

# Non-pecuniary loss in abuse claims

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# Introduction

Damages for non-pecuniary loss in abuse claims are difficult to value for two key reasons:

1. Unclear which heads of loss are recoverable
2. No clear guidance on how those heads of loss should be valued

# What is non-pecuniary loss?

Comprises all losses which do not represent an inroad upon a person's financial or material assets.

- ▶ *Money is not awarded as a replacement for other money, but as a substitute for that which is generally more important than money: it is the best that a court can do* (McGregor on Damages, 21<sup>st</sup> edition, 2-001)
- ▶ *"No sum is demonstrably equivalent to what has been lost. A value judgment is therefore required"* (Law Com No. 257)

# What is non-pecuniary loss?

Four main heads of non-pecuniary loss:

- ▶ damages for pain, suffering and loss of amenity
- ▶ physical inconvenience and discomfort
- ▶ loss of reputation / social discredit
- ▶ injury to feelings / mental distress

Two exceptional categories:

- ▶ aggravated damages
- ▶ exemplary damages

# What is non-pecuniary loss?

Trespass to the person is actionable per se:

- ▶ Damages for non-pecuniary loss are recoverable even if no physical or psychological injury is sustained (*McGregor on Damages*, 21<sup>st</sup> edition 42-001).

The following heads of non-pecuniary loss are recoverable in principle for the tort of assault / battery:

- ▶ PSLA for any injuries caused
- ▶ Physical inconvenience and discomfort
- ▶ Injury to feelings
- ▶ Aggravated damages
- ▶ Exemplary damages.

# Injury to feelings

Designed to reflect "*the indignity, mental suffering, disgrace and humiliation caused*" by the tort in question (*McGregor on Damages*, 21<sup>st</sup> Edition, 42-001).

*Vento* guidelines:

- a) The top band should normally be between **£29,600 and £49,300**. Sums in that range should be awarded in the most serious cases, such as where there had been a lengthy campaign of discriminatory harassment on the ground of sex or race. Only in the most exceptional case should an award of compensation for injury to feelings exceed £49,300.
- b) The middle band of between **£9,900 and £29,600** should be used for serious cases, which did not merit an award in the highest band.
- c) Lower band: awards of between **£990 and £9,900** are appropriate for less serious cases, such as where the act of discrimination was an isolated or one-off occurrence. In general, awards of less than £900 are to be avoided, as they risk being regarded as so low as not to be a proper recognition of injury to feelings.

# Aggravated damages

- ▶ Recoverable in cases of trespass to the person where the injury to the claimant's feelings is increased by the flagrancy, malevolence and particularly unacceptable nature of the defendant's behaviour (*McGregor on Damages*, 21<sup>st</sup> edition, 42-002).
- ▶ Awarded as compensation for the plaintiff's mental distress, where the manner in which the defendant has committed the tort, or his motives in so doing, or his conduct subsequent to the tort, has upset or outraged the plaintiff. Such conduct or motive "*aggravates*" the injury done to the plaintiff, and therefore warrants a greater or additional compensatory sum (*Rookes v Barnard* [1964] A.C. 1129 per Lord Devlin).
- ▶ *BDA v Quirino* [2015] EWHC 2974 (QB): £9,000 for aggravated damages and £16,000 for injury to feelings (with reference to the Vento guidelines).

# Exemplary damages

- ▶ Punitive
- ▶ Recoverable only in three narrow circumstances (*Rookes*):
  - ▶ Oppressive, arbitrary or unconstitutional conduct by government servants
  - ▶ Where the defendant's wrongdoing was calculated to make a profit; or
  - ▶ Where exemplary damages are expressly permitted by statute.
- ▶ Example in abuse context: *AT, NT, ML, AK v Dulghieru* [2009] EWHC 225 (QB)





**How do we value the non-injury  
element of an abuse claim?**

# Problem 1

Global awards are often made for the injury + non-injury element

# Problem 2

Lack of consistency in amount awarded

- ▶ Compare *JXL v Britton* [2014] EWHC 2571 (QB) with *Griffiths v Williams* (21st November 1995, CA unreported)
- ▶ Compare *PBX v JXD* (2019) with *GLB v TH* [2012] EWHC 3904 (QB)

# Problem 3

- ▶ Modest in absolute terms
  - ▶ Range: £5,300 - £78,000 (in today's money)
- ▶ Low in relative terms
  - ▶ *BDA v Quirino* [2015] EWHC 2974 (QB)
  - ▶ *Elton John v Mirror Group Newspapers (MGN) Ltd* [1995] The Times, 14 December
  - ▶ *Richard v BBC* [2018] EWHC 1837 (Ch)
- ▶ *TVZ & Others v Manchester City Football Club Limited* [2022] EWHC 7 (QB) at [369]:
  - ▶ *It is not easy to see why the law should afford less protection to bodily autonomy and integrity than privacy and autonomy over personal information, or why it should value the protection of children from sexual abuse less than the protection of celebrities from breaches of privacy.*

# Problem 4

Are aggravated damages actually recoverable?

