Damages awards after Gulati

08/01/2016

IP & IT analysis: David Bowden, freelance independent consultant, comments on the consequences of Gulati and others v MGN Ltd and talks to James Heath of Atkins Thomson Solicitors, who was lead solicitor for the claimants, and Christopher Knight, a barrister specialising in information law of 11 Kings Bench Walk.

Original news

Gulati and others v MGN Ltd [2015] EWCA Civ 1291, [2015] All ER (D) 193 (Dec)

The Court of Appeal, Civil Division, dismissed the defendant newspaper proprietor's appeals against orders awarding substantial sums to eight claimants for misuse of private information derived from intercepting voicemail messages left on the claimants' telephones. It held, among other things, that the judge had been 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.

What is the background to this case?

David Bowden (DB): This was a claim for damages and aggravated damages brought by eight claimants who claimed that the voicemails on their telephones had been intercepted over a prolonged period by journalists and others acting on behalf of the Mirror Group Newspapers. After voicemails had been intercepted a series of stories were run by MGN about all the claimants with the exception of Mr Yentob.

The judge found that phone hacking by MGN was widespread, institutionalised and long standing. He found there to be intrusion into the private lives of the claimants, which ranged from ‘serious’ to ‘enormous’. The very substantial awards of damages reflect this gross intrusion. The sums of damages are greater than any other publicly available award of damages in a privacy case and more substantial than in many libel cases, ranging from £72,500 for Lauren Alcorn to £260,250 for Sadie Frost. The high awards in these cases reflect the serious and repeated intrusions into the claimants’ privacy and the lasting impact that it has had on their lives.

At first blush the amount of damages awarded seems large but the trial judge did not adopt a novel approach but correctly applied existing principles. There was not an isolated breach of privacy but a series of breaches and the judge assessed damages for each breach separately and the damages are correspondingly a cumulative award.

In assessing damages the judge had to consider and balance four key previous decisions:

- *Lumba (Congo) v Secretary of State for the Home Department* [2011] UKSC 12, [2011] All ER (D) 262
- *Halford v UK* [1997] IRLR 471
- *Simmons v Castle* [2012] EWCA Civ 1039, [2013] 1 All ER 334, and
- *Vento v Chief Constable of West Yorkshire* [2002] EWCA Civ 1871, [2002] Akll ER (D) 363 (Dec)

Lumba holds that trespassory torts (such as false imprisonment) are actionable regardless of whether the victim suffers any harm and holds that claimants are not additionally entitled to damages to vindicate the importance of that right and

the seriousness of the infringement. Halford had her telephone calls intercepted which violated her right to privacy and the Strasbourg court awarded her £10,600 damages and costs.

Simmons was a personal injury case funded by a conditional fee agreement (CFA). The Court of Appeal in *Simmons* declared that from 1 April 2013, the proper level of general damages for:

- pain, suffering and loss of amenity in respect of personal injury
- nuisance
- defamation, and
- all other torts which cause suffering, inconvenience or distress to individuals

will be 10% higher than previously. Mann J held *Simmons* was a substitute for the loss of the opportunity to claim CFA success fees which had been removed for many post April 2013 cases. However, in defamation and privacy cases, success fees remain recoverable after April 2013 and the judge ruled that a *Simmons* 10% uplift should not apply.

Mann J considered in detail the factors in *Vento* and in the end decided that parallels could not be drawn by damages awarded in that case. *Vento* was an employment claim for race and sex discrimination. *Vento* set down three broad bands of compensation for compensation for injury to feelings:

- top band £15k to £25k—for the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race
- middle band £5k to £15k—for serious cases which do not merit a top band award
- lower band £500 to £5k—appropriate for less serious cases such as where the act of discrimination is an isolated or one off occurrence. In general, awards of less than £500 are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings

Mann J held that a parallel could not be drawn with the *Vento* bands for harassment damages because the nature of the wrong in phone hacking cases made a comparison inappropriate. As to apologies tendered by the defendant, Mann J ruled that these were not relevant to the totality of the hurt suffered by the claimants. Instead Mann J said these apologies were a tactical manoeuvre for the purposes of litigation rather than being motivated by genuine contrition on the defendant's part. The apologies had not mollified the claimants or reduced the hurt caused.

