

STATE LIABILITY CLAIMS IN THE ENGLISH COURTS

CELEBRATING 20 YEARS OF *FRANCOVICH* IN THE EU

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1. Important to note the substantial contribution English Courts to the subsequent ECJ/CJEU jurisprudence by making repeat references:

- 1.1. Case C-221/89 *R v SS for Transport ex p Factortame No.3* [1992] QB 680;
- 1.2. Case C-392/93 *R v HM Treasury, Ex p British Telecommunications plc* [1996] QB 61;
- 1.3. Case C-5/94 *R v Ministry of Agriculture, Fisheries and Food, Ex p Hedley Lomas (Ireland) Ltd* [1997] QB 139;
- 1.4. Case C-66/95 *R v SS for Social Security ex parte Sutton* [1997] 2 CMLR 382;
- 1.5. C-278/05 *Robins v Secretary of State for Work and Pensions* () [2007] E.C.R. I-1053;
- 1.6. C-446/04 *Test Claimants in the FII Group Litigation v Inland Revenue Commissioners* [2007] 1 C.M.L.R. 35;
- 1.7. C-524/04 *Test Claimants in the Thin Cap Group Litigation v IRC* [2007] 2 C.M.L.R. 31;
- 1.8. Case C-452/06 *Synthon v MHRA* [2008] ECR I-16 Oct 2008.

The popularity of the tort must be very largely a function of the absence of any equivalent remedy in English public law.

2. Nature of the domesticized claim – breach of statutory duty – six years limitation:

- 2.1. *Garden Cottage Foods Ltd v Milk Marketing Board* [1984] A.C. 130; [1983] 3 C.M.L.R. 43 at 141C-F per Lord Diplock

- 2.2. *R v Secretary of State for Transport Ex p. Factortame Ltd (No.6)* [2001] 1 W.L.R. 942; [2001] 1C.M.L.R. 47 per HHJ Toulmin QC
 - 2.3. Not available in a statutory jurisdiction unless specifically so authorized (and none do so far as I am aware): see *Mann v Secretary of State for Education & Employment* [1997] ICR 209
3. When does cause of action accrue/what is a continuing or repeated breach? Compare and contrast:
 - 3.1. *Phonographic Performance Ltd v Department of Trade and Industry* [2004] EWHC1795 (Ch); [2004] 3C.M.L.R. 31 (each occasion PPL lost revenues to which it was entitled under the relevant Directives as a separate breach).
 - 3.2. *Poole v HM Treasury* [2006] EWHC 2731 (Comm) (*Emmott* a decision on its facts that did not have the effect of stopping limitation running until there had been proper implementation).
 - 3.3. *Spencer v Secretary of State for Work & Pensions* [2008] EWCA Civ 750 (personal injury claims where the damage arising from defective implementation was conterminous with rather than subsequent to the injury sustained).
4. What is a sufficiently serious breach? This has been the main area of litigation. Cases rarely get beyond this. The UK courts' approach to the multi-factor test is contained in the following cases:
 - 4.1. *R v DSS ex parte Scullion* [1999] 3 CMLR 798 (Sullivan J, interest upon benefits refused in breach of EU law; sufficiently serious breach found, applying Case C-66/05 *R v S for Social Security ex parte Sutton* [1997] ECR I-2163);

- 4.2. *R. v Secretary of State for Transport Ex p. Factortame Ltd (No.5)* [2001] 1 A.C. 524; [1999] 3 C.M.L.R. 597;
 - 4.3. *FII Chancery [2009] S.T.C. 254*, esp [357]-[375], expanding upon/applying the ECJ decision in *Test Claimants in the FII Group Litigation v Inland Revenue Commissioners (C-446/04)* [2007] 1 C.M.L.R. 35 (compound interest as an effective remedy for an unlawfully paid tax; damages as an alternative);
 - 4.4. *Byrne v Motor Insurers' Bureau* [2008] EWCA Civ 574; [2009] QB 66 [2008] 3 C.M.L.R. 4, at [35]-[36], [44]-[45] per Carnwath LJ (Directive clarified by ECJ judgment);
 - 4.5. *FJ Chalke v HMRC* [2009] EWHC 952 (Ch); [2009] 3 CMLR 14;
 - 4.6. *Cooper v Attorney General* [2010] 3 CMLR 776, at [65] *et seq* (*Kobler* damages claim; v. high hurdle; no liability for failure to make a reference); and
 - 4.7. *R(Negassi) v SSHD* [2011] EWHC 386 (Admin) (Div Ct); [2011] 2 C.M.L.R. 36 (misinterpretation of a properly implemented Directive)
5. Conclusions from these cases (which represent the principal area of jurisprudence):
 - 5.1. Objective inquiry unless bad faith or (as in *Factortame No.5*) a deliberate decision to run the risk of illegality is in issue).
 - 5.2. High hurdle unless and until clarificatory case-law or strong harmonization with which the decision is obviously inconsistent (as in *Hedley Lomas, Synthon* or *Danske Slagterier*).

