BRIEFING

PUBLIC SECTOR & HUMAN RIGHTS

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INTRODUCTION

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As we face more time under the shadow of Covid-19, now in this 'new normal', many of us are using technology more and seeing the legal issues that are arising out of it/IT.

There have been Data Protection and Human Rights issues raised about the Government's new Covid-19 tracing app. and police surveillance. There have been the disturbing new trends of increased online abuse and even the 'Zoombombing' of child abuse.

There have also been recent Data Protection decisions involving Morrisons and Google that should provide some guidance on how this area of law is being developed.

In this Briefing, Geoff Weddell and Ian Clarke shine a light on the crucial areas of causation and damage in Data Protection claims. Their authoritative articles should benefit anyone considering or facing a data claim.

Members of the Public Sector & Human Rights team have for many years handled a number of the leading cases involving local and public authorities.

As ever, at 1 Chancery Lane our barristers and clerks are working hard to provide a full and consistent service. Please do not hesitate to contact us in Chambers and remember that we have our legal advice helpline for as long as the lockdown continues https://1chancerylane.com/free-legal-advice-helpline/

Best Wishes

CAUSATION IN DATA CLAIMS

GEOFFREY WEDDELL

The question of how damages are to be limited – in other words, the causation of loss - is never straightforward. In the majority of torts, losses are limited to those that were reasonably foreseeable at the time the tort was committed. In some torts, all losses are recoverable whether they are foreseeable or not (deceit and assault being two examples). In others the rules of causation can change within the same tort depending on what the Court makes of the facts. So, for example, in *Essa v Laing* [2004] EWCA Civ 2, the claimant's foreman made a racial epithet to the claimant which caused the claimant such distress that he developed a psychiatric illness. He left his employment and brought a claim for race discrimination. The employment tribunal accepted that the claimant was entitled to damages for distress but rejected his claim for damages for the psychiatric illness on the ground that it was not reasonably foreseeable that the epithet would make the claimant ill. The Court of Appeal, by a majority, allowed the claimant's appeal. Although the Court accepted that there was nothing in the statute that pointed towards a departure from the normal requirement to prove that claimed losses were foreseeable, Clarke LJ held that the purpose of the Act was to remedy a great evil and that it should be enough for a claimant to prove merely that his injury had in fact been caused by the discrimination. Pill LJ agreed, on the basis that the conduct in question had been deliberate. He said that where discrimination was not deliberate, the test of causation might be different: "Different considerations may apply within the confines of a single tort". (at paragraph 34). Rix LJ, dissenting, pointed out that it was unsatisfactory that a single tort should have multiple tests for causation depending on whether the discrimination was deliberate (paragraph 106). However that was a dissenting judgment.

In *Essa* the Court was wrestling with what Rix LJ described as the new statutory tort of race discrimination. In the sphere of data protection, we have similar "new" statutory torts – the Data Protection Act 1998 and its successor, the 2018 Act. Claims under either of these Acts are invariably accompanied by claims that the same conduct breached the claimant's rights under a variety of other causes of action, such as Article 8, breach of confidence and misuse of private information. So how is the Court going to approach the issue of causation in claims of this type?

The answer lies in the detail of the Cliff Richard case, *Richard v BBC* [2018] EWHC 1837 (Ch). The basic facts are that the BBC were given a tip-off by someone at the Met Police that South Yorkshire Police were investigating Sir Cliff and that he might be arrested. South Yorkshire Police then gave the BBC details of the allegation and the timings of a proposed search of Sir Cliff's home. This enabled the BBC to have a news helicopter circling overhead and to have their journalists outside Sir Cliff's home whilst the search was taking place, thus providing graphic coverage that included some shots of the search itself and that was syndicated worldwide. The police investigation found no evidence and Sir Cliff was not arrested. But the damage to his reputation was done.

Sir Cliff brought a claim against both the BBC and South Yorkshire Police for breach of the Data Protection Act, Article 8 of the ECHR and misuse of private information. The claim against South Yorkshire Police was settled but the claim against the BBC was tried.

Mann J ruled explicitly that each of the causes of action entitled Sir Cliff only to reimbursement of those losses that were reasonably foreseeable. He made that ruling despite a series of findings of inappropriate behaviour by the BBC. These included the fact that their journalist had deliberately given the false impression to South Yorkshire Police that the BBC would broadcast the story early, thus creating a risk of prejudice to the investigation, unless the police co-operated; that the BBC had advanced at trial a conspiracy theory against South Yorkshire Police (that it had concocted notes that were inconsistent with those made by the BBC) that was untrue and which the Court rejected; and that the BBC had added to the distress caused by its story by putting the broadcast forward for a Royal Television Society award. All of these things could be described as deliberate but they did not alter the Court's ruling on causation.

