How Much is Too Much? Privacy Damages and Phone-hacking

ADAM SPEKER

In May of this year the High Court ruled for the first time on the level of compensation to be awarded to victims of phone-hacking or voicemail interception (*Gulati & others v MGN Ltd* [2015] EWHC 1482 (Ch)). News International, the publishers of *The News of the World*, had settled all the cases brought against it in the courts before trial. MGN Ltd, the publishers of *The Mirror* and *The Sunday Mirror*, chose a different route. It decided to proceed to a hearing of eight test cases intended to establish guidance for settling or deciding future cases. In a 712 paragraph judgment, The Honourable Mr Justice Mann awarded a total of £1.2 million in damages to the eight claimants. These awards included £260,250 to the actress Sadie Frost and £188,250 to the former footballer Paul Gascoigne. The awards are the highest yet in privacy cases in this country. As the Judge put it towards the end of his judgment:

> It will be apparent that my awards of damages in this case are very substantial – far more substantial than in any hitherto reported privacy case. They are more substantial than in many libel cases. … The fact that they are greater than any other publicly available award results from the fact that the invasions of privacy involved were so serious and so prolonged.

It is an open question whether the awards will be a one-off, confined to their unusual facts, or will set a new yardstick for future privacy claims.

These days claimants faced with the publication of information about them often have a number of causes of action from which to choose. Many defamatory allegations are also allegations of a private or personal nature, for instance, that someone is having an adulterous affair. To found a claim in defamation, the accusation must be untrue and defamatory, requiring the individual now to surmount a statutory threshold of serious harm. Yet the same information can also found a claim in misuse of private information, whether true or false. Both causes of action can overlap with the Protection of Harassment Act if the accusation is repeated, perhaps online, or under the Data Protection Act 1998, a cause of action made more attractive by the Court of Appeal's recent ruling in *Vidal-Hall v Google Inc* [2015] EWCA Civ 311 that compensation must be available for a breach even if no pecuniary loss is shown.

Previously, the attraction of suing in defamation was the size of the damages awards. Libel damages have been significantly reduced over the years but are still high. In 2000, Mr Justice Eady in *Lillie & Reed v Newcastle City Council* [2000] EWHC 1600 (QB), probably the worst case of libel ever to come before the courts, considered that there was a cap on general damages of £200,000 (now thought to be around £275,000).

Damages under the other causes of action, however, have to date been very low and, if an interim injunction was not possible or successful, a claim for damages alone was seldom pursued. In *Campbell v MGN* [2004] 2 AC 457, the damages award was a mere £2,500 with an additional £1,000 in aggravated damages. In *Douglas v Hello!*, Michael Douglas and Catherine Zeta-Jones, were awarded damages of £3750 each for distress, awards upheld by the Court of Appeal which described them as 'very modest'. The folk singer Loreena McKennitt was awarded £5000 for hurt feelings and distress over the publication in a book of personal and intimate details acquired over the course of a friendship. This changed somewhat in 2008 when Max Mosley was successful in his claim against the publishers of *The News of the World*, the facts of which are well known. He received £60,000, significantly more than any previous award for misuse of private information but still much less than the highest libel award.

Since then, the phone-hacking scandal broke and those awards have seemed too low given the gravity of the behaviour revealed.

In *Gulati v MGN*, Mann J made two significant findings which led to the high awards in those cases. The first related to the factors to take into account when awarding compensation for invasions of privacy. The second to the number of awards that could be made to each claimant.

On the first, the Judge rejected the defendant's submission that compensation should only be for 'distress and injury to feelings' and accepted the claimants submissions that compensation for misuse of private

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information has several elements: for loss of privacy or autonomy; for injury to feelings including distress; and, for damage or affront to dignity or standing. He concluded on this point that the purpose of the tort of misuse of private information is to give effect to article 8 and:

> those values (or interests) are not confined to protection from distress…. If one has lost 'the right to control the dissemination of information about one's private life' then I fail to see why that, of itself, should not attract a degree of compensation, in an appropriate case. A right has been infringed, and loss of a kind recognised by the court as wrongful has been caused.

Whilst previous case law ruled out 'vindicatory damages', it did not rule out, he found at [132], 'compensation for the act of the misuse itself'.

On the second issue, the defendants invited the court to make an overall sum to each claimant for all wrongs, compensating each of them for the overall distress caused by the totality of the wrongful acts. The claimants invited the Judge to make separate awards for the voicemail interception, for the blagging of personal information and for the fruits of the voicemail interception or the blagging activity. Mann J held that a single global sum was not required by case law and would not be appropriate because 'the wrongs have too great a degree of separation for that' [155].

He found that:

> there are three areas of wrongful behaviour which need to be looked at separately... First there is the general hacking activity. Each of the individuals had their voicemails (and some of those whom they rang) hacked frequently (in their own cases daily), with most hacks not resulting directly in an article. Their private information was thus acquired and their right to privacy infringed, irrespective of whether an article was published. That fact makes it appropriate to take the activity separately and assess its effect (in terms of compensation) separately from damage arising from publication.

He then considered that he should ensure that the overall sum found appeared proportionate.

Gulati may go on appeal (the judge refused permission but MGN has said it intends to seek permission from the Court of Appeal) but until it does this judgment is significant, as is that of the Court of Appeal in *Vidal-Hall v Google*. Whilst many people may not be sympathetic to celebrities receiving high awards of damages, the impact of hacking on these individuals has been real, damaging friendships and relationships and engendering mistrust. It is celebrities who tend to be the claimants who develop the law in this area to allow others to be protected. In recognising the high value of private information and the right of the individual to decide when or how to make information available, subject to defences such as public interest, the courts are further developing the weapons needed to protect privacy in an online world.

Adam Speker was Called to the Bar in 1999. He specialises in defamation, privacy, media law and harassment from 5RB