- 5.3. *Kobler* claims in particular will face a steep uphill battle in the English Courts; ironically, this may mean that the only plausible target in many cases may be the SC.
 - 5.4. Factors include but are not limited to those identified by ECJ (e.g. in *Robins* at [77] "*Those factors include, in particular, in addition to the clarity and precision of the rule infringed and the measure of discretion left by that rule to the national authorities, whether the infringement or the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, and the fact that the position taken by a Community institution may have contributed towards the adoption or maintenance of national measures or practices contrary to Community law.*")
6. Does the provision breached confer rights on an individual? Limited case-law:
 - 6.1. *Three Rivers No.3* [2002] 2 WLR 15 at 80D -85A per Hirst LJ; [2003] 2 AC 1 (HL) (alleged misapplication of Banking Authorisation Directive); and
 - 6.2. *Poole v HM Treasury* [2006] EWHC 2731 (Comm) (relevant misimplemented Insurance Directive an instrument of general regulation not intended to create individual rights for the Claimant (customer) class but for insurers, so that they could provide business across EU).
7. Causing loss and damage:
 - 7.1. *Evans v SS for Transport* [2006] EWHC 322 (QB) (no prospect of any recoverable head of loss once costs waived).

- 7.2. *Factortame No.6* (above): no damages for distress or aggravated damages.
- 7.3. Exemplary damages if within standard *Rookes v Barnard* territory (especially after *Manfredi*): NB *Factortame No.5*, Div Ct [1998] 1 CMLR no longer good law (as it applies the old “cause of action” test disapproved by HoL in *Kuddus v Chief Constable of Leicestershire* [2002] 2 AC 122): see, by close analogy (another EU breach of statutory duty tort, this time A.101 TFEU) *Devenish v Aventis* [2007] EWHC 2394 [56] and esp [66] per Lewison J (not appealed on this point).
- 7.4. No other guidance – everything else has settled.

8. Issues out there:

- 8.1. Parallels on the damages quantification exercise with competition cases (especially exclusionary abuse/lost market share cases) and domestic lost opportunity cases: see e.g. *Les Laboratoires Servier v Apotex Inc* [2008] EWHC 2347; [2009] FSR 3 (damages assessed on a *Chaplin v Hicks* basis).
- 8.2. English Courts likely to be open to potential for cross-fertilisation: e.g. of whatever comes of Draft Guidance Paper – *Quantifying harm in actions for damages based on breaches of A.101/2*.
- 8.3. Very close linkage between principles of effective protection on a wide basis and fall back deployment of *Factortame* claims: see e.g. the tax litigation; *Byrne*.
- 8.4. Relationship to damages for breach of horizontally effective provisions and/or against emanations of the state. Little follow up

as yet. (Contrast the Swedish litigation about exemplary damages post *Laval* with *Viking*).

- 8.5. Contribution claims or damages claims by “emanations of the state”: *Griffin v South West Water Services Ltd* [1995] IRLR 15 illustrates the width of that concept. Yet such entities may not control the relevant offending legislation/regulatory regime but may be fixed across the field of their operation with directly effective obligations. Application of vertically directly effective obligations may impose competitive disadvantages. Problems akin to (but the reverse of) those in Case C-424/97 *Haim* [2002] 1 CMLR 11.
- 8.6. Adverse inference from refusal to waive privilege?
 - 8.6.1. *Armory v Delamirie*
 - 8.6.2. *R v SS Transport, ex p Factortame (Discovery)* (unreported) 7 May 1997 (partial disclosure of privilege relating to a defined period/set of issues);
 - 8.6.3. *Scullion* above, esp [66]
- 8.7. Claims for breach of the Charter:
 - 8.7.1. Missed trick in *R(Negassi) v SSHD* [2011] EWHC 386 (Admin) (Div Ct); [2011] 2 C.M.L.R. 36.
 - 8.7.2. Vertical Direct Effect: clearly; modulated approach to “manifest and grave disregard” given the importance of the fundamental rights?
 - 8.7.3. Interaction with s.8 HRA and with ECHR just satisfaction?