the UK with the National Maritime Operations Centre at its hub, HM Coastguard fulfils its responsibility for the initiation and co-ordination of civil maritime and aeronautical SAR. This includes the mobilisation, organisation and tasking of adequate resources to respond to persons in distress in the air, at sea, in tidal waters or at risk of injury or death on the sea cliffs and shoreline of the UK." (emphasis added)

69. The general duty does not require local authorities to provide lifeguarding services at beaches within their geographical area.

70. As to the *Osman* duty, the ECtHR in Osman (1998) 29 EHRR 245 defined the circumstances in which the obligation arises as follows:

> "It must be established to [the court's] 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." (at para 116)

71. It is clear from Van Colle [2009] 1 AC 225 that the court's role is to apply the test to the facts of the case under consideration; see paras 30, 66 and 116. Lord Hope, in a speech with which Lord Carswell agreed, stated:

> "In re Officer L [2007] 1 WLR 2135, para 20, Lord Carswell said that the real and immediate test is one that is not readily satisfied, the threshold being high. I read his words as amounting to no more than a comment on the nature of the test which the

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Strasbourg court has laid down, not as a qualification or a gloss upon it. We are fortunate that, in the case of this vitally important Convention right, the Strasbourg court has expressed itself in such clear terms. It has provided us with an objective test which requires no further explanation. The question in each case will be whether on the facts it has been satisfied." (at para 66)

72. Applying the *Osman* test to the facts of this case, it is submitted that it would be misconceived to attempt to characterise the many thousands of people at Camber Sands on 24 August 2016 as all being at real and immediate risk of death by drowning. As stated in section (3) above, RDC had no relationship with the deceased that it did not have with every other beach user at Camber Sands that day. The deceased were not identified individuals within the meaning of the *Osman* test. There would be no basis for concluding that RDC knew or ought to have known that the deceased were at real and immediate risk of drowning.

73. Further, it is important to recognise that not all situations which give rise to a real and immediate risk to life are covered by the *Osman* principle. In Rabone v Pennine Care NHS Trust [2012] 2 WLR 381, Lord Dyson JSC stated that the existence of a real and immediate risk to life is a necessary but not sufficient condition for the existence of the duty (para 21). No decision of the ECtHR clearly articulates the criteria for deciding whether, in circumstances where there is a real and immediate risk to life, the *Osman* operational duty exists (para 22). However, there are certain indicia which point the way. The operational duty will be held to exist where there has been an assumption of responsibility by the state for the individual's welfare and safety, including by the exercise of control (para 22). The vulnerability of the victim is a relevant consideration (para 23).

74. It is submitted that the risk of drowning posed by the sea, and in particular the risk of drowning posed by the sea at Camber Sands on 24 August 2016, should not be regarded as falling within the class of risks recognised by the courts as giving rise to the *Osman* operational duty. Strasbourg, like the common law, develops the law on a case by case basis. For a court to decide that the risk of drowning posed by the sea at Camber Sands on 24 August 2016 gave rise to the *Osman* operational duty would represent a radical development in the law rather than an incremental development. There is no justification in authority or principle for such a radical development.

75. In summary, the situation at Camber Sands on 24 August 2016 did not meet the *Osman* test. There would be no basis for concluding that RDC knew or ought to have known that the deceased were at real and immediate risk of drowning. Further, the risk of drowning posed by the sea at Camber Sands on 24 August 2016, should not be regarded as falling within the class of risks recognised by the courts as giving rise to the *Osman* operational duty.

(6) Section 3 HSWA

76. Section 3(1) HSWA 1974 places a general duty on an employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not exposed to risks to their health or safety.

77. The words "who may be affected thereby" are important. Section 3 HSWA is only concerned with material risks which arise out of the defendant's conduct of his undertaking.

78. Preventing persons from entering the sea or remaining in the sea did not form part of RDC's undertaking, nor did rescuing persons from the sea who were drowning or were in difficulties.

79. Further and in any event, it is submitted that the Tomlinson principle applies equally to the issue of criminal liability under section 3 HSWA with the result that no liability would arise in this case.

80. The case which provides the link between Tomlinson and the criminal law is R (Hampstead Heath Winter Swimming Club) v Corporation of London [2005] 1 WLR 2930. The Club sought judicial review of the Corporation's refusal to permit swimming in the ponds on Hampstead Heath, a refusal born out of a concern that it would be vulnerable to prosecution for contravening section 3 HSWA if it permitted swimming. Stanley Burnton J allowed the claim. The case is authority for the following relevant propositions.

(1) One expects the scope of tort to be wider than that of crime – para 45.

(2) The requirement in section 3 that the exposure to risk should be by the conduct of the employer's undertaking is subject to the same considerations as those referred to by the House of Lords in Tomlinson – para 63.

(3) The criminal law respects the individual freedom upheld by the House of Lords in Tomlinson – para 68.

81. The application of the Tomlinson principle does not appear to have troubled the criminal courts since Hampstead Heath WSC.

82. The leading case on sections 2 and 3 HSWA is now R v Tangerine and Veolia [2011] EWCA Crim 2015. But there is no reason to think that Tangerine has in any way diluted the interrelationship of the civil law of tort and the criminal law as explained in Hampstead Heath WSC.

83. The case of R v Upper Bay Ltd [2010] EWCA Crim 495 is clearly distinguishable from the facts of this case because of the differences between the defendant's undertaking and RDC's undertaking. The defendant in that case ran and operated premises which included a swimming pool, with sophisticated additional features, which provided attractive entertainment for paying visitors (para 18).

84. In short, the effect of the Tomlinson principle would be to defeat any attempt to prosecute RDC under section 3 HSWA.

Conclusion

85. An omission (i) to take any steps to prevent persons drowning in the sea or (ii) to take any steps to rescue persons who are drowning or in difficulties would not give rise to liability at common law unless there were some additional factual feature such as to bring it within a recognised exception to the general rule that the common law does not impose liability for omissions.

86. There is no statutory duty, statutory power or public law duty which would assist the families of the deceased in seeking to establish the existence of a common law duty of care owed by RDC to the deceased. The fact that RDC is a public body is, for the

purposes of analysing the possible existence of a common law duty of care, legally irrelevant.

87. RDC had in no way assumed responsibility for the safety of bathers at Camber Sands, including the deceased, on 24 August 2016.

88. The effect of the Tomlinson principle would be to defeat any claim brought against it for breach of the Occupiers' Liability Act or any attempt to prosecute it under section 3 HSWA.

89. The situation at Camber Sands on 24 August 2016 did not meet the *Osman* test. There would be no basis for concluding that RDC knew or ought to have known that the deceased were at real and immediate risk of drowning. Further, the risk of drowning posed by the sea at Camber Sands on 24 August 2016, should not be regarded as falling within the class of risks recognised by the courts as giving rise to the *Osman* operational duty.

90. As stated in para 3 above, we invite the Coroner to direct the other Interested Persons to provide him with written submissions indicating the extent, if any, to which they disagree with the analysis set out in this Note.

JAMES MAXWELL-SCOTT QC
Crown Office Chambers
27 April 2017