Damages under the Human Rights Act 1998

With the Bank Mellat litigation bubbling away, what principles of causation, mitigation and quantum should you apply to HRA damages?

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- Now almost 20 years since the enactment of the Human Rights Act 1998.
- What the Law Commission said in October 2000:
  - "*Perhaps the most striking feature of the Strasbourg case-law, to lawyers from the United Kingdom, is the lack of clear principles as to when damages should be awarded and how they should be measured*."

("Damages under the Human Rights Act 1998", Law Com No. 266)

- Is this still true?
- An answer in 3 parts:
  - (1) review the key principles that emerge from the existing law;
  - (2) introduce the Bank Mellat litigation;
  - (3) consider its implications and reflect on how the law might develop;
- At the end, I propose one way in which the argument in Bank Mellat might be developed, as it comes to trial.

Part 1

Key principles

HRA, section 8, judicial remedies

(1) 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 and appropriate.

[…]

(3) No award of damages is to be made unless, taking account of all the circumstances of the case, including—

(a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and

(b) the consequences of any decision (of that or any other court) in respect of that act,

the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.

(4) In determining—

(a) whether to award damages, or

(b) the amount of an award,

the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention.

Some important sources of guidance

(1) Anufrijeva v Southwark London Borough Council [2004] QB 1124 (Court of Appeal) (Art. 8)

(2) R (Greenfield)) v SSHD [2005] 1 WLR 673 (House of Lords) (Art. 6)

(3) R (Sturnham) v Parole Board (Nos 1 and 2) [2013] 2 AC 254 (Supreme Court) (Art. 5)

(4) The Iraqi Civilian litigation [2017] EWHC 3289 (Leggatt J.) (Art. 3 and 5)

(5) Practice Direction on Just Satisfaction Claims (ECtHR) (Sept. 2016)

10 key principles

(1) HRA damages are not "as of right". Unlike domestic torts (Anufrijeva, ¶50).

(2) When awarded, they are compensatory not punitive (Practice Direction ¶9).

(3) Damages are of secondary importance to findings of violation - or are they?

- Lord Woolf CJ in Anufrijeva at ¶53: *"the concern will usually be to bring the infringement to an end and any question of compensation will be of secondary, if any importance"*
- Lord Bingham MR in Greenfield at ¶9: *"[…] the focus of the Convention is on the protection of human rights and not the award of compensation."*
- But see Leggatt J. in Iraqi Civilians at ¶933: *"where the violation alleged is not continuing but purely historic […] the question of compensation is … of primary, if not sole, importance."*

(4) Courts should be primarily guided by any "*clear and consistent practice*" of ECtHR (Greenfield ¶19; Sturnham ¶13).

- Developed out of the direction in s.8(4) to take account of ECtHR "principles".
- SC in Sturnham – it is not sufficient to point to "one-off" decisions; cases which:

(1) are expressed in terms of principle or practice; or

(2) form part of a recognisable trend applied in a series of cases (¶114).

(5) ECtHR and domestic Courts differ over the nature and extent of fact-finding

- ECtHR is hampered by inability to compel witnesses or production of documents; the forensic exercise is limited and ECtHR may say that it declines to speculate or award damages for loss of opportunity (Sturnham, ¶37).
- SC in Sturnham: English Courts "*should resolve disputed issues of fact in the usual way, even if the [ECtHR], in similar circumstances, would not do so*" (¶39).

(6) "Clear causal link" must be established

- Practice Direction: "*The Court will not be satisfied … by mere speculation as to what might have been*" (¶7).
- Lack of causation is routinely cited in ECtHR as the basis for refusing damages.
- But, ECtHR has sometimes been willing to accept nebulous loss of opportunities (particularly in Article 6) on the basis that "*the outcome might possibly have been different*"; "*it cannot be entirely excluded*" (cited in Greenfield, ¶14).
- The result is a low threshold but also a law award.
- In English Courts: a change in culture post-Sturnham.

(7) In cases of pecuniary loss the key principle is *restitutio in integrum*

- If pecuniary loss can be calculated, usually the full amount will be awarded (Anufrijeva ¶59; Practice Direction ¶12).
- It appears that equitable discretion has little (if any) role to play?
- What (if any) role for remoteness? Or mitigation?

