
GARDEN COURT
CHAMBERS

Civil claims following inquests: Tips, tricks and licks on obtaining compensation for wrongful death and deaths in custody

Prof Leslie Thomas QC, Garden Court Chambers

Laura Profumo, Garden Court Chambers

Stephen Clark, Garden Court Chambers

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@gardencourtlaw

Post-Inquest Civil Claims: Overview, Issues & Strategies

Laura Profumo, Garden Court Chambers

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Introduction

- Provide an overview of the type of civil claims arising from inquests.
- Key case-law and themes in the area.
- Common issues raised Defendants and how to navigate them.

Civil claims arising from inquests

- Breaches of Article 2, 3, 8 ECHR - Human Rights Act 1998
- Negligence – Law Reform (Miscellaneous Provisions) Act 1934 ('LR(MP)A 1934').
- Dependency claims – Fatal Accident Act 1976 ('FAA 1976').
- Psychiatric Injury as Secondary Victim.

Human Rights Act 1998 – Articles 2, 3 & 8

- Can be brought by family members as indirect victims of substantive ECHR breaches under s.7(1) HRA 1998. Also on behalf of the Estate via s.1 LR(MP)A 1934.

- Significant overlap between these claims: does a claim for Article 3/8 ECHR breach actually add anything to Article 2?

- Get ahead of limitation issues:
  - If you take on your clients before the expiry of the limitation period lodge protectively if you can, against all potential Defendants. Then agree to extend time for service of CF/POC.
  - If the above isn't possible, seek to agree a limitation moratorium with all potential Defendants. *Most* are reasonable about this, agreeing a standstill for e.g. 3 months post-inquest to enable proper assessment of merits.
  - If limitation has expired, and you haven't negotiated a standstill: s.7(5)(b) "*such longer period as the the court or tribunal considers equitable having regard to all the circumstances*".

Article 2 ECHR claims

- Do the facts fall within the 'well-defined circumstances' wherein the Article 2 ECHR operational duty has been held to *prima facie* apply? I.e. prison, administrative detention & involuntary psychiatric inpatients detained under the MHA 1983.

- If not, look to the four key features in *Rabone v Pennine Care NHS Foundation Trust* [2012] 2 AC 72 which assist in determining the existence of the operational duty in any given circumstances [§§20-24]:
  (a) The existence of a real and immediate risk to the individual's life - being a necessary but not sufficient condition for the existence of a duty.
  (b) Assumption of responsibility by the state for the individual's welfare and safety (including the exercise of control);
  (c) Vulnerability of the individual concerned;
  (d) The nature of the risk being an exceptional risk, beyond an 'ordinary' risk of the kind that individuals in the relevant category should reasonably be expected to take.

Article 2 ECHR claims

- *Osman v UK* [1998] 29 EHRR 245 – breach of Article 2 ECHR duty where "*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*** *……and that they* ***failed to take measures*** *within the scope of their powers which, judged reasonably, might have been expected to avoid that risk"* [§116].
- A 'real' risk to life is one that is a "*substantial or significant risk and not a remote or fanciful one",* per *Rabone*. In that case, a 5-20% risk of suicide was considered real [§35].
- 'Immediate' risk is one that is "*present and continuing"* at the time of the alleged breach of duty, rather than one that will arise at some point in the future.
- No need for risk to be apparent just before death. *Renolde v France* (2009) 48 EHRR 969: ECtHR held that the risk to the deceased was sufficiently immediate where "*although his condition and the immediacy of the risk of a fresh suicide attempt varied…that risk was real and…the deceased required careful monitoring in case of any sudden deterioration"* [§89]

Article 2 ECHR claims

- Comparatively lower threshold for causation than that for standard civil law liability. Doesn't require causation to be established on the 'but for' basis.

- Article 2 ECHR violation can be established by matters which had a "*real prospect*" or "*substantial chance*" of altering the outcome (*Savage* [§82 & §89]) pr measures which "*judged reasonably, might have been expected to avoid that risk*" *(Opuz v Turkey,* [2010] 50 EHRR 28, Grand Chamber, [§136]).

