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WHICH WAY IS THE WIND BLOWING FOR QUANTUM IN PRIVACY & DATA CASES?

- How can you value a case with accuracy?

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INTRO: A FLASH THROUGH HISTORY...

We have come a long way since equity...

- Historically it was uncertain that damages could even be awarded for non-pecuniary loss for equitable breach of confidence where there were no grounds for an injunction
- Even after the principle was established awards tended to be “modest” (in the low £000s)

INTRO: A FLASH THROUGH HISTORY...

- More recently – it seems that misuse of private information awards might compete with defamation (potentially in the £000,000s?)
- A reflection partly of the increased influence of Article 8 ECHR on domestic law
- Similarly, with data privacy under DP legislation – awards still relatively uncommon but also upwards trajectory?

BACK TO THE BEGINNING... BREACH OF CONFIDENCE PRE-HRA 2000

- By the time of *Spycatcher* ([1990] 1 AC 109) damages were in effect treated by House of Lords as available in principle for non-pecuniary loss for breach of confidence
- “...the remedy of damages, which in cases of breach of confidence is now available, despite the equitable nature of the wrong, through a beneficent interpretation of the [Chancery Amendment Act 1858](#) (Lord Cairns' Act), and which by reason of the difficulties attending the taking of an account is often regarded as a more satisfactory remedy, at least in cases where the confidential information is of a commercial nature, and quantifiable damage may therefore have been suffered” (Lord Goff, p.286)

POST-HRA LANDSCAPE

- Following enactment of HRA in 2000 the principle becomes well established:
- *Campbell v MGN Ltd* [2004] 2 AC 457 – appeal on liability but HL does not question damages principle & reinstates award
- *Douglas v Hello! Ltd* [2006] QB 125 – CA per Lord Phillips MR: “*unassailable in principle*” [259]

POST-HRA 'PRIVACY' CASES: PRE-MOSLEY (2008) (1)

- Modest awards for distress/hurt feelings/loss of dignity – taking account all the circumstances
- *Cornelius v de Taranto* [2001] EMLR 12 – breach of contractual duty of confidence – disclosure of medical report by expert to GP/consultant without consent - £3,000 for injury to feelings
- *Campbell v MGN Ltd* [2002] EMLR 30 – first misuse of private information claim – front page splash - £2500 + £1000 aggravated damages for distress/hurt feelings for revelation of NA attendance only– reduced because significant part of distress caused by her own conduct as to which she could not complain (drug addiction)

PRE-MOSLEY (2)

- *Lady Archer v Williams* [2003] EMLR 38 – breach of confidence re allegation made to newspaper by ex-PA that she had had a facelift - £2500 – per Jackson J:

“General damages for injury to feelings should be kept to a modest level and should be proportionate to the injury suffered. Such awards should be well below the level of general damages for serious physical or psychiatric injury.”

PRE-MOSLEY (3)

- *Douglas v Hello!* [2006] QB 125 – breach of confidence – spoiler of wedding - £3750 for mental distress – but CA regarded as not “adequate” remedy and so injunction should have been maintained to protect rights adequately
- *McKennett v Ash* [2006] EMLR 10 – breach of confidence/ intrusion into private life by publication in book about aspects of C’s private life – in breach of trust - £5000 for hurt feelings/distress

MOSLEY V NEWS GROUP [2008] EMLR 20 – TURNING POINT

- *News of the World* Mass publication of ‘Nazi orgy’ images – breach of confidence/misuse of private information - £60,000 award – limited to publication in E&W - highest to that point. Eady J.
- Turning point - awards post-Mosley start to go up
- Influence of Article 8 – encompassing reputation – brings into sharp focus relationship between privacy and libel damage – & analogous comparison with personal injury damages

- *H23 “Damages for infringement of the Art.8 right could include damages for distress, hurt feelings and loss of dignity. A further legitimate consideration was that of vindication to mark the infringement of a right. The underlying policy was to ensure that the infringed right was met with an adequate remedy and it did not follow that an award of compensatory damages could not also fulfil its vindicatory purpose. The award had to be proportionate and not open to the criticism of arbitrariness.” [emphasis added]*
- *H17 “In some privacy cases, it might be appropriate to take into account any aggravating conduct which increased the hurt to the claimant's feelings.”*
- *H18 “Equally it might be appropriate to take into account the claimant's conduct. The extent to which a claimant had by his own conduct contributed to the nature and scale of the distress might be a relevant factor on causation. It was part and parcel of human dignity that one had to take at least some responsibility for one's actions.”*

- *H20* “An infringement of privacy could not ever be effectively compensated by a money award....The Court had to pick a figure which marked the fact that an unlawful intrusion had taken place, while affording some degree of comfort to the injured party. The figure selected ought not to be such that it could be interpreted as minimising the scale of the wrong done.”
- [216] “The scale of the distress and indignity in this case is difficult to comprehend. It is probably unprecedented. Apart from distress, there is another factor which probably has to be taken into account of a less tangible nature...that of vindication to mark the infringement of a right: see, e.g. [Ashley v Chief Constable of Sussex \[2008\] 2 W.L.R. 975](#) at [21]–[22] and [Chester v Afshar \[2005\] 1 A.C. 134](#) at [87]. Again, it should be stressed that this is different from vindication of reputation (long recognised as a proper factor in the award of libel damages). It is simply to mark the fact that either the state or a relevant individual has taken away or undermined the right of another—in this case taken away a person's dignity and struck at the core of his personality..”

