

## Damages and the Human Rights Act 1998

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### Introduction

This paper deals with the power of the courts under the Human Rights Act 1998 (HRA) to order a public authority to pay damages<sup>1</sup> where it has breached its duty<sup>2</sup> to act compatibly with Convention rights. The paper does not deal with the recent judgment of the Court of Appeal in *Anufrijeva v. London Borough of Southwark*<sup>3</sup>, which Richard Clayton will deal with in his paper<sup>4</sup>.

It should also be remembered, however, that it may often be possible to obtain an effective remedy by using the HRA in conjunction with existing law. Reliance on a Convention right does not restrict any other rights or the entitlement to bring proceedings which could have been brought apart from the Act<sup>5</sup>. All legislation, whenever enacted, must be "*read and given effect in a way which is compatible with the Convention rights*" so far as it is possible to do so<sup>6</sup>. And courts and tribunals are themselves "public authorities" who are bound by section 6 to act in a manner which is compatible with Convention rights. This means that they may be required on occasion to take positive steps to protect the Convention rights of individuals from interference by others, including by other individuals. In cases such as these, it may be unnecessary to rely primarily on the HRA. A few examples will serve to illustrate the point.

A public authority may be found to have acted *ultra vires* because its statutory power, interpreted in accordance with section 3, does not empower it to act in the manner which it purported to act because that would be a breach of a Convention right. Or again, an incompatible provision of subordinate legislation might be declared of no effect because the statutory rule-making power, so construed, did not permit the making of rules which are incompatible with Convention rights. In such cases the lawful warrant for what might otherwise be a lawful act simply falls away. Without necessarily relying on section 6, the act in question may be *ultra vires*, or tortious because done without statutory authority or lawful excuse.

Indirect effect may also be seen where the courts find themselves under a positive obligation to protect Convention rights. Protection of the right to respect for private life, most controversially from media intrusion, is likely to lead to development of the common law relating to trespass and breach of confidence<sup>7</sup>. The HRA has also played a part in the application of the Protection from Harassment Act to media intrusion.<sup>8</sup>

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<sup>1</sup> HRA Section 8.

<sup>2</sup> HRA Section 6.

<sup>3</sup> [2003] EWCA Civ 1406.

<sup>4</sup> A note on *Anufrijeva*, written by Paul Ridge and Stephen Grosz is due to be published in the Law Society's Gazette for 4 December 2003.

<sup>5</sup> HRA section 11.

<sup>6</sup> HRA section 3.

<sup>7</sup> *Douglas v. Hello! Ltd* [2001] Q.B. 967; *B & C v. A* [2002] EWCA Civ 337; [2002] H.R.L.R. 25. As to the development of a discrete tort of invasion of privacy, see *Home Office v. Wainwright & another* [2003] UKHL 53.

<sup>8</sup> The Court of Appeal had regard to the HRA in interpreting the 1997 Act in *Thomas v (1) News Group Newspapers Ltd & another* [2001] EWCA Civ 1233; (2002) EMLR 4. But see section 12 of the HRA which enjoins the court to "have particular regard to the importance of the Convention right to freedom of expression" in such cases.

Again, the Convention right to respect for the home can be asserted by anyone who is a resident, even on occasion if they do not have rights of ownership<sup>9</sup>. But at present, only a claimant who has an interest in land can establish a cause of action in nuisance.<sup>10</sup> The courts may well have to reconsider the law of nuisance they are to fulfil their duty, as public authorities, to secure the protection of Convention rights.<sup>11</sup> The Article 6 right of access to the courts is already having a considerable effect on public policy immunities. The blanket ban on tort liability in certain areas is being replaced with a new standard of care intended to strike a balance between individual rights of access to court and the general interest in allowing public authorities to carry out their functions without being hampered by unmeritorious litigation<sup>12</sup>.

In these ways, the HRA is working through existing law, where necessary fashioning human rights protection with tools familiar to our legal system. This way of proceeding is clearly what is expected to happen. Apart from the saving for existing rights in section 11, it is clear from the terms of section 8 that Parliament intended the HRA to develop in this way.<sup>13</sup> There are many advantages to this method.