- "*The Claimant does not have to show that had the Trust acted appropriately there would probably have been no death, but merely that she has 'lost a substantial chance of this*" (Savage, [§82]).

Article 2 ECHR claims – Quantum

- Non-pecuniary damages for Article 2 ECHR claims on behalf of the estate are modest, but nevertheless within a considerable range.
- ECtHR case-law adopts relatively broad-brush approach to quantum in this area, informed by the overall nature, extent and severity of the relevant breaches.
- *Anguelova v Bulgaria* (38361/97); *Edwards v UK* (2002) 35 EHRR 487; *Semache v France* (36083/16).
- For non-pecuniary awards for family members, see relevant criteria per *Rabone:* i) closeness of the family link between the victim and the deceased ii) the nature of the breach iii) the seriousness of the non-pecuniary damage suffered [§85].
- *Kats v Ukraine* (2010) 51 EHRR 44; *Ketreb v France* (38447/09); *Rabone*.

Articles 3 & 8 ECHR

- Will claims under Article 3/8 ECHR be parasitic to Article 2? Or will they add something in their own right?

- E.g. case of a mentally vulnerable prisoner who commits suicide – even if Article 2 substantive violation tricky to get off the ground – possible alternative route to liability under Article 3 ECHR re defects in the deceased's clinical care and treatment in the period leading to his death (*Kennan v UK* 27229/95).

- Article 3 ECHR threshold for severity of mistreatment – whether met will depend on all circumstances of the case: nature and context of treatment, duration, physical or mental effects, sex, age, health of victim (*Ireland v UK*, [1978] 2 EHRR 25).

- Article 8 ECHR claims by victims in their own right – the state's handling of the post-death investigation and treatment of the relatives?

Claims by the Estate – LR(MP)A 1934

- S.1(1) LR(MP)A provides for the survival of causes of action for the deceased's personal estate which the injured person had on their death – e.g. negligence, assault.

- Enables the estate to recover for loss and damage sustained by the deceased. Route to damages for PSLA. Need to consider period of pre-death suffering. The longer the period between the fatal act which causes the death and the death itself, the greater the quantum for PLSA.

- Consider special damages – i.e. loss of earnings in above period, medical expenses etc.

- S.1(2) LR(MP)A precludes recovery of damages for exemplary damages and projected loss of income.

- More stringent 'but for' causation here – facts which lend to a strong Article 2 ECHR claim may well not not satisfy a claim in negligence. Also possible reduction for contributory negligence?

Dependency Claims under the FAA 1976

- S.1(1) FAA 1976 confers right of action for any "*wrongful act, neglect or default*" which, if death had not occurred, would have entitled the injured party to bring an action and recover damages against the person who would have been liable if death had not occurred.

- Right of action accrues to the deceased's dependants (if any): s.1(2) FAA 1976.

- In order to recover under the FAA route, the relevant tortious cause of action must first be established (e.g. negligence) and causation test satisfied.

- S.1(3) definition of dependants relatively expansive: includes parents, siblings, aunts, children, any (former) wife/civil partner.

- Per section 3(1), damages may be awarded "*proportioned to the injury resulting from the death to the dependants respectively*". i.e. Any reasonable expectation of pecuniary benefit which arose as a result of the family relationship with the deceased and would have continued but for their death.

Dependency Claims under the FAA 1976

- Claim for future earnings on which the dependant would have relied. Need to substantiate this with proper evidence and workings.

- Standard of Proof for expected entitlement lower than BoP – whether there was a significant chance (i.e. greater than speculative possibility) of such pecuniary entitlement (*Davies v Taylor* [1974] AC 207).

- Pecuniary benefit can include gratuitous/intangible services – i.e. loss to child of a parent's daily care and support (*Regan v Williamson* [1976] 1 WLR 305).

- Parent of a minor, spouse, civil partner or cohabitee of the deceased can recoup a 'Bereavement Award' per s.1A(2). Funeral expenses recoverable per s.3(5).

Defendant Issues & How to Navigate

- Reliance on the evidence/outcome of the inquest – different threshold & arena, not determinative of merits of civil claim, albeit will inform D's appetite for settlement.