- ▶ *Richardson v Howie* [2004] EWCA Civ 1127
- ▶ *Rowlands v Chief Constable of Merseyside* [2006] EWCA Civ 1773
- ▶ *Doherty v MoD* [2019] NIQB 35
- ▶ *B v Cager* [2021] EWHC 540 (QB)
- ▶ *KCR v Scouts Association* [2016] EWHC 587 (QB)
- ▶ *LXA v Wilcox* [2018] EWHC 2256 (QB)

What about loss of reputation?

# JC Guidelines

- ▶ 1<sup>st</sup> edition: 1992.
- ▶ 16<sup>th</sup> edition: 2022.

# The role of the JCG

- ▶ Authoritative guidelines on PSLA that are regularly updated to reflect inter alia inflation, societal changes and developing medical understanding.
- ▶ *“Paradoxical as it may seem, one of the commonest tasks of a judge sitting in a civil court is also one of the most difficult. This is the assessment of general damages for pain, suffering, or loss of the amenities of life ...The solution to this dilemma has lain in using the amount of damages awarded in reported cases as guidelines or markers and seeking to slot the particular case into the framework thus provided.” (foreword, 16<sup>th</sup> edition).*
- ▶ *“The Editorial Board do not make the law on general damages but reflect the awards being made by judges in particular by reviewing such reports of assessments of damages as are available. The very success of the Guidelines means that there are fewer such reports.” (foreword, 15<sup>th</sup> edition).*
- ▶ Double edged sword: the more successful the guidelines, the fewer reported cases.

# The JCG and the courts

- ▶ (1) comparator cases:
  - ▶ Individual assessments of damages for PSLA based on individual facts that can be compared to X's case to see whether X should be awarded more, similar or less.
- ▶ (2) appellate cases:
  - ▶ Reviewing the general approach from time to time.
    - ▶ *"changing the current levels of damages, if they are no longer reflective of what should be the correct level of awards, is ... part of the courts' duty. A duty which the court should not shirk"*: Heil v Rankin [2000] 2 WLR 1173 at [40].
    - ▶ *"this court has not merely the power, but a positive duty, to monitor, and where appropriate to alter, the guideline rates for general damages in personal injury actions"* : Simmons v Castle [2012] EWCA Civ 1288 at [12].



# The JCG's historical approach to PSLA arising from abuse

- ▶ All references to abuse have always been within the psychological and psychiatric injury chapter.
- ▶ The first reference to abuse is in the 6<sup>th</sup> edition (2002).

Edition	Chapter preamble	(A) Psychiatric injury generally
1 <sup>st</sup> to 5 <sup>th</sup> editions (1992 to 2002)	<u>No specific references.</u>	<u>No specific references.</u>
6 <sup>th</sup> to 10 <sup>th</sup> editions (2002 to 2012)	<i>Where cases arise out of sexual and/or physical abuse in breach of parental, family, or other trust, involving victims who are young and/or vulnerable, awards will tend to be at the upper end of the relevant bracket to take into account (A)(vii) below.</i>	<i>(vii) (a) whether the injury results from sexual and/or physical abuse and/or breach of trust; (vii) (b) if so, the nature of the relationship between victim and abuser, the nature of the abuse, its duration and the symptoms caused by it.</i>
11 <sup>th</sup> to 14 <sup>th</sup> editions (2012 to 2019)	<u>As above.</u>	<i>(vii) Claims relating to sexual and physical abuse usually include a significant aspect of psychiatric or psychological damage. The brackets discussed in this chapter provide a useful starting point in the assessment of general damages in such cases. It should not be forgotten, however, that this aspect of the injury is likely to form only part of the injury for which damages will be awarded. Many cases include physical or sexual abuse and injury. Others have an element of false imprisonment. The fact of an abuse of trust is relevant to the award of damages. A further feature, which distinguishes these cases from most involving psychiatric damage, is that there may have been a long period during which the effects of the abuse were undiagnosed, untreated, unrecognised or even denied. Aggravated damages may be appropriate.</i>
15 <sup>th</sup> edition (2019 to 2022)	<u>As above.</u>	<i><u>As above</u> + Awards should take into account not only the psychiatric effects of the abuse on the injured party but also the immediate effects of the abuse at the time that it was perpetrated, including feelings of degradation. Aggravated damages may be appropriate. Cases of prolonged and frequent physical and sexual abuse of a child over many years by a person in a position of trust, involving penetrative violation, are likely to fall into (A)(a) or (B)(a) and reflect aggravated damages, leading to an award towards the top end of the bracket.</i>