### Rights and remedies arising under the HRA

Section 6(1) of the HRA provides that

*It is unlawful for a public authority to act in a way which is incompatible with a Convention right.*

Section 7 provides that a victim of an alleged violation may bring proceedings against the public authority or rely on the Convention right alleged to have been breached – as a defence or counter-claim – in any proceedings brought by or at the instigation of a public authority.

The principal remedial provision is **section 8**, headed “judicial remedies”, which provides as follows:

*(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**.*

<sup>9</sup> *Mentes v. Turkey* (1998) 26 EHRR 595. See also *Khatun & 180 others v. United Kingdom* (1998) 26 EHRR CD 212, where the claimants in the failed Limehouse Link litigation took their claims to the Commission, which decided that their right to respect for their homes was engaged. The case was declared inadmissible on other grounds.

<sup>10</sup> *Hunter v. Canary Wharf Limited* [1997] 2 All ER 426 HL. See the dissenting judgment of Lord Cooke of Thorndon.

<sup>11</sup> See also *Whiteside v United Kingdom* (1994) 18 EHRR CD 126 (State’s failure to remedy the serious and persistent harassment).

<sup>12</sup> *Barrett v Enfield London Borough Council* (2001) 2 AC 550; *Phelps v Hillingdon London Borough Council* (2001) 2 AC 619; *JD v. East Berkshire Community Health* [2003] EWCA Civ 1151.

<sup>13</sup> See in particular section 8(3)(a) and the reference to “any other relief or remedy granted, or order made, in relation to the act in question”.

(2) *But damages may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings.*

(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.<sup>14</sup>*

**Article 41** of the Convention, which is headed “just satisfaction”, provides as follows:

*If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.<sup>15</sup>*

Read as a whole, section 8 propounds one general rule, followed by a number of limitations which relate to the power to award damages. Consideration of the limitations will help to understand the ambit of the general rule.

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<sup>14</sup> Emphasis added.

<sup>15</sup> Emphasis added. Until the adoption of the 11th Protocol which amended the Convention, the equivalent provision was Article 50. The Strasbourg Court has not adopted any different principles or practices in relation to the new provision.

### *The general rule*

This rule is to be found in section 8(1), providing that the court may grant "*such relief or remedy, or make such order, within its powers as it considers just and appropriate.*"

Although the right to an effective remedy<sup>16</sup> does not feature among the Convention rights to which the HRA gives effect, the Lord Chancellor made clear that the courts are nonetheless entitled to take account of the Strasbourg case law relating to it when applying their remedial powers.<sup>17</sup>

Section 8(1) is deliberately worded in the widest possible terms, as the Lord Chancellor made clear to Parliament:

"Our courts are rich in remedies and have every freedom under Clause 8 ... The Bill has been constructed in a way that affords ample protection for individuals' rights under the convention. We have adopted an intentionally wide definition of public authority under Clause 6, and Clause 8(1), which I have already read, gives the courts ample scope for doing justice when unlawful acts are committed. ... *Clause 8(1) is of the widest amplitude*".<sup>18</sup>

The words "just and appropriate" leave a wide discretion to the court, echoing as they do the powers of High Court under section 37(1) of the Supreme Court Act 1981 to grant an interlocutory or final injunction or appoint a receiver "*in all cases in which it appears to the court to be just and convenient to do so*".

It may also be instructive to look at the case law relating to similar provisions in other jurisdictions. For example, the Canadian Charter of Rights and Freedoms, empowers courts to grant remedies which are "appropriate and just in the circumstances" to anyone whose rights have been infringed<sup>19</sup>. Applying this provision, the Saskatchewan Court of Appeal considered that appropriateness connoted suitability from the point of view of the victim, i.e. effective redress of a grievance. Justness referred to all those who were affected by the chosen remedy<sup>20</sup>. Although the South African Interim Constitution refers only to the appropriateness of the remedy, the Constitutional Court has held that a requirement of justness is to be implied: appropriate relief is what is required to protect and enforce the Constitution, and the Court should seek to serve the interests of the complainant and society as a whole<sup>21</sup>. The Court of Appeal has recently laid emphasis on the words "just" as operating as a brake on the discretion to award damages under the HRA and on the quantum of such damages, allowing the Court to take account of the interests of the wider public who have an interest in the wider funding of public services<sup>22</sup>.