- Restrictive interpretation of the threshold for Article 2 ECHR operational breach – i.e. the deceased did not expressly evince suicidal ideation in the period immediately prior to death.

- In cases of deaths of voluntary psychiatric patients, attempts to distinguish *Rabone* on an overly narrow basis – i.e. deceased in that case was a detained patient in substance if not form, clear evidence she would have been re-detained under MHA 1983 if had insisted on leaving. See the far broader criteria for engagement of the Article 2 ECHR operational duty at [§§20-24] of *Rabone;* also recent CoA case of *Morahan v HM Assistant Coroner for West London* EWHC 1603.

Defendant Issues & How to Navigate

- In Article 2 ECHR cases concerning deaths in detention arising from medical failings, misplaced reliance on *Powell v UK* (2000) 30 EHRR CD 362/*Lopes de Sousa Fernandes v Portugal* (506080/13) . These concern Art 2 claims in the context of 'ordinary' hospital negligence –where only in 'exceptional circumstances', i.e. denial of access to life-saving treatment, or systemic breach will Art 2 ECHR liability be triggered.
- This restrictive scope doesn't extend to cases of medical deaths in custody where state has enhanced and direct responsibility for these individuals [*Lopes de Sousa,* §163], such that an individualised failure to provide timely & appropriate medical care detainee can amount to an Article 2 operational breach: *Tyrrell v HM Coroner for County Durham & Darlington* [2016] EWHC 1892, §33; *Daniel v St George's Healthcare NHS Trust & LAS* [2016] EWHC 23 (QB) [§23].
- *R (Maguire) v HM Senior Coroner for Blackpool and Fylde & Ors* [2020] EWCA Civ 738 "***The Osman operational duty on prison authorities extends to medical care provided within custodial institutions in the way discussed in Tyrell and in securing outside medical treatment in a timely way when it is needed***. *.....If the facts in Tyrell had included a suggestion that the NHS hospital had treated the cancer negligently, the operational duty would not have arisen save to the extent that the cumulative tests now found in Lopes de Sousa were satisfied.*"

Defendant Issues & How to Navigate

- Challenging the victim status for family members under S.7(1) HRA 1998 –e.g. not sufficiently close or direct relatives. This is often weak ground for D.
- Causation in negligence - how far can the expert evidence from the inquest take you?
- Resistance to recovery for pecuniary damages under the HRA 1998 – see Green J's guidance in his quantum judgment for *DSD vs Commissioner of Police for the Metropolis,* [2104] EWHC 2493 which makes clear that ECHR awards can compensate for pecuniary harm by way of 'just satisfaction.
- For dependency claims –make sure your Schedule of Loss is tightly framed. D may well seek to challenge nature of relationship, employment history/prospects, life expectancy etc. May well be difficult where deceased was in the prison estate for a long time/facing a lengthy sentence or had a significant forensic/mental health history.

Post-inquest civil claims: hitting a lick with damages and costs

Stephen Clark, Garden Court Chambers

27 July 2021

Quantum

Two themes

Going to look at two different issues in damages:

1. Human Rights Act damages, just satisfaction and measuring non-pecuniary losses (incl. psychiatric injury)

2. Loss of earnings claims under the law of negligence and the Human Rights Act

Just satisfaction – the trap

Defendants will emphasise select passages from the two classic domestic authorities of *Anufrijeva & Another v. Southwark London Borough Council* [2004] QB 1124 and *R (on the application of Greenfield) v. Secretary of State for the Home Department* [2005] UKHL 14; [2005] 1 WLR 673, namely:

"53. *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.*" (*Anufrijeva*)

and

"9. *The routine treatment of a finding of violation as, in itself, just satisfaction for the violation found reflects the point already made that the focus of the Convention is on the protection of human rights and not the award of compensation.*" (*Greenfield*)

The wrong issue

Anufirejva and *Greenfield* are really about *whether* to award damages or not, rather than the quantum of those damages once the decision to award them has been made.

Once you are into the realm of damages awards being necessary to afford 'just satisfaction' those paragraphs above do not tell you about the *level* of damages which should be provided.