On what grounds did MGN bring an appeal?

There were four separate grounds of appeal before the Court of Appeal:

- the judge should have awarded damages for distress only
- the awards were disproportionate when compared with the tariff in particular for personal injury awards
- the awards were disproportionate compared with awards by the Strasbourg Court, and
- some elements of the awards were counted twice

How did the Court of Appeal address MGN's claim that the judge should have awarded damages for privacy only?

This ground of appeal was roundly rejected by the Court of Appeal who stressed that:

> 'Privacy lies at the heart of liberty in a modern state. A proper degree of liberty is essential for the well-being and development of an individual.'

MGN submitted that the judge was wrong to hold that damages could be awarded for the mere intrusion into a person's privacy independently of any distress caused. It submitted that the court should award damages only for distress and injury to feelings, and not for the fact of intrusion into a person's privacy, autonomy or dignity.

The claimants submitted that courts have awarded general damages to children even though the child was not aware of the invasion of privacy and therefore suffered no distress. In *Weller v Associated Newspapers Ltd* [2014] EWHC 1163 (QB), [2014] All ER (D) 142 (Apr) awards of between £2,500 and £5,000 were made to the children of a celebrity for publication of unpixellated photographs showing their faces. In *Halford* the Strasbourg court awarded the applicant £10,000 as just satisfaction for the interception of her telephone calls in violation of article 8 of the European Convention on Human Rights (ECHR) even though it was not satisfied that she had shown that the stress she had suffered was due to this interception.

The claimants submitted that the damages awarded are not vindicatory damages of the kind which the majority of the Supreme Court held in *Lumba* could not be awarded. The Court of Appeal agreed with this submission saying:

> 'This is a very important point in the context of the awards made in the present case…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 respondents also for the misuse of their private information. The essential principle is that, by misusing their private information, MGN deprived the respondents of their right to control the use of private information.'

The Court of Appeal said privacy is a fundamental right and the reasons for having the right are no doubt manifold. Arden LJ said:

> '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 respondents could justifiably have felt because their private information had been exploited, and are assessed by reference to that loss.'

James Heath (JH): MGN argued that there could not be an award of damages solely on the grounds of an infringed right to privacy. It was argued that there had to be some damage limited to distress or hurt to feelings which could be proved before damages were awarded. MGN said damages could not be awarded simply to punish a party for infringing someone else's rights. The claimants pointed to other cases including the recent case *Weller and others v Associated Newspapers Ltd* [2015] EWCA Civ 1176, [2015] All ER (D) 194 (Nov) in which children have been awarded damages despite being oblivious to their privacy rights being violated. It was argued that *Vidal-Hall and others v Google Inc (The Information Commissioner intervening)* [2015] EWCA Civ 311, [2015] All ER (D) 307 (Mar) did not apply as distress and injury to feelings were the only form of damages claimed in that case.

The Court of Appeal agreed that depriving the claimants of their right to control their own privacy was a separate head of damage and that damages were not limited to distress:

'the respondents are entitled to be compensated for that loss of control of information as well as for any distress.'

How did the Court of Appeal resolve MGN's argument that the damages awarded in this case were out of kilter with awards for personal injury?

DB: MGN's primary submission was that the aggregate award made to each victim must be comparable to personal injuries compensation, which would be much lower. MGN also relied on the tariff fixed by the courts for discrimination and harassment, and false imprisonment. While there was some authority to support this argument, Arden LJ considered that on analysis this authority provides guidance at a general level, and does not lead to the conclusion that the aggregate awards need be comparable in the way MGN suggested.

In *The Gleaner Co Ltd v Abrahams* [2003] UKPC 55, [2003] All ER (D) 360 (Jul), Lord Hoffman in the Privy Council pointed out the differences between an award for libel and an award for personal injury. He included the difference in economic effect personal injury damages, unlike libel damages, are generally met by insurers who pass on the cost to their clients who pass on the cost to society in general. Lord Hoffmann pointed out that a purpose of libel damages was also to control irresponsible behaviour by the press.

Arden LJ ruled that *John v MGN* [1996] 2 All ER 35 reminds the court that:

- the process for assessing damages for non-pecuniary loss in defamation cases must not be carried out in

disregard or ignorance of damages awarded in personal injury cases, and
- there should be some reasonable relationship between awards in both cases

This is so even though the factors to be taken into account are materially different, and no exact correlation can be achieved.