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<sup>16</sup> Article 13.

<sup>17</sup> "The courts may have regard to Article 13. In particular they may wish to do so when considering the very ample provisions of Clause 8(1)...." HL Debs 18th November 1997, cols. 476-477.

<sup>18</sup> HL Debs, 19th January 1998, col. 1266 (emphasis added).

<sup>19</sup> Section s.24 (1).

<sup>20</sup> *Saskatchewan Human Rights Commission v. Kodellas* (1989) 60 D.L.R. (4<sup>th</sup>) 143. For a general discussion see Amos, *Damages for breach of the Human Rights Act 1998*, (1999) EHRLR 178.

<sup>21</sup> *Fose v. Minister of Safety and Security* (1997) (3) S.A. 786 (CC).

<sup>22</sup> *Anufrijeva & another v. London Borough of Southwark* [2003] EWCA Civ 1406, para. 56.

### *The limitations on damages*

The first limitation on the award of damages is jurisdictional: damages may only be awarded by a court which has power to award damages or compensation in civil proceedings.<sup>23</sup> Criminal courts do not have such power, but the Criminal Division of the Court of Appeal probably does, since the Court of Appeal has "*power to award damages ... in civil proceedings*".<sup>24</sup> Secondly, by virtue of section 9(3), damages may not be awarded for judicial acts done in good faith save to the extent required by Article 5(5) of the Convention.<sup>25</sup>

But the most significant limitations are those set out in sections 8(3) and 8(4). No award of damages is to be made unless the court is satisfied that the award is necessary to afford "just satisfaction" to the person in whose favour it is made. In determining this question, the court must take account of all the circumstances of the case, including any other relief or remedy granted, or order made in relation to the act in question (by that or any other court), and the consequences of any decision (of that or any other court) in respect of the act. And in determining whether to award damages and, if so, the amount of any award, the court must also take account of the principles applied by the European Court of Human Rights in relation to an award of compensation under Article 41 of the Convention.

### *The combined effect of the general rule and the limitations: the duty to afford just satisfaction*

As we have seen, courts and tribunals have a wide discretion to grant such remedy, within their powers, as they consider just and appropriate. The Lord Chancellor made clear that they may take account of the right to an effective remedy under Article 13 of the Convention. Sections 8(3) and 8(4) give further implicit guidance as to the objective to be achieved by the section 8 power. It is to be used to give the victim "just satisfaction". What the limitations do is encourage the court to achieve just satisfaction, so far as possible, through means *other than* the award of damages. Only if this cannot be done should a court consider an award of damages, taking account of the principles applied by the Strasbourg Court in relation to awards of compensation under Article 41 of the Convention.

The next question, therefore, is what is "just satisfaction". An initial indication can be gleaned from the text of the Article itself, which provides that the power to make an award comes into play only if the State's internal law "allows only partial reparation to be made". In order to throw further light on the meaning of the expression, it is necessary to look at the origins of the notion of just satisfaction in the Convention and the principles which the Strasbourg Court adopts in the exercise of its Article 41 powers<sup>26</sup>.

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<sup>23</sup> Section 7(11) HRA empowers the Minister responsible for making rules for a particular tribunal to add to the relief or remedies which that tribunal may grant in order to ensure that it can provide an appropriate remedy. So far as this author is aware, no such rules have been made.

<sup>24</sup> See Lester & Pannick (eds) *Human Rights Law and Practice* (1999), p.40.

<sup>25</sup> Which guarantees an enforceable right to compensation for unlawful detention.

