

HUMAN RIGHTS ACT DAMAGES IN COURT OF PROTECTION CASES

Richard Clayton QC carries out a wide range of advisory and litigation work in the public law field: eg education, community care and mental health, cuts, consultation and public sector equality duty cases, human rights, local government (vires, powers, governance and standards), public procurement, health care and international constitutional law. He has appeared in many Supreme Court, House of Lords and Privy Council cases, most recently in ***Kennedy v Charity Commission*** in 2015 and Mohammed v Public Service Commission in the Privy Council case in July 2017. Richard is ranked in Chambers Directory as a Leading Silk in Public Law, Human Rights and Local Government Law. Other recent cases of note include ***R(Derbyshire County Council) v Sheffield City Region Combined Authority*** (2016) (the first case concerning the English devolution legislation), ***R(Watch Tower) v Charity Commission*** (2016) (Court of Appeal (judicial review and alternative remedy)), ***R(English Bridge Union v Sports Council)*** (2015) (whether Bridge is a sport) ***R(Hall) v Leicestershire County Council*** ((2015) (cuts and consultation), ***R(Thomson) v Trafford MBC*** (2015) (cuts and consultation), ***R v Misick*** (2014) (8 day hearing before Turks and Caicos Court of Appeal) (constitutional challenge to judicial independence), ***R(Hardy) v Sandwell MBC*** (2014) (discretionary housing allowance and Art 14), ***R(Wood) v Leeds City Council*** ((2014) successful challenge to increase in allotment rents by Leeds Allotment Society) and ***R(Bridgerow) v Chester West*** (2014) (local government delegation). He has been the United Kingdom's representative to the Venice Commission, the Council of Europe's advisory body on constitutional law since 2011 and is a member of its executive and is the Chairman of its Working Methods Sub-Commission. Richard is a former Chairman of the Constitutional and Administrative Law Bar Association and a former Vice Chair of Liberty. Richard is a Visiting Professor at UCL London from 2015-2020 and has been an Associate Fellow at the Centre for Public Law at Cambridge University since 2001. He is the co-author of ***the Law of Human Rights*** (2nd ed, OUP) which has been cited in the Supreme Court, House of Lords and Privy Council over 45 times.

Introduction

1. Following the Supreme Court decision in ***Cheshire West and Chester Council v P***, there have been many complaints that breaches of Articles 5 or 8 of the Convention should result in damages under the Human Rights Act (HRA).¹ The Supreme Court held that that since the term “*deprivation of liberty*” in the context of the living arrangements of a mentally incapacitated person was to be given the same meaning in domestic law as in Article 5 of the Convention, it was to be construed by reference to the relevant jurisprudence of the European Court of Human Rights. Under that jurisprudence the difference between a restriction and a deprivation of liberty was one of fact and degree depending on the actual situation of the person concerned, but in cases concerning the placement of mentally disturbed people in hospitals or care homes the test to be applied was whether the person was under continuous supervision and control, and was not free to leave. The Supreme Court also held that that same test applied even where the person was being confined for a benevolent or beneficial purpose, under court order, in a non-institutional setting which aimed at providing an environment of relative normality and to which the person did not object. Furthermore, as a matter of policy, persons of extreme vulnerability needed to be subject to periodic checks on whether the legal justification for the constraints on them continued to be made out; and that, accordingly, the appellants' living arrangements were to be considered on the basis that mentally incapacitated persons had the same rights to liberty as everyone else, so that living arrangements which amounted to a deprivation of liberty in the case of a non-disabled person would be a deprivation of liberty of the disabled person

The power to seek damages under the HRA

2. Section 8(3)(4) which permits damages to be awarded under the HRA states:

(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,

¹ [2014] A.C. 896

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.

[Emphasis added]

The development of principles for HRA damages

3. The key cases are:
 - ***R(Bernard) v Enfield LBC***²
 - ***Anufrijeva v London Borough of Southwark***:³
 - ***R(Greenfield) v Secretary of State for the Home Office***⁴
 - ***R(Sturnham) Secretary of State for Justice***⁵

The approved method in damages cases

4. The key case is ***R(Sturnham) Secretary of State for Justice***⁶

Conclusion on HRA damages in relation to COP cases

5. The authorities suggest the following principles apply:
 - (1) the mere fact a judge has found breaches of Convention rights in COP cases does not entitle an award of damages;
 - (2) normally when a Court makes a finding that there has been a breach of Convention rights, a declaration that the right has been breached is a sufficient remedy;
 - (3) it is necessary for a claimant to identify special features in his case which justify an award of damages;
 - (4) any award of HRA damages made must be in line with ECtHR cases; and
 - (5) the amount of any HRA damages will depend upon the particular circumstances of the case and whether it is equitable to make an award.

The COP damages cases

6. The key cases are:

² [2003] HRLR 4

³ [2004] QB 1124

⁴ [2005] 1 WLR 673

⁵ [2013] 2 AC 254

⁶ [2013] 2 AC 254

- **Essex County Council v RF**⁷
- **The Local Authority v Mrs D**⁸
- **H v A Metropolitan Council**⁹

HRA Damages vs damages for false imprisonment

7. In some cases a COP claimant may have a claim both under Article 5 and for false imprisonment. The principles for computing damages are obviously different.
 - **Thompson v Commissioner of Police of the Metropolis**¹⁰
 - **Lunt v Liverpool Justices**¹¹
 - **Mohidin v Commissioner of Police of the Metropolis**¹²
8. However, it is difficult to see why a claimant could recover damages both for false imprisonment and HRA damages- since there is double recovery and it is not necessary to award HRA damages.

Procedure for seeking HRA damages

9. In **YA(F) v A Local Authority** Charles J held that the Court of Protection has the '*jurisdiction and thus power to award damages under the Human Rights Act*'.¹³ It is also important to note that Court of Protection Rule 9(1) states:

In any case not expressly provided for by these Rules or the practice directions made under them, the court may apply either the Civil Procedure Rules 1998 2 or the Family Procedure Rules 2010 3 (including in either case the practice directions made under them) with any necessary modifications, in so far as is necessary to further the overriding objective.
10. Pre-action protocol letter- **H v Northamptonshire County Council**¹⁴

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RICHARD CLAYTON
RClayton@7br.co.uk

⁷ [2015] EWCOP 1

⁸ [2013] EWCOP B34

⁹ [2017] EWCOP 12

¹⁰ [1998] QB 498

¹¹ [1991] CA 5 Mar 1991

¹² [2015] EWHC 2740 (QB)

¹³ [2010] EWCOP 2770

¹⁴ [2017] EWHC 282 (Fam)