Arden LJ held that Mann J did have regard to the personal injury scale and the real question is whether Mann J achieved the reasonable relationship between that scale and his awards. It was common ground that each invasion of privacy gave rise to a separate cause of action and it follows a separate event giving rise to injury.

Arden LJ ruled that the choice between whether to make a global award or separate awards for invasions of privacy must be a matter for the exercise of judicial discretion. There may be some kinds of cases in which it has been implicitly established that it would be wrong to assess damages save on the basis of a global sum. That is not, however, applicable to the present appeals. The Court of Appeal can only interfere in the exercise of the judicial discretion to make separate awards if it is satisfied that Mann J was plainly wrong or misdirected himself in law, which is not demonstrated in this case.

Whatever choice the judge makes on whether to make a single global award or break the award down in some way, the tariff set out in the guidelines consists of a sum within certain brackets and thus this is a recognition of the fact that the actual award has to be tailored to the circumstances of the particular case. That means, in the case of general damages for personal injuries, that factors such as the severity of the pain, or even sometimes gender if that is relevant to the effect of the injury (eg facial scarring) can be taken into account. Similarly in the *Vento* guidelines, the court can take into account factors which are likely to vary in every case, such as the period during which discrimination has taken place and whether it was deliberate.

Arden LJ also ruled that MGN's counsel was right not to press his point about the court setting a tariff for these sort of cases.

JH: This begs the question as to whether awards in personal injury cases should be higher. A lot of personal injury claims are against public bodies and the awards of damages have been set at a low level for policy reasons. It is artificial to compare awards for personal injury with these claims for breach of privacy and libel. It is one factor for a court to bear in mind and it is clear from his judgment that Mann J did consider this.

How did the Court of Appeal resolve MGN's argument that the damages awarded in this case were out of kilter with awards made by the Strasbourg court?

DB: This was a new point taken by MGN for the first time in the Court of Appeal.

If the Strasbourg court finds a violation of any ECHR right, it may award a sum to afford 'just satisfaction', pursuant to ECHR, art 41. This is reflected in section 8(4) of the Human Rights Act 1998 (HRA 1998), which provides that:

> 'In determining—(a) whether to award damages, or (b) the amount of an award, the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under article 41 of the Convention.'

MGN referred to four cases from Strasbourg and the 'just satisfaction' awarded:

- *Peck v UK* (App No. 44647/98)—CCTV recording of the applicant cutting his wrists was made public: €11,800
- *Lustig-Prean v UK* [1999] ECHR 71, (2001) 31 EHRR 23—grave interferences with their private life as a result of investigations by the Ministry of Defence into their sexual orientation: £19,000
- *Armonienė v Lithuania* [2010] ECHR 2229, [2009] EMLR 7—abuse of press freedom by publication of the applicants' HIV medical condition: €6,500.
- *Avram v Moldova* [2011] ECHR 1076, [2015] 61 EHRR 24—just satisfaction of €5,000, €6,000 and €4,000 to the applicants

MGN said that the Strasbourg court again looks at the conduct as a whole and does not simply say that one arrives at a very large sum where there has been a number of incidents in the course of conduct. The victims submitted:

- this point has never been raised in any previous privacy case
- it is based on a fundamental misunderstanding of 'just satisfaction' as awarded by the Strasbourg court, and
- damages for 'just satisfaction' are discretionary

Arden LJ agreed with the victim's submissions saying that English law has only recently recognised a civil wrong for intrusions of privacy. Initially the law of confidence had been expanded by reference to the values to be found in ECHR, arts 8 and 10. The court, when making an award for misuse of private information is not proceeding under either HRA 1998, s 8 or ECHR, art 41. The question of the measure of damages is more naturally a question for English domestic law.

The conditions of the tort are governed by English law and not ECHR. That makes it more appropriate for English domestic law to assess the measure of damages. Moreover, if damages awarded for misuse of private information within the law were excessive, there would be appropriate ways for the national authorities to reduce them. National courts are intrinsically better able to assess the adequacy of an award in their jurisdiction than an international body. This is one of the bases in which the Strasbourg court is likely to recognise that there is a margin of appreciation in its jurisprudence.