<sup>26</sup> Although section 8(4) directs courts to take account of the principles applied by the ECtHR only in relation to the making and quantification of an award of damages, it is impossible to divide the exercise of the Court's remedial power in

In *Papamichalopoulos v. Greece*, the ECtHR pointed out that a judgment of the Court which finds a breach of the Convention imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach<sup>27</sup>. If the nature of the breach which the Court has found allows of *restitutio in integrum*, it is for the respondent State to effect it<sup>28</sup>. In support of this approach the Court referred to the principles identified in international case law, which it described as a precious source of inspiration<sup>29</sup>. In particular, it referred to the following passage in the judgment of the Permanent Court of International Justice (PCIJ) given on 13 September 1928 in the *Factory at Chorzow* case:

“...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. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.”

The International Law Commission<sup>30</sup> referred to this same passage in its Commentary on Article 31 of the *Articles on the Responsibility of States for Internationally Wrongful Acts*<sup>31</sup>. What emerges from these Articles is that a State's international obligations, following a finding of breach, are broadly two-fold:

- securing cessation of the violation and its non-repetition<sup>32</sup>; and
- making full reparation for the injury caused by the internationally wrongful act. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of the State<sup>33</sup>.

Article 34 of the *Articles* provides that full reparation is to take the form of restitution, compensation and satisfaction, either singly or in combination. The primary obligation is to make restitution

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this way. Whether the Court awards damages, and if so how much, depends on its assessment of the duty to afford just satisfaction. The principles, if any, which the Court has developed under Article 41 are clearly relevant.

<sup>27</sup> (1996) 21 EHRR 439, paragraph 34. See also *Clooth v. Belgium*, judgment of 5 March 1998, para 14. RJD 1998-1.

<sup>28</sup> Ibid.

<sup>29</sup> The *travaux préparatoires* to the Convention also show that it was intended that the Convention should reflect the general principles of international law on State responsibility when determining the obligations of a State found to be in violation of the Convention: Report of the Committee of Experts, 16 March 1950, *Collected Edition of the 'Travaux Préparatoires'*, Vol. IV, 45.

<sup>30</sup> The discussion of the Articles and the ILC commentary is based on material contained in Murray Hunt's paper "State Obligations following from a judgment", delivered to the seminar on ECtHR: Remedies and Execution of Judgments" held by the British Institute of International and Comparative Law on 28 October 2003.

<sup>31</sup> Annexed to the UN General Assembly Resolution 56/83 adopted on 12 December 2001. The Articles represent a codification of international law principles.

<sup>32</sup> Article 30.

<sup>33</sup> Article 31. Article 32 provides that a State may not rely on the provisions of its internal law as justification for failure to comply with its obligations.

wherever this is possible, for example by restoring expropriated property, quashing a conviction, annulling an administrative decision or refunding a fine. Restitution is not required where it is not materially possible or where it involves a burden out of all proportion to the benefit deriving from restitution instead of compensation<sup>34</sup>. A State must compensate for the damage caused by any internationally wrong act, insofar as such damage is not made good by restitution. Compensation must cover any financially assessable damage including loss of profits, insofar as it is established<sup>35</sup>. A State must give satisfaction for any injury which cannot be made good by restitution or compensation. Again this directly reflects the approach of the PCIJ in the *Factory at Chorzow* case.

### *Application of the remedial power*

Applied at the domestic level, this means that for the national court – or other national authority – the overriding purpose of the exercise of the power to afford just satisfaction is, where possible, to provide *restitutio in integrum*.<sup>36</sup> The combined effect of sections 8(1) and 8(3) is to direct the courts to seek to achieve the aim of full reparation primarily by non-pecuniary remedies and procedural devices, leaving damages as a subsidiary remedy to be adopted only where this cannot be done. Where a breach has not yet occurred, a court may prevent it breach by injunction or prohibiting order. This course must be regarded as preferable to allowing the breach to take place and providing a remedy afterwards, and the principle of full reparation must be born in mind on interim hearings when considering whether damages would be an adequate remedy. Once a court has found that a public authority *has* acted in breach of its duty under section 6, it must ask whether it is possible to restore the position as it was before the breach.

