

# The Mystery of Human Rights Damages

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1. No general right to damages in public law.

"A claim for judicial review may include a claim for damages, restitution or the recovery of a sum due but may not seek such a remedy alone"

CPR Pt 53.4(2)

2. Common law compensation claims against public bodies:

- Restitution (common law and Community law);
- False imprisonment;
- Negligence (?);
- Misfeasance in public office.

3. Community law: *Francovich* damages:

- rule of law confers rights on individuals;
- sufficiently serious breach or "manifest and grave disregard";
- direct causal link between breach and damage.

These conditions are, and are intended to be, difficult to meet: *Factortame* [1997] EuLR 475 at 513, DC.

4. Human Rights Act 1998:

"In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just an appropriate": s 8(1).

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No award to be made unless necessary for just satisfaction, taking into account the other remedies granted: s 8(3).

Court must take into account the principles applied in Strasbourg: s 8(4).

#### 5. The policy context

"The expectation is ... and has always been, that a member state found to have violated the Convention will act promptly to prevent a repetition of the violation, and in this way the primary object of the Convention is served." *R(Greenfield) v Home Secretary* [2005] 1 WLR 673 at 677 per Lord Bingham.

"Where an infringement of an individual's human rights has occurred, the concern will usually be to bring the infringement to an end and any question of compensation will be of secondary, if any, importance":

*Anufrijeiva v Southwark LBC* [2004] QB 1124 para 57 per Lord Woolf CJ.

#### 6. Are HRA damages like tort?

The obvious analogy is a claim against a public authority in tort. The rules in tort are the prima facie measure to be applied.

*Law Commission, 2000*

Where damages are awarded, they should be comparable to tort damages:  
*Anufrijeiva*, para 74.

#### 7. But:

"this approach should not be followed... courts in this country should look to Strasbourg and not to domestic precedents ...

They are not inflexibly bound by Strasbourg awards in what may be different cases. But they should not aim to be significantly more or less generous than the court might be expected to be, in a case where it was willing to make an award at all."

*Greenfield*, para 19.

Cf: *R(Ullah) v Special Adjudicator* [2004] 2 AC 323, para 20 per Lord Bingham: "The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less."

#### 8. The restitutionary approach:

"reparation must as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed"

*Papamichalopoulos v Greece* (1996) 21 EHRR 439 para 36.

"Where the breach of a Convention right has clearly caused significant pecuniary loss, this will usually be assessed and awarded."

*Anufrijeiva*, para 59.

9. Eg: *Darby v Sweden* (1991) 13 EHRR 774: tax levied in breach of Art 14 read together with A1P1 repaid with interest. The judgment was sufficient reparation for any "mental suffering".

10. The equitable approach.

"The [ECTHR] routinely describes its awards as equitable, which I take to mean that they are not precisely calculated but are judged by the court to be fair in the individual case. Judges in England and Wales must also make a similar judgment in the case before them." *Greenfield* para 19

"The critical message is that the remedy has to be 'just and appropriate' and 'necessary' to afford 'just satisfaction'. The approach is an equitable one. The 'equitable basis' has been cited by the Court of Human Rights both as a reason for awarding damages and as a basis on which to calculate them": *Anufrijeiva*, para 74.

*A v Lord Grey School* [2006] 2 AC 363: no damages for exclusion from school. Not "necessary" as child had returned to school.

*Re: P* [2007] EWCA Civ 2: no damages for procedural breach of Art 8 in family proceedings.

11. More principles:

- seriousness and manner of violation are relevant;
- can recover "pecuniary" and "non-pecuniary damages";
- causation must be clear;
- a finding of violation may be sufficient, even where harm is clearly suffered;
- the case law is not consistent.

12. Breach of Art 5(5): *R(KB) v Secretary of State* (2004) QB 936.

13. Breach of Article 6:

"it does not follow from a finding that the trial process has involved a breach of an article 6 right that the outcome of the trial process was wrong or would have been otherwise had the breach not occurred. There is an obvious contrast with article 5 ... There is a risk of error if Strasbourg decisions given in relation to one article of the Convention are read across as applicable to another."

*Greenfield*, para 7.

14. Approach to Art 6 in *Greenfield*:

- damages rarely awarded at all;
- a retrial will vindicate the defendant's rights;
- if the violation actually caused loss, then damages are payable;
- in the absence of a clear causal connection, the Court will treat the finding of a violation as sufficient;
- an award may be made for a "loss of real opportunities", but usually the Court will not speculate on the outcome of a trial.
- no award for "structural bias";
- damages for anxiety and frustration have been "noteworthy for their modesty".

15. Procedure: *Anufrijeiva* para 81:

- Courts should look critically at any attempt to recover for maladministration other than through JR.
- If damages only, claim to be brought in Admin Court.
- Claimant must explain why not using complaint procedures or Ombudsmen before permission is granted.
- Court will consider deferring the damages claim until other remedies have been tried.
- The citing of more than three authorities and a hearing of more than half a day only in exceptional circumstances.

16. *Van Colle v Chief Constable of Hertfordshire* [2007] EWCA Civ 325: Greenfield applied and a modest award of damages made for breach of Art 2 arising out of a failure to prevent a death in custody in accordance with Strasbourg cases.

17. Special rules for claims against Judges:

- Can only bring the claim in the High Court: s 9(1) HRA; *R(TH) v Wood Green Crown Court* [2007] 1 WLR 1670.
- only awarded in absence of good faith, or for breach of Art 5: s 9 HRA.

18. The mystery: why so few successful claims?

- discretionary remedy;
- remedy of last resort: s 8(3);
- damage not always suffered;
- the domestic case law;
- public law wrongs: decision remitted?

19. Why is public law different?

- public finance is limited and paying compensation diverts resources;
- public bodies do not disappear and are an attractive target;
- public bodies must balance complex competing considerations;
- liability may make for defensive decision making.

*Markesinis and Deakin's Tort Law*, pp 376 -381.

20. But sometimes compensation should be paid:

"On the one hand the courts must not contribute to the creation of a society bent on litigation, which is premised on the illusion that for every misfortune there is a remedy. On the other hand, there are cases where the courts must recognise on principled grounds the compelling demands of corrective justice or what has been called the rule of public policy which has first claim on the loyalty of the law: that wrongs should be remedied... Sometimes cases may not obviously fall into one category or another. Truly difficult cases arise."

*Gorringe v Calderdale MBC* [2004] 1 WLR 1057 at 2 per Lord Steyn.

21. Can the courts develop a remedy?

"That the cases do not include damages for abuse of power falling short of [misfeasance] in public office does not necessarily mean that door is closed to them in principle. But the policy implications of such a step are immense, and it may well be that... a legal entitlement to them cannot now come into being without legislation."

*R v C&E ex p F&I Services* [2001] STC 939 at 73 per Sedley LJ.

22. The Law Commission, *Remedies Against Public Bodies*, 2006:

"To allow an action for [public law] damages ... would be a radical departure from the existing law, almost certainly requiring legislation. Such a change would move English law towards the system of French administrative law, where the liability of public bodies is founded on 'fault' and 'mere illegality is in itself a fault capable of giving rise to liability without more, and towards EU law."

23. Issues raised by the Law Commission:

- Apply Community law approach: "manifest and grave disregard"?
- What if the public authority can retake its decision?
- Would a second decision against the claimant absolve the authority of liability in damages?
- Tort of breach of statutory duty?
- Negligence?
- Misfeasance?

24. The future?

- Expanded use of restitutionary remedies?
- Extension of the law of negligence?
- HRA damages finally catch on.

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