This is a sensible decision, giving certainty to lawyers on both sides of data claims. It means that no matter how the data claim is advanced, the recoverable losses are limited to those which were reasonably foreseeable.

DAMAGES UNDER DATA PROTECTION LAW

IAN CLARKE

DPA 1998 [1]

Data protection legislation in the UK was overhauled following the Human Rights Act 1998 and the need to give effect to the rights enshrined under EU law. A key development was the Data Protection Directive 1995 ('the Directive'). Article 23(1) of the Directive provides that: "*Member States shall provide that any person who has suffered damage as a result of an unlawful processing operation or of any act incompatible with the national provisions adopted pursuant to this Directive is entitled to receive compensation from the controller for the damage suffered.*" The Data Protection Act 1998 purports to give effect to this provision under section 13. That section provides:

> *1) An individual who suffers damage by reason of any contravention by a data controller of any of the requirements of this Act is entitled to compensation from the data controller for that damage.*
> *2) An individual who suffers distress by reason of any contravention by a data controller of any of the requirements of this Act is entitled to compensation from the data controller if:*
> *a. The individual also suffers damage by reason of the contravention; or*
> *b. The contravention relates to the processing of personal data for the special purposes.*

There have in recent years been a number of important decisions dealing with the application of these provisions and particularly the scope of 'damage'. The courts have taken a wide approach to the interpretation of 'damage', so much so that the manner in which section 13 currently applies is entirely at odds with the position described in its initial formulation. The focus of this article is on explaining this development and clarifying the key principles underlying the law in this area. As the UK courts begin to try cases brought under the DPA 2018, it is essential that these principles are understood as they will continue to inform the courts' approach to domestic data protection litigation.

Moreover, the way that the Courts have approached the question of what constitutes damage has resulted in a wider pool of potential Claimants. This has brought concerns for data controllers and their insurers who fear a significant increase in claims.

Johnson v Medical Defence Union

The first case to look at the meaning of section 13 substantively was *Johnson v Medical Defence Union* [2007] EWCA Civ 262. Buxton LJ considered (in obiter comments) that there "*is no compelling reason to think that "damage" in the directive has to go beyond its root meaning of pecuniary loss*"

[§74]. Accordingly, 'damage' under section 13 was limited to pecuniary loss, unless the pecuniary loss had been suffered in tandem with distress per section 13(2)a.

Discontent: Murray v Big Pictures and Halliday v Creation Consumer Finance

The case law immediately following this decision suggests the courts considered this to be a harsh and potentially unwarranted restriction on the interpretation of 'damage' under the DPA 1998. The first substantive decision in which this discontent was voiced was *Murray v Big Pictures (UK) Ltd* [2008] EWCA Civ 446. The claim concerned a photograph that had been taken of JK Rowling and her family and had been brought under Article 8 of the ECHR and pursuant to the DPA. The claim was struck out at first instance but the Court of Appeal overturned the decision. In relation to the DPA argument the Master of the Rolls, who gave the unanimous decision of the Court, thought that it was arguable that the Data Protection Directive warranted a construction of section 13 that would allow recovery for injury to feelings or distress: [§62-63]. It was widely considered that this decision indicated the Court of Appeal's desire to re-open the issue of how section 13 should be interpreted.

A further manifestation of the unease can arguably be located in the Court of Appeal's decision in *Halliday v Creation Consumer Finance* [2013] EWCA Civ 33. In *Halliday* the Claimant was awarded nominal damages of £1 against the Defendant; that award was sufficient to satisfy the requirement for damage under section 13(2)(a) and to open the door to the recovery of damages for "distress". Importantly it had been conceded that nominal damage was "damage" for the purposes of section 13(2).

A decision arrived at on similar lines is *AB v Ministry of Justice* [2014] EWHC 1847 (QB). The claimant had clearly established distress (valued at £2,250) but there was otherwise no clear basis on which to establish that pecuniary loss had been suffered. Baker J, instead of declining to award compensation on the basis section 13(2)a had not been met, awarded nominal damage of £1 which was said to reflect the fact that the claimant had spent considerable time and expense trying to obtain the actionable disclosure from the defendant. The court's policy was seemingly to prevent the difficulties of proving pecuniary loss from precluding a claim for damages under the DPA 1988.