(8) Non-pecuniary losses are determined on an "equitable" basis

> *"… if the Court considers that a monetary award is necessary, it will make an assessment on an equitable basis, having regard to the standards which emerge from its case law."* (PD ¶14).

- Difficulty lies in identifying those standards.
- Particularly problematic given the aim of convergence: *viz.* that domestic awards should be *"not … be significantly more or less generous"* than in the ECtHR (Lord Bingham MR in Greenfield).
- Important to note differences in the value of money in other Convention states.

(9) Tort damages do not provide a guide to non-pecuniary recovery – or do they?

- Anufrijeva: *"rough guidance"* may be drawn from the measures of damages under the Judicial Studies Board guidelines (¶74).
- Greenfield: tort measures should not be applied. (a) HRA not a tort statute; (b) purpose of HRA was to "bring rights home", not change them; (c) effect of s. 8(4).

- Most recently, in Iraqi Civilians: Leggatt J: courts should consider tort measures where the HR violation was *"akin to a private wrong".*
- Why?

  (a) Argument of principle: HRs are not less valuable than rights in private law;

  (b) Consistent with s.8(4): ECtHR takes guidance from domestic standards (Art. 41);

  (c) Compatible with Greenfield: because HL did not require the Courts to ignore tort damages.

- Consider Leggatt J.'s method
  - First, calculate measure in tort;
  - then consider whether there is a "*good and sufficient reason*" to award a different sum (¶932)
- This is more than mere consideration of the tort measure – Leggatt J. is proposing a rebuttable presumption that the tort measure applies.

(10) Damages may be reduced if Court "*finds reasons in equity*" to do so

- See PD ¶2 and 12: very little guidance as to when this will apply.
- Inconsistent with *restitutio in integrum* and unclear what role this plays in relation to pecuniary losses.
- Controversial suggestion that it permits reduction of damages in public interest: Anufrijeva, ¶56
  - Lord Woolf CJ: "*In considering whether to award compensation and, if so, how much, there is a balance to be drawn between the interests of the victim and those of the public as a whole*".
  - Endorsed academic commentary that *"this involves determining the "appropriate" remedy […] having regard to what would be "just", not only for that individual victim, but also for the wider public who have an interest in the continued funding of a public service"*

Scorey & Eicke, Human Rights Damages, Principles and Practice

Part 2

The Bank Mellat litigation

Bank Mellat – facts

- UK Government suspected that BM was contributing to Iran's nuclear and ballistic weapons programme.
- HMT made a financial restriction order under the Counter-Terrorism Act 2008, prohibiting all persons in the UK financial sector from transacting business with BM.
- The Supreme Court held that the order was unlawful – it was disproportionate, irrational and offended common law fairness: [2013] UKSC 38.
- The case then returned to first instance (Flaux J.) for consideration of consequential relief.

Had there been a breach of A1P1?

- On a preliminary issue before Flaux J, HMT disputed whether the SC had made a finding that the order breached A1P1, rather than being unlawful at common law.
- Flaux J, held that a finding of A1P1 breach had been made: [2015] EWHC 1258 (Comm).
- But what "*possessions*" had been infringed?

What “possessions”?

- Flaux J. concluded that SC must have decided that it had interfered with the Bank’s commercial “goodwill” built-up in UK, which was a possession: see Mitting J. [2010] EWHC 1332 (QB), ¶2.

  “[…] the bank has been unable to make profitable use of the goodwill which it has established in the United Kingdom – undoubtedly a possession for the purposes of A1P1.”

- HMT also acknowledged that, in principle, BM’s existing contracts were possessions.

- It was common ground that future profits were not a possession.

- Key issue: could BM recover the lost future profits from not being able to conduct business.

BM’s case on lost profits

- Once the infringement of a possession is established, C can recover all resulting losses.
- This includes future profits, even though they are not possessions themselves.
- In other words, the identification of possessions is relevant only to breach, not remedy.