JH: There is a good reason why awards from the Strasbourg court are set at a low level. It makes an award to mark the fact that there has been a breach of a Convention right. The domestic courts are the appropriate place to get redress and the compensation that correspondingly comes with it.

What did the Court of Appeal say about the double recovery point?

JH: The judgment of Mann J is littered with at least ten separate references to the fact that he had to be very careful that there was not to be any double counting when he assessed the damages. In view of this, Arden LJ dismissed MGN's appeal on this point.

Do you think this ruling indicates that damages awards will grow in privacy cases?

JH: The Court of Appeal stressed that it had exceptional cases before it. There is bound to be comparisons made with the awards made by Mann J in this case with other claims for damages for breach of privacy that follow *Gulati*. We may see inflation in awards in privacy awards as a result. Mann J made it clear that it is a discretionary award by the court in a privacy claim. Where claims are brought, for example, as a result of unwarranted surveillance that may mean that awards are increased.

There is a good reason for damages for breach of privacy to be set at a high level. Once personal information is out in the public domain, it cannot be put back and made private again. If the personal information that has been made public relates to someone's relationship difficulties or problems with alcohol, newspaper readers will tend to view that person differently. There can never be a full repair made once someone's privacy has been breached.

Christopher Knight (CK): I think it is highly likely that damages awards will increase for misuse of private information in the light of the Court of Appeal's judgment. It is clear that both Mann J and the Court of Appeal thought the discreditable conduct involved in phone hacking warranted very significant damages awards, and not all instances of tort will result in the trial judge seeking to reach such high levels. The decoupling of these awards from their spiritual home of art 8 breach of privacy cases under Strasbourg jurisprudence, as well as departing from the personal injury guidelines, means that there is now very little against which a court can benchmark an appropriate award. The £60,000 award to Max Mosley—easily the highest sum before this litigation—still looks out of step, but now as being too low rather than the previous belief that it was unusually high.

It will be very interesting to see whether the Supreme Court seeks to rein the quantum in, because it is undeniable that MGN have a real point when they argue that this sort of level of award, higher than most types of personal injury, risks undermining public confidence in how the justice system is approaching different forms of damages.

Are there any other practice points to take away from this judgment?

JH: Arden LJ is in places quite scathing about the conduct of MGN. She said that as far as she was concerned 'there were no mitigating circumstances at all'. She said that those employed by MGN:

> 'repeatedly engaged in disgraceful actions and ransacked the respondents' voice mail to produce in many cases demeaning articles about wholly innocent members of the public in order to create stories for MGN's newspapers'.

As to the MGN journalists, Arden LJ said they were 'totally uncaring about the real distress and damage to relationships caused by their callous actions' and 'the disclosures were strikingly distressing to the respondents involved'.

Mann J gave a detailed and carefully reasoned reserved judgment. MGN needed to think carefully before it appealed this judgment. Now it has, and that appeal has been dismissed, there is a judgment of precedent value that other judges will have to follow and by which settlement offers will be gauged. The Court of Appeal refused permission for a final appeal to the Supreme Court. It should be noted that Glenn Mulcaire was arrested in August 2006. At that point MGN maintained that there was one rogue reported and it was not a systemic issue. It was only when the disclosure stage was reached in this case in September 2014 that MGN had to change its position. This is a period of over eight years in which MGN denied the scale of the problem. This case was the first wave case. There are 75 other cases in the second wave which have yet to be determined. As a result of this case, more claimants may come forward although limitation may be an issue for some of these. In some quarters there are demands for another inquiry ('Leveson 2') just into phone hacking.

CK: One of the really interesting points to take from the judgment will be the degree to which the *Gulati* approach feeds into the calculation of damages for breach of the Data Protection Act 1998 (DPA 1998). The loss of control of one's private information is a concept which might be thought to read across quite easily to a loss of control of personal data, and the logic of *Gulati* would suggest that that loss of control—say by a data breach—can result in a form of pecuniary loss over and above distress. Given the historically very low levels of damages under s 13 for breach of DPA 1998, the combination of *Gulati* and *Vidal-Hall* earlier this year may give rise to a real boost in data protection litigation.

Interviewed by David Bowden.

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