

DEKA
CHAMBERS

DEFENDING DATA PROTECTION CLAIMS

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The Pleading

CPR 16.4(1) requires that a Particulars of Claim include "a concise statement of the facts upon which the claimant relies".

PD 53B provides at §2.1 that statements of case "should be confined to the information necessary to inform the other party of the nature of the case they have to meet. Such information should be set out concisely and in a manner proportionate to the subject matter of the claim".

The Pleading

§9 of PD 53B goes on to provide that the Particulars of Claim must:

- Specify the legislation and provision that the claimant alleges the defendant has breached;
- Specify any specific data or acts of processing to which the claim relates;



The Pleading

- Specify the specific acts and omissions said to amount to a breach and the claimant's grounds for that allegation; and
- Specify the remedies which are sought.

The Pleading

What happens if the Particulars of Claim fails to comply with the rules and PD?

Piepenbrock v London School of Economics and others [2022] EWHC 2421 (KB). Williams J at 223:



The Pleading

"Absent a coherent pleading it is not possible to determine whether an arguable claim could exist. Given the extremely vague nature of what is alleged here, no arguable claim is identified at present."

DPA and Negligence

Is there a co-extensive duty of care in tort?

Smeaton v Equifax [2013] EWCA Civ 108. Tomlinson LJ:

"It would be otiose given the DPA provides a detailed code for determining the civil liability ... of data controllers arising out of improper processing of data".

DPA and Negligence

Also: *Warren v DSG Retail Ltd* [2021] EWHC 2168
(QB), Saini J

"Imposing a duty owed generally to those affected by a data breach would potentially give rise to an indeterminate liability to an indetermined class".

DPA and MPI/BOC

REMEMBER:

The tort of MPI is not the same as a claim under the UK GDPR/DPA - there must be a misuse of the information!

See *Warren v DSG Retail*:



MPI

Born out of Article 8:

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights or freedoms of others.”



MPI

Campbell v MGN Ltd [2004] UKHL 22:

*English law has adapted the action for breach of confidence to provide a remedy for the unauthorised disclosure of personal information This development has been mediated by the analogy of the right to privacy conferred by article 8 of the European Convention on Human Rights **and has required a balancing of that right against the right to freedom of expression conferred by article 10**"*



MPI

NB:

MPI is a distinct tort separate from Breach of Confidence
(*Bloomberg LP v ZXC* [2022] UKSC 5 at [45])

Also, distinct from defamation – issue is whether information is private, not whether it is true or false (*McKennitt v Ash* [2006] EWCA 1714).



MPI

Two questions:

First: whether the information was private. Did the Claimant objectively have a reasonable expectation of privacy?

MPI

Some information is presumed to be private:

- Health
- Personal relationship
- Finances
- Fact of Arrest before charge



MPI

Otherwise look at *Murray* factors (*Murray v Express Newspapers plc*)

- (1) the attributes of the claimant;
- (2) the nature of the activity in which the claimant was engaged;
- (3) the place at which it was happening;
- (4) the nature and purpose of the intrusion;
- (5) the absence of consent and whether it was known or could be inferred;
- (6) the effect on the claimant; and
- (7) the circumstances in which and the purposes for which the information came into the hands of the publisher



MPI

Second: If Article 8 is engaged, the Court has to consider whether there has been an infringement by way of application of Article 8(2), i.e. is there a justification for the use of the private information?

Involves a balancing exercise.

Art 8 does not trump Art 10



BoC

Coco v AN Clark (Engineers) Ltd [1969] R.P.C 41

1. Information must have necessary quality of confidence;
2. Information must have been imparted in circumstances obliging an obligation of confidence;
3. Must be unauthorised use or disclosure.



DPA and MPI/BOC - Warren v DSG Retail

"In the language of Article 8 ECHR (the basis for the MPI tort), there must be an 'interference' by the defendant, which falls to be justified. I have not overlooked the Claimant's argument that the conduct of DSG was "tantamount to publication". Although it was attractively presented, I do not find it persuasive. If a burglar enters my home through an open window (carelessly left open by me) and steals my son's bank statements, it makes little sense to describe this as a "misuse of private information" by me. Recharacterising my failure to lock the window as "publication" of the statements is wholly artificial. It is an unconvincing attempt to shoehorn the facts of the data breach into the tort of MPI."



Overlapping causes of action

Johnson v Eastlight Community Homes [2021]
EWHC 3069 (QB).

D inadvertently sent C's rent statement to a third party. C issued proceedings in the High Court seeking damages for breaches pursuant to the DPA, a declaration that there was a breach of her article 8 rights.

Overlapping causes of action

Master Thornett:

"taking the claim as a whole, the breach of confidence claim and the claim in privacy fail to satisfy me they add anything useful and independent to the claim arising from the admitted breach of the GDPR."



Overlapping causes of action

"As such, I agree with the Defendant's submission that claims collateral to the GDPR claim are likely to obstruct the just disposal of these proceedings and take up disproportionate and unreasonable court time and costs. They are struck out under CPR 3.4(2)(b) . By the same reasoning, they should be excluded under CPR 3.1(2)(k) and/or (m)"



Allocation

Master Thornett went on:

"...mindful that the court should strive to provide a remedy to any litigant if it can ["to fashion any procedure by which that claim can be adjudicated in a proportionate way"], the claim ought not to be entirely struck out but instead redirected to the more appropriate forum, the County Court."

Allocation

"Everything about this case has all of the hallmarks of a Small Claim Track claim that should have been issued in the County Court and so allocated. The suggestion that this is a developing area of law or where, even if principle is established, requires elaborate and complex legal argument is unrealistic if not, at least arguably, opportunistic."