They are a distraction – the real task is to look at the domestic and Strasbourg authorities and look for the proper guidelines

Better summary of the principles of just satisfaction is at [904] – [917] of Leggatt J's judgment in *Alseran & Ors v Ministry of Defence* [2017] EWHC 3289 (QB)

Domestic authorities

The existing A2 cases need to be treated with a degree of caution:

Van Colle v. Chief Constable of the Hertfordshire Police [2007] EWCA Civ 325; [2007] 1 W.L.R. 1821: £10,000 (£15,607) to the estate and £7,500 (£10,642) to each surviving parent; based on four Strasbourg cases with variable awards and with little evidence about the underlying evidence of pecuniary or non-pecuniary loss in those cases

Rabone v. Pennine Care NHS Trust [2012] UKSC 2; [2012] 2 A.C. 72

Lord Dyson notes the range of awards of €5,000 and €60,000 ((£5,000 and £66,671 now) in *Savage (No. 2)* and merely says that '*effect of the cases has not been disputed before us*'. If you look at the underlying judgment, that list was taken from a schedule prepared by counsel covering awards for non-pecuniary loss awards at Strasbourg between 2008 and 2010

Comparator Cases

Useful, but generally treat with caution:

- Very limited information in the Strasbourg judgments about (a) which family members claimed (incl. estate), (b) what evidence was put forward to support those claims and (c) the weight attached to various factors
- Well recognised that the level of Strasbsourg Court awards varies according to the cost of living and purchasing power in each Member State – *Faulkner v Secretary of State for Justice* [2013] UKSC 23 at [38]
- Strasbourg will also "*take into account*" local comparable compensation awards which will be "*relevant*" but not "*decisive*" - *Z v the United Kingdom* [2002] 34 EHRR 3; ECtHR Practice Direction on Just Satisfaction

Recent comparators in A2 cases

Top tip: Watch out if it is a substantive or procedural breach of Article

Laptev v. Russia, app. No. 36480/13, 9 February 2021

a substantive breach of Article 2 for not protecting an individual exhibiting signs of suicidality in a police cell and a procedural breach of Article 2 for a failure to investigate the death properly at the domestic level. The Court records that the family made a claim, but left the amount to the discretion of the court. An award of €23,000 (£19,756) was made.

SF v. Switzerland (app. no. 23405/16) Judgment of 30 June 2020: a substantive breach of Article 2 where the deceased had clear signs of suicidality, but was left alone in his cell where he committed suicide and a systemic failure to have in place adequate protection in law for a suicidal person.

In just satisfaction, the Applicant was awarded for pecuniary loss for death and inheritance certificates, funeral expenses and psychotherapy for herself to the sum of €5769 (£4,959). She was awarded non-pecuniary loss for experiencing 'great suffering' on her part, although where the state agents had no intention to cause death at the sum of €50,000 (£42,948).

Recent comparators in A2 cases

Fernandes de Oliveira v. Portugal (app. no. 78103/14) 31 January 2019:

The death of a psychiatric patient with alcoholism and a history of suicide attempts, but where his most recent hospitalisation prior to death was due to alcoholism and with no suicidal behaviours indicated. The deceased absconded from detention and jumped in front of a train. A violation of the procedural aspect of Article 2 alone, due to the absence of a real risk which the authorities knew or ought to have known about.

The Applicant sought €703 in funeral costs, €40,000 for loss of income from her son and €40,000 in non-pecuniary damage divided up as €30,000 for her allegation of a breach of the substantive Article 2 duty and €10,000 for the alleged breach of the procedural Article 2 duty. Due to the ECtHR's finding that only the procedural duty had been breached, the pecuniary and non-pecuniary loss claims failed in the absence of a causal link. The €10,000 (£8,555) was awarded as sought by the Applicant.

Recent comparators in A2 cases

Basbilen v. Turkey (app. no. 35872/08) 26 April 2016:

A procedural breach of Article 2 alone for failure to properly investigate a suicide due to deficiencies in the first investigation and, although 'commendable efforts' were made subsequently, the second investigation was not carried out with due expedition.

In just satisfaction, the family sought €500,000 in pecuniary loss for the financial assistance their son would have provided them if still alive. The Court found that there was no causal link (which is right – this was a procedural rather than substantive breach) between the violation and that loss, but awarded €20,000 (£17,676) in non-pecuniary damage.

