



Welcome to:

Data Protection Act:
Implications for Liability Insurers
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The lecture will start soon !

Data Breaches, Distress and Anxiety - the new PPI?

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What we will cover

- › GDPR and DPA 2018
- › Liability for data breaches
- › Damages – material and non-material including distress
- › Group actions
- › The claims – now and in the future
- › Costs
- › Insurance issues and implications

Why is GDPR necessary?

Google



TalkTalk



Cambridge
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Is it a problem?

MATT



GDPR / DPA

- › *‘The protection of natural persons with regard to the processing of personal data and rules relating to the free movement of personal data’ (Art 1.1)*
 - › Personal data is defined as
 - ‘any information relating to an identified or identifiable natural person who can be identified, directly or indirectly ... by reference to an identifier such as a name, an identification number, location data, an on-line identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person’ (Art 4(1))*
 - › Information that can be used to identify someone
-

Obligations of the Controller

- › *‘Personal data shall be processed in a manner that ensures appropriate security of the personal data, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organisational measures’ (Art 5.1(f))*
- › Art 6 sets out how to process data lawfully
- › In practice
 - › Systems – technical and organisational measures
 - › Training
 - › Records of processing activities
- › *‘Data protection by design and by default’ (Art 25)*

What might go wrong?

- › Poor security and poor systems
- › Human error
- › Malware
- › Theft of data carrying device
- › Inside-job
- › Remember - a breach alone is not a disaster. Mishandling it is ...

Consequences of a data breach

- › *‘any person who has suffered material or non-material damage as a result of an infringement of this Regulation shall have the right to receive compensation from the controller or processor for the damage suffered’ (Art 82.1)*
- › *“non-material damage’ includes distress ..’ (s.168 DPA 2018)*
- › Civil claims - [Google v Vidal-Hall](#)
- › Administrative fines

Case Study - Morrisons

- › Andrew Skelton – auditor
- › 100,000 employees’ payroll data shared
- › Group claim for damages for distress
- › High Court - no direct liability **but** vicarious liability
- › Court of Appeal - agreed
- › Supreme Court decision – *in the ordinary course of employment* test
- › Data breach exclusion for vicarious liability?



Data Breaches - Implications of Morrison

- › Employee processing data exclusively for employer – direct liability
- › Employer failing to meet security obligations that has a causal connection to the data breach by a rogue employee – direct liability
- › Employer cannot argue for a blanket ban on vicarious liability for all rogue employees - fact dependent
- › Employer entrusting data to a rogue employee - unlikely to be sufficient to establish vicarious liability
- › So - the facts are critical ...

Group Actions

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Group Actions – CPR 19.6

› CPR 19.6

- › *(1) Where more than one person has the same interest in a claim –*
 - › *(a) the claim may be begun; or*
 - › *(b) the court may order that the claim be continued,*
- › *by or against one or more of the persons who have the same interest as representatives of any other persons who have that interest.*
- › *(2) The court may direct that a person may not act as a representative.*
- › *(3) Any party may apply to the court for an order under paragraph (2).*

Lloyd v Google – Court of Appeal

- › Held that the use of CPR 19.6(1) was unusual but permissible
 - › Discretion
 - › Where does that leave ‘group litigation’?
 - › Scotland – class actions now permitted
 - › EU – draft Collective Redress Directive
- › Data breach - damages for distress
- › But ... Atkinson v Equifax



A case study - easyJet

- External hack
- Discovered January 2020
- Affected 9M customers;
- 2,208 had credit card details accessed
- Informed ICO
- Told customers April 2020
- Group action – PGMBM ‘class action’
- Impact on the business



Damages

- › Does distress give rise to a claim for damages for personal injury
 - › Pre-GDPR
 - › Post-GDPR?
- › Shock and anxiety?
- › The claims - what are we currently seeing?

Damages

- › Minor breaches
- › Regulatory breaches
- › Allegations include data breach; breach of privacy; misuse of confidential information etc
- › Group Litigation - Lloyd - £500-750 sought per claimant (class of 4-5M)
- › TLT v Home Office - £2,500-12,000 awarded
- › Gulati v MGN - £117,500 awarded

Costs

- › CPR 53.1 defines media claims
- › Includes claims in data protection law and for misuse of private information
- › Pre-action protocol for Media & Communication claims
- › So data breach treated same as a defamation
- › Key - entitlement to costs on the standard basis ie. hourly rate
- › The reality to date

Costs – some thoughts

- › The claims – are CFAs and success fees recoverable?
- › What track? Implications
- › Issues for allocation – financial value; inherently complex; public importance
- › Common issues – designed to increase costs
 - › Lengthy, vague letters of claim
 - › Pro forma correspondence
 - › Wide requests for disclosure (fishing expeditions)
- › Test case? inevitable
- › MoJ protocol? Maybe - but Media Protocol ...

A Pause for Thought - what if?

- › Mass data breach of employees' personal data
- › Mass data breach of customers' personal data
- › Mass data breach of members' personal data
- › Mass data breach of all our personal data

Insurance implications

- › EL / PL – data breach cover?
- › Cyber – cover for personal injury? Distress?
- › Crime
- › What does the risk look like?
 - › Data breach
 - › Regulatory breach
 - › What's covered? What's not?
 - › Wider investigation by ICO beyond original breach
 - › Fines and remedial steps

Insurance

- › Move for certainty – driven by PRA
 - › Endorsements
 - › Exclusions
 - › Aggregation
- › What if?
 - › Ransomware email
 - › Rogue employee
- › Contingency planning

Conclusion – we all need to

- › **P**rotect - personal data held
- › **P**lan – for the ‘what if’
- › **I**nsurance – ensure it is fit for purpose and meets needs

- › Any questions?

Further Information

- › <http://www.legislation.gov.uk/ukpga/2018/12/part/1/enacted>
- › <https://gdpr-info.eu/>

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