Allocation

Ashley v Amplifon [2021] EWHC 2921 (QB)

"The claimant cannot be criticised for pleading all causes of action open to him, but as a matter of proportionality, an issue to which I shall shortly return, there is no need for a cause of action to go to trial which could only succeed if the more appropriate and convenient cause of action - which I am about to consider next - succeeds.



Allocation

"Next, I agree with the defendant that the claimant has no prospect whatever of achieving any remedy at trial other than damages. As is customary, the pleading includes a claim for a declaration and an injunction to restrain repetition of the data breach. Mr Flinn is right to submit that these remedies would be wholly superfluous and pointless."

BUT



Allocation

"In conclusion, I would not deny the claimant access to the county court, probably the small claims track, to litigate the claim particularly in circumstances where the defendant appears not to have revealed the whole of its hand and has, at the same time, sought to rid itself of the action in a manner that prevents its disclosure obligations from arising."

Allocation

Stadler v Currys Group LTD [2022] EWHC 160 (QB):

D resold a customer's Smart TV without performing a factory setting or data wipe.

C bought a claim for breaches of DPA, MPI and BoC



Allocation

HHJ Lewis:

- Struck out the MPI/BOC claims as inadequately pleaded and amounting to a claim for data security (see Warren);
- Struck out the negligence claim (as per Warren);
- Allowed the DPA claim to proceed but in the County Court with a recommendation that it should be allocated to SCT



Upset, really?!

Rolfe v Veale Wasbrough Vizards LLP [2021] EWHC 2809 (QB).

The case concerned a single email mistakenly sent to the wrong recipient. The claimants sought damages for distress!



Upset, really?

Common ground:

- Damages can be recovered for distress even absent pecuniary loss (Vidal-Hall v Google)
- But, claim cannot succeed where loss or distress is not made out or is trivial.

Upset, really?

Lloyd v Google [2020] QB 747. Sir Geoffrey Vos:

"I understood it to be common ground that the threshold of seriousness applied to section 13 as much as to MPI. That threshold would undoubtedly exclude, for example, a claim for damages for an accidental one-off data breach that was quickly remedied."



Upset, really?

Master McCloud:

"We have a plainly exaggerated claim for time spent by the Claimants dealing with the case and a frankly inherently implausible suggestion that the minimal breach caused significant distress and worry or even made them 'feel ill'. In my judgment no person of ordinary fortitude would reasonably suffer the distress claimed arising in these circumstances in the 21st Century, in a case where a single breach was quickly remedied."



Upset, really?

There is no credible case that distress or damage over a de minimis threshold will be proved. In the modern world it is not appropriate for a party to claim, (especially in the High Court) for breaches of this sort which are, frankly, trivial. The case law referred to above provides ample authority that whatever cause of action is relied on the law will not supply a remedy in cases where effectively no harm has credibly been shown or be likely to be shown.



Upset, really?

Not only was summary judgment awarded in favour of the Defendant, but the Claimants were ordered to pay the Defendant's costs on the indemnity basis due to the "nature of the claim in terms of exaggeration and lack of credible evidence of distress, and that the court regards the claim as speculative given its de minimis nature".

You did what?

Vicarious liability

Ali v Luton Borough Council [2022] EWHC 132 (QB)

C made a complaint to the police about incidents of domestic abuse by her ex-husband. The complaint was shared by the police with the local authority.



Vicarious liability

An employee of the local authority, who was now in a relationship with C's ex husband, accessed the records and shared certain documents with him, who in turn told others within the community.

C sought damages for the local authority.

Vicarious liability

Richard Spearman QC, sitting as a High Court Judge:

Applied the principles set out in *Various Claimants v Morrisons Supermarkets* [2020] AC 989.

Vicarious liability

Lord Reed: The test for determining vicarious liability in context of employment

“whether the wrongful conduct was so closely connected with acts the employee was authorised to do that, for the purposes of the liability of his employer, it may fairly and properly be regarded as done by the employee while acting in the ordinary course of his employment”



There is a distinction between cases where, on the one hand, the employee was engaged, however misguidedly, in furthering his employer's business, and cases where the employee is engaged solely in pursuing his own interests: on a 'frolic of his own'.



Vicarious liability

In Ali

“Although Ms Begum gained the opportunity to access and process data relating to the Claimant (and the children) by reason of the unrestricted access to the Liquid Logic system which she was required to be afforded in order to perform her role as a contact centre worker, it formed no part of any work which she was engaged by the Defendant to do to access or process those particular records. Indeed, if Ms Begum had disclosed her connection with the Claimant’s husband, as she ought to have done, her access to these records would have been restricted by the Defendant.”



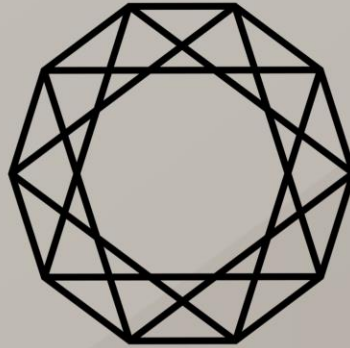
Vicarious liability

“In doing what she did, Ms Begum was engaged solely in pursuing her own agenda, namely divulging information to the Claimant's husband, with whom she had some relationship. Further, that was to the detriment of the Claimant (and the children) whose safety and interests as users of the Defendant's services it formed part of Ms Begum's core duties to further and protect.”



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Thank you for your attention
Questions?



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