These suggestions appear to accord with the principles tentatively propounded by Lord Woolf and summarised in the Law Commission's report on Damages Under the Human Rights Act 1998.<sup>37</sup> Of particular interest for this discussion are Lord Woolf's first and third proposed principles:

- If there is any other remedy in addition to damages, that other remedy<sup>38</sup> should usually be granted initially and damages should only be granted in addition if necessary to afford just satisfaction;
- An award should be "of no greater sum than that necessary to achieve just satisfaction". If it is necessary for a decision to be retaken, the court should wait and see what the outcome is.<sup>39</sup>

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<sup>34</sup> Article 35.

<sup>35</sup> Article 36.

<sup>36</sup> *De Wilde, Ooms and Versyp v. Belgium (No.2)* 1 EHRR 438, para. 20.

<sup>37</sup> LAW COM No 266 (October 2000), para. 4.31, citing Lord Woolf's paper "The Human Rights Act 1998 and Remedies" in M Andenas and D Fairgreve (eds), *Judicial Review in International Perspective II* (2000), p 433.

<sup>38</sup> For example, an order to retake the decision, an injunction to restrain the unlawful conduct, or a declaration to establish its unlawfulness.

<sup>39</sup> Thus, he suggests, "if... a retrial is necessary of a criminal offence the decision as to whether to make an award of damages could well depend on the outcome of the retrial."

In summary, it is suggested that the court must embark on the following inquiry:

- what is needed in order to provide full reparation, i.e. to restore the position before the breach?
- has any court already given any remedy or made an order in respect of the unlawful act, or what are the consequences of any decision in respect of that act? (s.8 (3)). (e.g. damages for a related tort. Declaration. Quashing order); or do any consequences flow from a decision that the act in question is unlawful?
- if so, has the claimant received “just satisfaction” in the sense of full reparation for all the damage caused by the breach?
- if not, does the court have any other powers, apart from a monetary award, which can provide full reparation to the applicant?
- if the court cannot make an order which will provide full reparation, then it must consider whether an award of damages is necessary to afford just satisfaction, and if so, how much.

#### *Principles applicable to the award of damages*

Although section 8(4) directs courts and tribunals to take account of the principles adopted by the Strasbourg Court, commentators have pointed to the difficulty in discerning much in the way of principles. Some broad propositions about the Court’s practice can be made.

1. The award of damages is not automatic on finding of a breach. It is discretionary.
2. Damages may be awarded to compensate for pecuniary and non-pecuniary loss.
3. Pecuniary damage includes, for example, loss of past and future earnings and pension entitlement<sup>40</sup>, the value of expropriated property<sup>41</sup>, and the loss of an opportunity, for example to bring legal proceedings<sup>42</sup>.
4. Non-pecuniary damage is not limited to recognisable psychiatric disorder resulting from the breach, but includes feelings of distress, anxiety, frustration and humiliation caused by the breach

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<sup>40</sup> *Smith & Grady v. United Kingdom* (1999) 29 EHRR 493.

<sup>41</sup> *Papamichalopoulos v. Greece* (1996) 21 EHRR 439.

<sup>42</sup> *Weeks v. United Kingdom*, judgment of 5<sup>th</sup> October 1988, paragraph 13 (loss of the opportunity for period review of continued lawfulness of discretionary life sentence); *Tinnelly & Sons Ltd. & ors v United Kingdom*; *McElduff & ors v United Kingdom*, (1999) 27 EHRR 249: awards of £15,000 and £10,000 for loss of the opportunity to have an adjudication on the merits of their complaints before the domestic courts following the issue of (public interest immunity) certificates under section 42 of the Fair Employment (Northern Ireland) Act 1976. By contrast, in many cases, particularly those involving procedural breaches of fair trial guarantees, the Court has refused to award compensation on the basis that it is not prepared to speculate as to what the outcome would have been: e.g. *Saunders v. United Kingdom* (1997) 23 EHRR 313, paragraph 86.