# Some problems with the historical approach

- ▶ The preamble reference to abuse was not updated between 2002 and 2022.
- ▶ No distinction between physical and sexual abuse.
- ▶ The abuse-specific wording is not particularly helpful in practice:
  - ▶ No definition of e.g. a *“young”* or *“vulnerable”* survivor, *“prolonged”* or *“frequent”* abuse.
  - ▶ Simply says that certain features *“may”* be present without giving any guidance as to what the implication should be.
- ▶ Conflation of the award for PSLA with the award for the *“fact of”* abuse.
- ▶ 11<sup>th</sup> edition onwards say aggravated damages may be appropriate but that’s all. Query whether the JCG should be speaking beyond PSLA.

# The JCG's current approach to abuse: 16th edition

Edition	Chapter 4(C) narrative
16 <sup>th</sup> edition (2022 onwards)	<p><i>The cases in this section include damages for the sexual and/or physical abuse itself as well as any psychiatric injury caused to the injured person. In many cases there is also an element in the award of general damages for the indignity, mental suffering, humiliation, distress, or anger caused by such an attack. This is sometimes characterised as aggravated damages, but more properly is injury to feelings and is included in the brackets below. Where the element for injury to feelings has been broken down in reported cases, which is usually where there is significant injury, the range is usually in the region of <b>£15,000 to £25,000</b></i></p> <p><i>The factors to be taken into account in valuing general damages for the abuse and the psychiatric injury in claims of this nature are as follows:</i></p> <ul style="list-style-type: none"> <li><i>i. the nature and duration of the abuse and any physical injuries caused</i></li> <li><i>ii. the nature and duration of the psychological injury and its effect on the injured person's ability to cope with life, education, and work</i></li> <li><i>iii. the effect on the injured person's ability to sustain personal and sexual relationships</i></li> <li><i>iv. abuse of trust</i></li> <li><i>v. the extent to which treatment would be successful</i></li> <li><i>vi. future vulnerability</i></li> <li><i>vii. prognosis for psychological injury</i></li> </ul> <p><i>Aggravating features which would lead to an additional sum for injury to feelings include</i></p> <ul style="list-style-type: none"> <li><i>i. the nature of the abuse</i></li> <li><i>ii. the level of abuse of trust</i></li> <li><i>iii. any manipulation following the abuse to stop reporting of the abuse, or to seek to put blame on the injured party</i></li> <li><i>iv. the need for the injured party to give accounts and evidence of the abuse in criminal or civil proceedings, or in any other relevant investigation</i></li> </ul>

# JCG 16<sup>th</sup> edition: PSLA element

▶ What it says:

- ▶ Lists relevant factors in the narrative: similar to the non-abuse factors.
- ▶ Each of the three brackets refers to the seriousness of the abuse and the seriousness of the injury.
- ▶ The three brackets:

(a) Severe	£45,000 to £120,000 Caveat: the majority will be £55,000 to £90,000
(b) Moderate	£20,570 to £45,000
(c) Less severe	£9,730 to £20,570

▶ Problems:

- ▶ No distinction between sexual and non-sexual abuse.
- ▶ The caveat to (a) Severe means that "*the majority*" will be worth less than a comparable non-abuse injury. Contrary to the underlying principle.
- ▶ Difficult conflation of the seriousness of the abuse with seriousness of the resultant injury: what matters more?

# JCG 16<sup>th</sup> edition: non-PSLA element

## ▶ What it says:

- ▶ The fact of the abuse element is subsumed within the JCG brackets.
- ▶ This element will apply in “*many*” cases depending on the listed “*aggravating features*”.
- ▶ This element has often been called “*aggravated damages*” but should be called “*injury to feelings damages*”.

## ▶ Problems:

- ▶ The JCG’s remit is PSLA, not other heads of general damages?
- ▶ Surely the fact of the abuse element should either apply to all or no PSLA awards, not “*many*”?
- ▶ Conflates two very different heads of loss.
- ▶ Doesn’t deal with whether this element can/ should push an award into a higher bracket.

# JCG 16<sup>th</sup> edition: where it leaves us

- ▶ Good that injury claims arising from abuse are being acknowledged as different to other injury claims. Huge step forward in this edition.
- ▶ Difficult that the JCG addresses, and attempts to subsume, heads of loss other than PSLA.
- ▶ Reported cases are needed to see if and how the 16<sup>th</sup> edition works in practice.
- ▶ Likely grounds for argument:
  - ▶ Whether the additional "*element*" should be awarded and at what level.
  - ▶ If yes, whether that can move the award into a higher bracket.
  - ▶ Whether a severe case is sufficiently exceptional to get beyond the caveat.
  - ▶ The significance of the seriousness of the abuse vs the seriousness of the injury.

# Final thoughts