Recent comparators in A2 cases

Çoşelav v. Turkey (app. no. 1413/07) 9 October 2012*:*

a suicide of a young offender with a history of ligatures in the custodial estate and with clear signs of future risk, but treated with 'indifference' by the prison authorities. Subsequent substantive and procedural violations of Article 2.

Just satisfaction claims for €200,000 for pecuniary loss and €200,000 for non-pecuniary loss were made by the Applicants, but it is critical to note that there was no documentary evidence of the pecuniary loss claim and therefore the ECtHR said it could not determine whether there was a causal link. In respect of non-pecuniary damage, a joint award of €45,000 (£43,473) was made.

What does Strasbourg award it for?

As in Data Protection Act claims, it is for general anxiety and distress *without* psychiatric injury

ECtHR has been willing to award damages for '*physical and mental suffering*' – which has been variously described as '*uncertainty and anxiety*', '*frustration and helplessness*' and '*distress and anxiety* (*Greenfield*, [16]).

In the Article 2 context, it was said that a relative '*must have suffered anguish and distress as a result of the circumstances of his relative's death and his inability to obtain an effective investigation into the matter*' (*Laptev v. Russia*, app. No. 36480/13, 9 February 2021) for a breach of the substantive and procedural Article 2 rights in a prison suicide case.

Don’t undervalue psychiatric injury claims

Note the substantial, large award in *SF v. Switzerland* in a psychiatric injury case – not out of line with the Judicial College guidelines

Permissible to look at JC Guidelines – see *Z v. the United Kingdom*

Note that although the level of award in *DSD & NBV v. Commissioner of Police for the Metropolis* [2014] EWHC 2493 (QB) was lower than the JC Guidelines for PTSD, this is because they had both already acquired compensation from Worboys himself (£10,000 each) and from CICA (£13,500 for DSD) – see [43] of Green J’s judgment. Bearing in mind that this was *also* an investigative duty breach, not substantive, this ends up giving a total compensation figure for DSD of £45,750

Pecuniary Loss claims

A family member suffers psychiatric injury and finds themselves unable to work, leading to a substantial loss of earnings claim – what are the routes to recovery?

Secondary victim status in negligence

Just satisfaction

Secondary victim status

Have things improved since *Alcock?*

No.

Liverpool Women's Hospital NHS Foundation Trust v Ronayne [2015] EWCA Civ 588:

(a) The Claimant must have a close tie of love and affection with the person killed, injured or imperilled;

(b) The Claimant must have been close to the incident in time and space;

(c) The Claimant must have directly perceived the incident rather than, for example, hearing about it from a third person; and

(d) The Claimant's illness must have been induced by a sudden shocking event.

Secondary victim status

Almost all claims in the 'usual' inquest field (psychiatric detention, prison deaths, etc) will fail on this basis - in *Taylor v Somerset Health Authority* [1993] PIQR 262, the High Court rejected the claim that being informed of someone's death at the hospital by a treating physician could fall within the definition of 'immediate aftermath'. It is *geographic* proximity as well as *temporal* proximity to the shock event – which is why Claimants who were physically at Hillsborough (or shortly after) succeeded, whereas individuals watching at home did not.

Secondary victim status

One to watch though with two cases going to the Court of Appeal:

Paul & Paul v. Royal Wolverhampton NHS Trust [2020] EWHC 1415 (QB)

Polmear & Anor v Royal Cornwall Hospitals NHS Trust [2021] EWHC 196 (QB)

Pecuniary loss in HRA damages

Strasbourg Court emphasises that the principle of *restitution in integrum* applies where pecuniary loss has been sought – i.e. if awarding just satisfaction is necessary and the Applicant can establish a direct causal link between the violation and pecuniary loss suffered, it should be awarded to put the Applicant in a position as if the breach had not happened (*Yukos v. Russia* (Just Satisfaction), app. no. 14902/04, 31 July 2014; *Former King of Greece and Others v. Greece* [GC] (just satisfaction), app. no. 25701/94, 28 November 2002; *Beyeler v. Italy* [GC] (just satisfaction), app. no. 33202/96, 28 May 2002).