of the Convention which the Court has found. As Amos remarks, "Such damage may have been caused by Convention violations such as inordinately lengthy proceedings, the deprivation of property for a long period of time, failure to provide a fair hearing, ill-treatment in custody and deprivation of liberty."<sup>43</sup>

5. Non-pecuniary damage may often arise in cases of delay caused by maladministration, for example where the applicant is involved in proceedings which exceed the "reasonable time" requirement<sup>44</sup>.
6. The claimant must show a causal connection between the breach and the loss. In some cases, the Court has been prepared to assume that the breach has caused distress without requiring proof of causation.
7. The Court is sometimes prepared to accept that a procedural breach gives rise to a claim for loss of opportunity<sup>45</sup>. In other cases, it has awarded no compensation on the basis that it is not prepared to speculate on what the outcome would have been had there been no procedural defect.<sup>46</sup> It is sometimes difficult to discern any guiding principle by which to distinguish the one class of case from the other.
8. In many cases, without articulating its reasons, the Court has held that finding of a violation is sufficient just satisfaction, and that accordingly it is not "necessary" to make any award of compensation under Article 41<sup>47</sup>.

Beyond these unhelpfully broad propositions, it is difficult to make much from the case law. It can be said that

- the Court has been more ready to award compensation for substantive violations than for procedural;

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<sup>43</sup> Damages for breach of the Human Rights Act 1998, [1999] EHRLR 178, 191.

<sup>44</sup> Article 6(1). See for example *Estima Jorge v. Portugal* (Application no. 24550/94), judgment of 21 April 1998, where the applicant was awarded PTE 1,000,000 (just over £3250), for a delay of thirteen years in obtaining repayment of a loan. The applicant claimed that she had had to put up with hardship that had become increasingly difficult to bear the older she got. The fact that she had had to wait so long had caused anxiety and bouts of depression. See also *Foley v. United Kingdom* Application 39197/98, judgment of 22 October 2002, in which the applicant was awarded 4000 Euros (about £2,500) on the basis that, it was reasonable to assume that the applicant suffered distress, anxiety and frustration as a result of the delays found by the Court to have been attributable to the State. The case concerned an action for breach of certain commercial contracts.

<sup>45</sup> *Tinnelly & Sons Ltd. & ors v United Kingdom*, see above note 38.

<sup>46</sup> *Saunders v. United Kingdom*, see above note 38.

<sup>47</sup> See, for example, *Golder v. United Kingdom* 1 EHRR 524 para. 46. For a recent example of the application of this approach in the House of Lords see *R v. Secretary of State for the Home Department, ex parte IH(FC)* [2003] UKHL 59: the House found a violation of Article 5(4) (right to judicial review of lawfulness of detention) but refused compensation because the violation had been publicly acknowledged and the appellant's rights thereby vindicated, the law had been amended to prevent similar violations in future and the appellant had not been unlawfully detained at any time.

- a finding of violation is more likely to be regarded as sufficient where only non-pecuniary loss has been claimed. However, a finding of violation of Article 2 or 3 will almost always attract an award.
- the seriousness of the violation<sup>48</sup> is more likely to justify an award, and a higher award, although the Court does not talk in terms of aggravated or exemplary damages;
- the conduct or character of the applicant may reduce any award or disentitle him or her entirely<sup>49</sup>.
- the effect of an award on national resources has never featured as a factor in the Court's assessment of quantum of damages.
- Awards for non-pecuniary loss are modest, even in the most serious of cases.

There appears to be little consistency in the amounts awarded by the Court, nor is it possible to discern any hierarchy of seriousness in the quantum of non-pecuniary loss.

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<sup>48</sup> And possibly the existence of a continuing practice.

<sup>49</sup> *McCann, Farrell and Savage v. United Kingdom* (1995) 21 EHRR 97, paragraph 219, the "Death on the Rock" case (Court did not consider it appropriate to make an award of compensation since the applicants, three terrorist suspects, had been intending to plant a bomb in Gibraltar).