

Data Protection Law

Introduction

There is no independent tort of infringement of privacy in English law. However, individuals do have a right to the protection of personal or private information from misuse or unauthorised disclosure by reason of torts, in particular the equitable wrong of breach of confidence, and statutes dealing with particular aspects of privacy.

Tort law has evolved and a breach of any obligation of confidentiality is no longer required. Additionally, actions in privacy must also take account of the European Convention on Human Rights, in particular, Article 8, a right to respect of privacy. There is often tension between Article 8 and Article 10 which gives a right to freedom of expression.

Breach of Confidence

English courts will recognise a breach of confidence if the following three requirements are met:

- The information has “the necessary degree of confidence about it,” meaning that it is not in the public domain and will remain private;
- The information was provided in circumstances importing an obligation of confidence, and disclosure would be unjustified;
- There was an unauthorised use or disclosure of that information and a risk of damage.

The defences to this are consent and that the information is already in the public domain.

However, in *Campbell v MGN* [2004] UKHL 22 it was observed that it would be better described as “a misuse of information”. “*Information about an individual's private life would not, in ordinary usage, be called 'confidential'. The more natural description today is that such information is private. The essence of the tort is better encapsulated now as misuse of private information.*” This was the way the tort would evolve.

European Convention for the Protection of Human Rights and Fundamental Freedoms

Article 8 of the ECHR provides an explicit right to respect for a private and family life:

- 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 and freedoms of others.*

Human Rights Act 1998

The Human Rights Act 1998 incorporated into English law the European Convention. This means that personal information about an individual could not be released without permission, except in certain circumstances. This means any breach of the act may lead to an action for damages.

Data Protection Act 1998

A further development was the Data Protection Act 1998. Principle 6 - Rights states that: *Personal data should be processed in accordance with the rights of individuals.* This gave individuals the right to choose how their personal data would be used. This includes the individual having access to their personal data, being able to prevent any process likely to cause damage or distress, prevent direct marketing, and the use of data for automated decision making.

The most important feature of the Act is that it creates circumstances that a claim may be brought for distress where damage has been suffered. This is detailed in **Section 13 Compensation for failure to comply with certain requirements:**

(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 for that distress 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.

(3) In proceedings brought against a person by virtue of this section it is a defence to prove that he had taken such care as in all the circumstances was reasonably required to comply with the requirement concerned.

Section 13 does not refer to pecuniary loss, but states that claimants must have suffered “damage” in order to claim compensation for distress. This was qualified in *Johnson v Medical Defence Union* [2007] EWCA Civ 262. The Court of Appeal stated that compensation for distress would only be provided where the claimant could also show a pecuniary loss.

There are few claims under the Act and the level of damages are low. In *Halliday v Creation Consumer Finance Limited* [2013] EWCA Civ 333, incorrect information was disclosed to credit reference agencies. It was held that the breach did not lead to loss of credit or reputation. Nominal damages of £1 were awarded. However, it held that Mr Halliday had suffered distress from non-compliance with data protection requirements and he was awarded £750 for distress.

Google Inc. v Vidal-Hall [2015] EWCA Civ 311

A group called ‘Safari Users Against Google’s Secret Tracking’ brought an action against Google in respect of tracking and collation of information about their internet usage by Google. The claimant asserted that the defendant collected private information about their internet usage without their knowledge and consent. This allowed advertisers to select advertisements targeted to the claimants’ interests. The allegation was that this amounted to misuse of personal information. The issue was the meaning of ‘damage’ in section 13 of the Data Protection Act 1998 and whether there could be a claim for damages for distress where the individual does not suffer any pecuniary loss. Distress is “often the only real damage that is caused by a contravention”.

The important point was that there was held to be a distinct tort of the **misuse of private information** with no need to establish pecuniary loss.

There was also an issue regarding jurisdiction, and it was held that the claims were made in tort and damage had been sustained in the jurisdiction. England was clearly therefore the most appropriate forum.

***Lloyd v Google* [2019] EWCA Civ 1599**

The circumstances of this action were analogous with *Vidall-Hall v Google*. Lloyd claimed a set amount of damages for each of about 4 million Apple iPhone users within the class without each individual having to show the specific details of their loss. The argument was that they were all subject to the same wrong and had all sustained the exact same loss: they had their browser data taken and used without their consent.

This is a US-style 'opt-out' class action relying on the representative claims procedure set out in Civil Procedure Rule (CPR) 19.6. This has given rise to a Government Review of Representative Action Provisions, considering on whether there should be new legislation to enable organisations to bring actions on behalf of claimants without their express consent.

The Court of Appeal confirmed that damages could be awarded for loss of control of data under section 13 of the Data Protection Act 1998, even when there had been no pecuniary loss or distress.

The Court of Appeal also held that “the members of the class that Mr Lloyd seeks to represent did have the same interest under CPR Part 19.6(1) and were identifiable.” They would therefore allow the action to proceed. The claim could also be served out of the jurisdiction, in the United States.

At the time of writing The Supreme Court have heard an appeal, and judgment is awaited.

General Data Protection Regulations (GDPR)

The Regulations applied from 25 May 2018 and were enacted in the UK by the Data Protection Act 2018. The regulations apply to 'controllers' and 'processors' defined as organisations based in the EU or outside the EU if they process personal data of EU residents.

The new accountability principle in Article 5(2) requires an organisation to demonstrate that it complies with the principles and states explicitly that this is its responsibility.

There is a right to be forgotten – data subjects have a right to have data erased if there are no legitimate grounds for retaining that data.

Consent is required to process personal data and data controllers need to inform data subjects with necessary information to ensure fair and transparent processing.

'Privacy by design' - Data controllers are required to implement appropriate measures to be able to demonstrate that processing is performed in accordance with the Regulation. Data protection by design is about considering data protection and privacy issues upfront in everything you do

Data controllers must conduct a data protection impact assessment where data processing gives rise to a high risk to the rights and freedoms of a natural person.

Data controllers must notify the "supervisory authority" "without undue delay," and "where feasible, not later than 72 hours after" becoming aware of a personal data breach that risks the rights and freedoms of individuals.

A data controller must inform the subject of the data breach of the incident without undue delay, if the breach is a high risk to the rights and freedoms of individuals.

Data subjects will have the right to a judicial remedy if they consider their rights under the Regulation have been infringed before either the courts of (1) the Member State where the controller or processor has an establishment or (2) their habitual residence (Article 79).

Data subjects will be entitled to receive compensation for both material and non-material damage as a result of an infringement of the Regulation (Article 82).

Article 82 of the GDPR gives a right to compensation for material or non-material damage. “Non-material damage” includes distress.

Data Protection Act 2018

The Act revises the Data Protection Act 1998 and includes provisions of the GDPR detailed above. The European Union (Withdrawal) Act 2018, incorporated the GDPR directly into UK law immediately after exit from the European Union. The is now termed the UK GDPR. It is similar to the EU regulation and places similar obligations on data controllers and processors. The relevant section of the Act dealing with compensation is as follows:

S 168 Compensation for contravention of the GDPR

(1) In Article 82 of the GDPR (right to compensation for material or non-material damage), “non-material damage” includes distress.

(2) Subsection (3) applies where—

(a) in accordance with rules of court, proceedings under Article 82 of the GDPR are brought by a representative body on behalf of a person, and

(b) a court orders the payment of compensation.

(3) The court may make an order providing for the compensation to be paid on behalf of the person to—

(a) the representative body, or

(b) such other person as the court thinks fit.

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