HMT's case on lost profits

- Damages are recoverable only in respect of losses to "possessions".
- Reasoning (?):
  - Convention only protects possessions;
  - Remedies should be / are limited to vindicating that right.
- *Cf the principle in tort that losses are only recoverable in negligence if they fall within the scope of the duty that has been breached.*

Decision

- Flaux J. agreed with BM: the identification of "*possessions*" was relevant to establishing the interference. Once this was established, recovery simply turned on causation: ¶78

- Court of Appeal: both positions arguable and should not be decided as a preliminary issue: [2016] EWCA Civ 452.

- Now to be decided at trial, listed for a 5 week hearing.

Part 3

Implications of Bank Mellat & how the law may develop

Why Flaux J's approach matters

(1) Due to the English Courts' forensic approach to causation

- Cf ECtHR's approach in Centro Europa v Italy [2012] ECHR 974.
  - C was granted broadcasting licence but not allocated frequencies
  - Claimed €2 billion for lost earnings.
  - ECtHR: loss of earnings: "*must be conclusively established and must not be based on mere conjecture or probability*" (¶219).
  - But, found "*a real loss of opportunities*" - €10m. No reasoning.
- Compare this to the approach mandated by the SC in Sturnham – detailed factual enquiry.

(2) And because A1P1 can give rise to no-fault liability.

- Consider the process of justifying an interference:

  (1) in the public interest – *usually straightforward*

  (2) Proportionate – *wide latitude (unlike Article 8)*

  (3) Lawful (conditions provided by law) – *absolute.*

- It therefore catches non-negligent errors of law: (Infinis Plc) v Gas & Electricity Markets Authority [2013] EWCA Civ 70. (Good faith misinterpretation of statutory entitlement to Renewables Obligation Certificates.)

What limits on pecuniary losses might Courts impose?

- Is it unacceptable to have non-negligent errors giving rise to liability limited only by "but for" causation?
  - Mitigation? A requirement to take all reasonable steps – develop from (a) causation, and (b) the equitable discretion - *"just and appropriate*".
  - Remoteness? Reasonable foreseeability - as with mitigation.
  - Raise threshold for causation? Something *more* than the balance of probabilities? Cf Central Europa (above): must be "conclusively *established"* more than *"mere conjecture or probability*". Unlikely. Balance of probabilities is sacrosanct.
  - Reductions in damages for public interest? As per Anufrijeva. No – problematic both in principle and practice.
  - Other thresholds? A test of "*sufficient seriousness*"? Would require legislation.
- Practical techniques: intense focus on the nature of the possession and causation.

Returning to Bank Mellat – a way out for HMT?

- If BM's possession was "goodwill", what losses resulted from any interference with it?
- First, what is "goodwill" or "marketable goodwill"?

  "It appears that 'goodwill' is being used rather in the economic sense of the capitalised value of a business or part of a business as a going concern which, according to modern theory of corporate finance, is best understood as the expected free future cash flows of the business discounted to a present value at an appropriate after tax weighted average cost of funds […]."

  R (Nicholds) v Security Industry Authority [2007] 1 WLR 2067 at para.72 *per* Kenneth Parker QC (as he then was).

- Lord Dyson MR in Breyer Group v Department of Energy and Climate Change [2015] 1 WLR 4559 at para. 32)
  - *"…distinction … between the present day value of future income (which is not treated by the European court as part of goodwill and a possession) and the present day value of a business which reflects the capacity to earn profits in the future (which may be part of goodwill and a possession). The capacity to earn profits in the future is derived from the reputation that the business enjoys as a result of its past efforts."*
- Key conclusion: when considering goodwill
  - the focus is the value of the business; and
  - the capacity to generate profits is only a proxy for assessing this value.

(2) In light of this, what losses flowed from the interference?

- Interference with "*goodwill*" means interference with the capitalised value of that business, not the activities of the business itself.
- The loss of future profits is, therefore, not a consequence of infringing the goodwill.
- Profits are lost due to an interruption in the performance of the business, not an interference with its goodwill.
- Lost profits are therefore irrecoverable.
- To establish loss to goodwill, C would need to show that the marketable value of the business was suppressed, and remained suppressed at the date of assessment.

THE END