Disapplication of section 13(2): Google Inc v Vidal-Hall [2015] EWCA Civ 311

The case of *Vidal-Hall* represented an important shift in data protection law in the UK. As a result of the decision, a claimant who has suffered distress but no pecuniary loss as a result of a breach of the DPA 1988 is entitled to compensation under section 13(1).

The material breach concerned the use of browser-generated information ('BGI') collected via the Apple Safari browser without the claimants' knowledge or consent. It was common ground between the parties that the claimants could not obtain compensation on a literal interpretation of section 13 as there had been no allegation of pecuniary loss and the claims did not relate to processing any of the special purposes defined in section 3: [§59]. The question before the court was whether there can be a claim for compensation under section 13 without pecuniary loss. The Master of the Rolls and Sharp LJ gave the leading judgment. It was first held that what was said in *Johnson* about the proper interpretation of section 13 was *obiter dicta* and consequently not binding: : [§68]. It was also clear to the courts that *Halliday* was being used "as a gateway for an award of substantial compensation for distress" in cases where there was no allegation of pecuniary loss: [§69]. The Court then considered the aims of the Data Protection Directive as set out by the recitals in the preamble and article 1. It was considered that the "natural and wide meaning" of article 23 of the Directive included both material and non-material damage: [§76]. It would moreover be an oddity if the meaning of 'damage' was limited to economic rights given that the purpose of the Directive was the protection of privacy and not economic rights: [§77]. Having interpreted damage under article 23 as including both material and non-material damage, the question then arose whether section 13 could be interpreted to render it compatible under the *Marleasing* principle. It could not: "*it is clear that Parliament deliberately chose to limit the right to compensation [under section 13] in the way that it did*" [§91] and the Court could not "*interpret section 13(2) compatibly with article 23*" [§94].

The Court finally considered whether the narrow interpretation of damage under section 13(1) was incompatible with Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'). It was considered, applying the principles laid down in *Benkharbouche* [2016] QB 347 [69-85], that section 13(2) failed to provide an effective remedy for breaches of Article 8 and was thus in conflict with Article 47 and that "*what is required in order to make section 13(2) compatible with EU law is the **disapplication** of section 13(2), no more and no less. The consequence of this would be that compensation would be recoverable under section 13(1) for **any** damage suffered as a result of a contravention by a data controller of any requirements of the DPA*".

That significant conclusion paved the way for claims for distress alone, without the need to have any other form of damage no matter how nominal. The decision is also mirrored within Article 82 of the GDPR (the right to compensation for material and non-material damage) and as enacted by Section 168 of the 2018 Data Protection Act that confirms as s.168 (1) that "*non-material damage*" includes distress.

As such the pre-DPA 2018 case law on damage

remains relevant both in terms of guiding principles and the quantification of damages for distress.

A case in which a number of important principles relating to claims under the DPA 1998 are set out is *TLT & Ors v The Secretary of State for the Home Department* [2016] 2217 (QB). The breach in in *TLT* related to the Home Office's accidental disclosure of a spreadsheet containing details of applicants involving in the family returns process. The spreadsheet contained personal details of the lead applicants in those cases, including names, details of birthdates and sensitive information relating to information status. The claimants sought damages for MPI, breach of confidence and breach of the DPA 1988. The first issue to be resolved was whether the unnamed family members of the lead applicants could also claim damages. Manning J held that they could on the basis that their identity could readily be inferred from the disclosure of the lead applicant's name: [§12]. Though this aspect of the decision was appealed, Mitting J's ruling was ultimately upheld: see [2018] EWCA Civ 2217.

The second issue related to whether there was a threshold of distress under which damages could not be recoverable. Mitting J at §15 held

> *"Mr Sanders* [Counsel for the Home office] *submits that there is a threshold which damages for distress may not be awarded in respect of it. I agree there is. It is the de minimis principle. There is no other …"*

This aspect of the decision, combined with the decision in *Vidal-Hall*, represents an important expansion of the potential basis of liability particularly in group action claims, as seemingly the slightest degree of "distress" can prove actionable.

The third issue was whether guidance as to the level of damages could be obtained from cases involving the deliberate exploitation of private information by media publishers. Mitting J held that it could not: the claimants' cases were "*far closer to cases in which claimants have been caused to suffer psychiatric injury by an actionable wrong*" [§16] and the learned judge drew a comparison to child sex abuse cases.