QUANTUM POST-MOSLEY (1)

- *Cooper v Turrell* [2011] EWHC 3269 (QB) – disclosure of private medical information on internet (and defamatory publication) – libel award £50,000; MPI £30,000 (but would have been £40,000 if no libel claim)
- *Spelman v Express Newspapers* [2012] EWHC 355 (QB) – per Tugendhat J

[114] “If a remedy in damages is to be an effective remedy, then the amount that the court may award must not be subject to too severe a limitation. Recent settlements in the much publicised phone hacking cases have been reported to be in sums far exceeding what in the past might have been thought to be available to be awarded by the courts. The sums awarded in the early cases such as Campbell were very low. But it can no longer be assumed that damages at those levels are the limit of the court's powers.”

QUANTUM POST-MOSLEY (2)

- *WXY v Gewanter* [2013] EWHC 589 – disclosure online of private information including sex matters – MPI - £24,950 (incl £5k aggravated) – reference to CA guidance on harassment damages in *Vento v CC of West Yorkshire Police* [2003] ICR 318 as being relevant because of element of harassment in the MPI facts (*Vento* scale as at 2002 of ‘low’ of £500-5000, ‘middle’ of £5000-15000 and ‘top’ from £15000-25000)

QUANTUM POST-MOSLEY (3)

- *AAA v Associated Newspapers Ltd* [2013] EMLR 2 – photo published of young child of famous father – MPI - £15,000 to mark court’s view of seriousness of breach of child privacy
- *Weller v Associated Newspapers Ltd* [2014] EMLR 24 – publication of photos of children of famous father on shopping trip in public – MPI – disclosure of facial features without consent sufficient - £5000 for teenager; £2500 each for 10 month old babies

GULATI V MGN LTD [2016] FSR 12

- Phone hacking cases – MPI trial of 8 representative claimants re quantum only on admitted facts. Mann J
- Largest privacy awards ever – ranged from £72,500 to £260,250 – total £1.2 million
- Reasoning in a nutshell – [702] “*the invasions of privacy involved were so serious and so prolonged*” and none of the articles would have been published “*had it not been for the underlying prolonged phone hacking that went on, which was known to be wrongful*”.

GULATI V MGN – COURT OF APPEAL (1)

- *Gulati* upheld in CA both as to approach to quantum and individual awards [2017] QB 149. Per Arden LJ:
- [45] *“In my judgment, the judge was correct to conclude that the power of the court to grant general damages was not limited to distress and could be exercised to compensate the claimants also for the misuse of their private information. The essential principle is that, by misusing their private information, MGN deprived the claimants of their right to control the use of private information.”*
- [48] *“Damages in consequence of a breach of a person's private rights are not the same as vindicatory damages to vindicate some constitutional right. In the present context, the damages are an award to compensate for the loss or diminution of a right to control formerly private information and for the distress that the claimants could justifiably have felt because their private information had been exploited, and are assessed by reference to that loss.”*

GULATI V MGN – COURT OF APPEAL (2)

- As in libel, personal injury awards may be considered as a comparator
- [62] *“Lord Hoffmann explains in The Gleaner Co Ltd that libel damages are awarded on a different basis from personal injury damages, but the logic of the fundamental point in John v MGN , with respect, remains. The courts are not expected to produce an exact relationship. Nor would society necessarily expect some precise correlation to be given, for reasons that include the economic reasons advanced by Lord Hoffmann. Taking account of personal injury compensation does not mean that the outcome in this field has to be exactly the same.”*

QUANTUM REMAINING HIGH POST-GULATI? (1)

- Apparently so, at least in high profile or mass publication cases – but not in smaller publication cases...

Burrell v Clifford [2017] EMLR 2 – MPI re D's disclosure to newspaper of a private letter by C about C's relations with the royal family - £5000. Note newspaper did not publish letter. Richard Spearman QC (sitting as deputy HC Judge)

AXB v BXA [2018] EWHC 588 (QB) – Sir David Eady – MPI/harassment - £5000 – small scale private disclosures to C's staff of private information intended to embarrass

Ali v Channel 5 [2018] EMLR 17 – broadcast to 9M+ viewers of eviction of Cs – MPI - £10,000 each but would have been higher but for fact footage was also published on social media by relative of landlord; note also programme was held to contribute to debate of general interest but not inclusion of the private information as to the eviction itself. Perhaps not surprisingly Cs cross-appelling quantum to CA Dec 2018.