I repeat: nothing in *Anufirejva* or *Greenfield* disavows the application of this principle or means that it is irrecoverable or a presumption against an award of this nature. *Greenfield* actually positively draws it out of the Article 6 case law.

Useful, detailed and structured example

Smith and Grady v. the United Kingdom (just satisfaction), app. nos. 33985/96 and 33986/96, 25 July 2000.

Dismissal of LGBT+ soldiers from the armed services on a discriminatory basis

The two applicants sought a loss of earnings claim based on past loss, the difference between their civilian and service income and loss of pension rights. The sums claimed for the First Applicant were £64,186.20 for past lost income, £167,737 for future loss of earnings and £358,299.20 in respect of pension rights. The Second Applicant claimed similar sums.

Smith & Grady contd.

ECtHR observed that a precise calculation of pecuniary loss was not possible due to the '*inherently uncertain character of the damage flowing from the violations*' and that '*given the large number of imponderables involved in their assessment, it is nevertheless the case that the greater the interval since the discharge of the applicants the more uncertain the damage becomes*'.

It summarised its task by saying that '*question to be decided is the level of just satisfaction, in respect of both past and future pecuniary loss, which it is necessary to award to each applicant, the matter to be determined by the Court at its discretion, having regard to what is equitable.*'

Smith & Grady cotd.

In dealing with the individual claims, ECtHR then carried out the following exercise: the ECtHR reminded itself of the underlying factual basis and its findings in the substantive judgment – including the impact on the applicants. It then went on to look at the career history and pension schemes for both applicants.

The conclusion was that the First Applicant could recover inclusive of interest from 1994 to 2000 (with inflation adjusted figures in brackets):

Past loss earnings: **£30,000** (£56,804) against £64,186.20 claimed

Future loss of earnings: **£15,000** (£28,402) against £167,737 claimed

Pension rights: **£14,000** (£26,509) against £358,299.20 claimed

Total Award: **£59,000** (£111,715)

So what?

There is nothing special about HRA damages claims for pecuniary loss – orthodox principles of recovery apply, but subject to one major qualifier in the Article 2 context…

It **must** be a breach of the Article 2 *substantive* duties and not the *procedural* duties:

Basbilen v. Turkey – fails for no "direct causal link" because it is a procedural breach

Çoşelav v. Turkey – fails for lack of any evidence put in to justify the €200,000 claim

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Costs

(please note I am good for more than just costs and procedure)

Maximising recovery

Fullick v. Commissioner of Police for the Metropolis [2019] EWHC 1941 (QB); [2019] Costs LR 1231, there are effectively two stages to determining the recoverability of inquest costs as part of adjectival civil proceedings:

Firstly, whether the costs have been incurred in respect of steps which are relevant to that civil claim (*Roach v. Home Office* [2009] 2 Costs LR 287).

Secondly, whether they are proportionate to the sums in issue – although making particular allowance for the fact that the civil claim will not just be about money, but breaches of Article 2 and non-monetary relief.

Admissions

Your opponent cynically seeking to knock you out on recovering the costs of the inquest in the subsequent civil claim and serves, 28 days before the inquest, a schedule of "admissions" on the facts and causation which go to the Article 2 civil claim

Separately, they send you a letter in the civil claim referring to those admissions

Are the costs of the inquest irrecoverable in the civil action?

Don’t panic

Don’t let that make you think that there is a blanket rule or bright line rule about recovery:

Punting in a “note” in the inquest alone is not enough – there is a formal process for making pre-action admissions in CPR 14.1A(1) which should be followed

Even if they make admissions about facts or causation, that is not always going to encapsulate the full breadth of the issues – you will always be identifying facts and issues which arise out of the inquest as live evidence comes out. Mark out your note of *which* witnesses bring out new and previously unrealised issues which go beyond the admissions and which you can respectably justify recovery for work done

You are not <u>just</u> there for whether there was a breach or not, you also there to identify how “*egregious*” the breach is for damages/quantum - *Rabone*

Thank you!

laurap@gclaw.co.uk