The fourth issue was whether damages could be recovered in respect of the loss of control of personal and confidential information as per *Gulati v MGN LTD* [2016] 2 WLR 1217. Mitting J accepted that this was in principle the position and endeavoured "to take it into account in the awards" rather than making a separate award [§17]. Crucially it is not clear whether this aspect of the decision related to the claim brought under the data protection act or whether it was confined to the MPI element as the judge did not analyse quantum for each cause of action separately (this uncertainty was later resolved in *Richard Lloyd v Google LLC* [2018] EWHC 2599). What is clear is that similar principles relating to the necessity of comparing the award to personal injuries compensation will apply under the DPA 1998: [§11]

Arguably the most important aspect of the decision is the methodical way in which Mitting J analysed the claimants' cases on quantum and provides useful guidance when attempting to value quantum in such distress cases. TLT and his wife (TLU) were each awarded £12,500. The distress caused to them was particularly serious as they were concerned about the prospect of the Iranian government targeting their family. The family also moved houses as a result of the disclosure. TLT's daughter (TLV) was awarded £2,500, with her youth considered to be a mitigating factor. PNA was awarded £3,000: Mitting J considered she suffered understandable shock at the disclosure and felt an initial distrust of authorities. PNC was awarded £3,000 on a similar basis. Finally, PNB was awarded £6,000. PNB had been treated traumatically by the Sri Lankan army in her youth and she was concerned that if she was forced to return to Sri Lanka the army would again target her due to the disclosure. PNB's PTSD (caused by her experiences in Sri Lanka) was also a factor that suggested a greater level of distress would be felt.

This topic cannot be left without reference to *Lloyd v Google LLC* [2019] EWCA Civ 1599[2] (which will be the subject of a separate article shortly). *Lloyd* has arguably changed the face of data protection law in the UK and proved a concern for the handlers of data and their insurers.

Mr Lloyd on behalf of over four million Apple iPhone users sought damages for the non-consensual

acquisition and use of the users' browser-generate information ('BGI'). No financial loss or distress was alleged as required under section 13 of the DPA 1988. The question arose whether contravention of the rights protected by the data legislation could itself be the damage.

Warby J first held the construction of section 13(1) shows that the infringement and the damage are "presented as two separate events, connected by a causal link": [§55]. Accordingly, infringement alone could not be said to amount to damages for the purposes of section 13(1).

The matter found its way to the Court of Appeal and the decision in *Gulati* was central to the reasoning of the Court. As noted above the Court in *Gulati* found that in the tort of MPI damages could be awarded for the loss of control of private information irrespective of whether there was any other damage or distress. In *Lloyd* Sir Geoffrey Vos noted that:

> *"Gulati is, therefore, particularly relevant because the underlying rights on which MPI and infringements of the DPA are based are themselves founded on the same principle, namely, that privacy be protected … Since the torts of MPI and breach of the DPA are undoubtedly similar domestic actions, it would be prima facie inappropriate for the court to apply differing approaches to the meaning of damage. Moreover, the principle of effectiveness provides that a Member State must not render it practically impossible or excessively difficult to exercise rights conferred by EU law. The protection of data is such a right, so this principle too is engaged."*

At §57 Sir Geoffrey summarised the position thus:

> *"I would conclude that damages are* ***in principle capable of being awarded for loss of control of data under article 23 and section 13, even if there is no pecuniary loss and no distress.*** *The words in section 13 "[an] individual who suffers damage by reason of [a breach] is entitled to compensation" justify such an interpretation, when read in the context of the Directive and of article 8 of the Convention and article 8 of the Charter, and having regard to the decision in Gulati. Only by construing the legislation in this way can individuals be provided with an effective remedy for the infringement of such rights."*

The current position appears to be therefore that claimants can bring a claim for breach of the DPA that has resulted in a loss of control of personal data without having to prove either pecuniary loss or distress. That position is a world away from the situation described in section 13 of the 1998 Act and potentially exposes data controllers to a very significant number of claims.

Interestingly the Court of Appeal was unimpressed by Google's floodgate arguments noting that there remained a *de minimis* threshold test that applied to loss of control claims (as per TLT). How that test is to be applied is uncertain but the judicial mood seems to be that the Courts are increasingly concerned to protect privacy and information rights.

Ian Clarke [3]

[1] On 25 May 2018, the DPA 2018 came into force in the UK, giving effect to the General Data Protection Regulation (EU) 2016/679. The DPA 2018 replaced the DPA 1998, though the DPA 1998 will still apply to data breaches occurring before 25 May 2018. The relevant provisions for compensation under the DPA 2018 are section 168 and section 169. There has yet to be a UK authority on the assessment of damages under the DPA 2018, but the relevant principles are expected to be the same or similar as those that currently apply to the DPA 1998 (as set out in this article).

[2] Permission to appeal to the Supreme Court was granted on 11 March 2020.

[3] With appreciation to Henk Soede, a pupil at 1 Chancery Lane.

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