QUANTUM REMAINING HIGH POST-GULATI? (2)

- *Cliff Richard v BBC* [2018] EMLR 26 – breach of confidence, MPI and DPA – very high profile broadcast of police raid on singer’s home - £190,000 plus £20,000 aggravated. Mann J
- Currently next highest award after *Gulati*.
- Extension of privacy further into reputation protection?
- Special damage – losses need to be reasonably foreseeable as result of the tort. Left for second trial.
- H16 “Protection of reputation was part of the function of the law of privacy, and it was therefore right to reflect in an award of general damages for misuse of private information the damage caused to the claimant’s reputation by the BBC’s broadcasts.”

- *H17 “The factors relevant to the award of general damages for misuse of private information included distress, damage to health, invasion of privacy, and damage to status, dignity and reputation, in all of which respects the claimant was profoundly affected; the general adverse effect on his lifestyle; the nature and content of the private information revealed, which was extremely serious; the scope of the publication; and its presentation.”*
- *H20 “As for the special damage claim, none of the legal costs of dealing with the print and broadcast media in relation to threatened stories, of dealing with an instance of attempted blackmail, of taking down a highly defamatory Facebook page, and of advising on media interviews following the decision not to charge the claimant, would have been incurred had it not been for the BBC’s broadcasts. Similarly, publication of the claimant’s book would probably have taken place had there been no publicity for the police investigation and search.”*

CLARIFICATION OF GULATI GUIDANCE

- In *Lloyd v Google LLC* [2018] EMLR 4 Warby J provided an indication of how he, at least, would be likely to apply *Gulati* (the facts of which he described as ‘exceptional’):
- [70] *“In my judgment, the Court of Appeal's decision in [Gulati](#) is not to be read as approving the award of substantial damages for the abstract fact that a person has had their personal information misused. The essential features of [Gulati](#) can be summarised, for present purposes, in this way. The case holds that (1) damages can be awarded for misuse of private information even in the absence of material loss or distress; and (2) in the factual circumstances of the cases before the Court, the defendants' conduct had adversely affected the claimants' ability to exercise control over information about themselves, and thus the value of their right to exercise such control, in a way and to an extent which was significant or material, and deserving of substantial (as opposed to nominal) compensation for misuse of private information.”*

WHICH WAY IS THE WIND BLOWING FOR DATA PROTECTION AWARDS? (1)

- Separate data privacy/DPA claims have been few and far between and non-media claims with mostly low damages – eg:
- *Halliday v Creation Finance* [2013] EWCA Civ 333 (company continued failure to process data in compliance with DPA: £750 for distress and £1 nominal damages to get over the pre-Vidal-Hall s.13(2) DPA problem)
- *AB v Ministry of Justice* [2014] EWHC 1847 (QB) – C awarded nominal damages of £1 re D's delay in dealing with his DPA subject access requests and £2250 for distress.
- *CR19 c CC of Police Service Northern Ireland* [2014] NICA 54 - £1 nominal damages re burglary where C's data obtained by terrorists; £20,000 having already been awarded in negligence

WHICH WAY IS THE WIND BLOWING FOR DATA PROTECTION AWARDS? (2)

- CA in *Vidal-Hall v Google Inc.* [2016] QB 1003 made clear that damages under s.13(2) DPA 1998 could be claimed for distress only (as well as in journalism cases)
- Also that there is a triviality threshold for data claims – because they are privacy claims – although based on *Vidal-Hall* facts it appears not to be a high threshold (placing of cookies so that adverts may be seen only by claimant him/herself)

WHICH WAY IS THE WIND BLOWING FOR DATA PROTECTION AWARDS? (3)

- But – the flood of claims anticipated have not materialised (so far) – and DPA claims awards remain modest
- In most cases where DPA has been relied on it has been in addition to misuse of private information
- Consequently the courts have tended not to make separate awards for the data privacy element – eg *Weller*, *Cliff Richard*, *TLT v Home Department*.

WHICH WAY IS THE WIND BLOWING FOR DATA PROTECTION AWARDS? (4)

- But – in *TLT v Home Department* [2016] EWHC 2217 - accidental disclosure by the HO of personal data of applicants for asylum/leave to remain – held to be misuse of private information and a breach of the DPA – and some larger awards than previously typical for DPA breach were awarded. Mitting J
- Applying *Gulati*, the court stated that in principle, damages could be awarded in respect of the loss of control of personal and confidential information

WHICH WAY IS THE WIND BLOWING FOR DATA PROTECTION AWARDS? (5)

- In *TLT* - damages awarded of between £2500 and £12,500 - using psychiatric and psychological damage cases as guideline comparators and after assessing the Cs' evidence as to the distress caused by the data breaches. No separate awards for DPA/MPI however.
- Similarly - *Grinyer v Plymouth Hospitals NHS Trust* (Plymouth County Court, 14/9/2011, HHJ Cotter QC) – award of £12,500 due to a “significant exacerbation” of existing medical condition by unauthorised disclosure of medical information

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