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Mass Compensation Claims for Illegal Online Tracking

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Lloyd v Google is one of the most important data privacy and collective redress disputes to date. The claim was based on breach of the Data Protection Act 1998 (DPA 1998). Google illegally tracked the web browsing activity of millions of individuals and used the collected data for targeted advertising. Given how wide-spread such online tracking practices are these days, the Supreme Court's unanimous judgment ([2021] UKSC 50, [2021] 3 WLR 1268) provides a much-needed clarification of the law.

Mr Lloyd, backed by a commercial litigation funder, applied to serve English proceedings against Google outside the jurisdiction. Mr Lloyd pursued his claim as a representative action (CPR r 19.6) on behalf of himself and some 4.4 million of Apple iPhone users. The sole remedy sought was 'compensation' pursuant to s 13(1) of the DPA 1998, namely compensation for 'loss of control' over personal data of the represented individuals. No material damage or distress was alleged.

According to CPR r 19.6, '[w]here more than one person has the same interest in a claim' the court may direct that a person may represent those other persons who have that interest. According to s 13(1) of the DPA 1998, any 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 controller for that damage'.

On the claimant's case—rejected by the High Court ([2018] EWHC 2599 (QB), [2019] 1 WLR 1265) but unanimously accepted by the Court of Appeal ([2019] EWCA Civ 1599, [2020] QB 747)—, 'an individual is entitled to … compensation … whenever a data controller fails to comply with any of the requirements of the [DPA 1998] in relation to any personal data of which that individual is the subject, provided that the contravention [and resulting 'damage' (at [153])] is not trivial' (at [110]).

No wonder why data controllers nervously scratched their heads prior to the UKSC judgment. There was a worry that data subjects would be able successfully to demand compensation for

any non-trivial contravention of data protection laws in respect of their personal data without proof of actual harm. According to the Court of Appeal, such breaches would be actionable per se and attract compensation (at [110]). Anyone other than the data subjects would, of course, still need to prove actual harm.

What an attractive litigation business model, right? A representative action brought on behalf of millions of data subjects, if pursued on an opt-out basis without the need for the represented individuals to register their claim before trial (just like in *Lloyd*), would be a perfect vehicle for mass compensation claims against BigTech companies.

Indeed, it was anticipated by the claimant that compensation would be assessed on a uniform per capita basis (a figure of £750 was advanced) which 'would produce an award of damages of the order of £3 billion' (at [5]). This would be significantly more than any data protection penalty issued so far and could thus ignite significant changes in the AdTech industry. Furthermore, it would incentivise litigation funders to support similar claims. The practical difficulties concerning distribution of the award to individual members of the represented class (at [83] and [158]) would not, it seems, be a sufficient reason to disallow such mass compensation claims (at [32], [50], and [72]).

Google opposed the claim on the grounds that (i) the pleaded facts did not disclose any basis for claiming compensation under the DPA 1998 and (ii) the court should not in any event permit the claim to continue as a representative action.

The UKSC allowed the appeal and restored the first instance order refusing Mr Lloyd's application for permission to serve the proceedings on Google outside the jurisdiction (at [160]). Why? The judgment delivered by Lord Leggatt (Lords Reed, Sales, Burrows and Lady Arden agreed) can be summarised as a series of three negative answers to the following three questions.

First, the UKSC needed to decide whether any data subject's 'loss of control' over personal data could, at least in principle, amount to compensable 'damage' under s 13 of the DPA 1998. The answer was in the negative, implying that such loss cannot be compensated under the DPA 1998. According to the Supreme Court, the word 'damage' in the DPA 1998 includes only two mutually exclusive categories of harm—'material damage' and 'distress' (at [92] and [96], applying *Vidal-Hall v Google* [2015] EWCA Civ 311, [2016] QB 1003 [105])—but loss of control does not amount to either. At best, this type of harm could be compensated under the tort of misuse of private information (*Campbell v MGN Ltd* [2004] 2 AC 457) where 'intrusion on privacy, without any [actual] misuse of information, is actionable' (*Lloyd* at [98]) and where 'loss of control' over personal information (but not all personal data) is a compensable head of damage without the need to show that the tort caused any material damage or distress (at [105]).

No matter whether you think that 'damage' under the DPA 1998 must include non-material damage beyond mere 'distress' (cf Art 23 of the Directive 95/46/EC, *Vidal-Hall* at [72]–[76], and *Lloyd* at [118], [121], and [123]), the UKSC was right to exclude rights-based damage from the scope of s 13(1) of the DPA 1998. This is because s 13(1) grants compensation only in relation to damage suffered 'by reason of' any DPA breach. So while it may be true that any contravention of the data subject's DPA rights 'ipso facto involves "loss of control" of data' (at [110]), such damage is merely another description of the rights-violation (at [120]) and cannot be compensated as damage that is suffered 'by reason of' the breach (at [115]).

This restriction on the scope of compensable harms may have significant implications for new cases as well. Whilst the UKSC correctly refused to have regard to subsequent legislation when interpreting the DPA 1998 (at [16]), this does not mean that judges will not seek to interpret the similarly worded provisions of our current data protection legislation in accordance with the UKSC's judgment (cf s 169 of the DPA 2018 and Art 82 of the (UK) GDPR), though the CJEU may soon persuade them otherwise (see Case C-300/21). There are already some high-profile disputes such as the TikTok Data Claim UK or the YouTube Data Breach Claim which are clearly influenced by *Lloyd*.

That said, we should not read too much into this restrictive interpretation of damage. The notion of 'damage' in *Lloyd* does not exclude every 'loss of control' over personal data from the scope of compensable damage. It only applies to loss of control that cannot be conceived in terms of some factual detriment resulting from the breach (at [115]). Thus, loss of control which would involve a factual setback resulting from the breach could, in principle, be compensated. For example, we know that mobile phone apps automatically collect certain types of data and that loss of control over such data would therefore ipso facto result from the breach (see, eg, AppCensus or Exodus Privacy). To this end, it might even be possible to argue that such setback must be ipso facto involved in every individual case because the standardised tracking techniques must (by definition) cause a uniform effect on each member of the represented class (cf [87]). Given that the UKSC was 'prepared to assume … that as a matter of discretion the court could … allow a representative claim to be pursued for only a part of the compensation that could potentially be claimed by any given individual' (at [147]), it will be interesting to see whether *Lloyd* will inspire some innovative routes to collective redress for illegal online tracking.

Second, to close any eventual gaps in its answer to the first question, the UKSC needed to decide whether 'loss of control'—assuming that it might, in principle, ipso facto result from the breach—would ever be 'more than trivial' (at [158]), 'without proof of any further facts particular to that individual' (at [152]). The answer was in the negative (at [128], [138], and [153]), implying that even if loss of control were a valid head of damage under the DPA 1998, no substantive compensation could ever be granted for such trivial harm.

Google's wrongdoing in *Lloyd* was of course not trivial. 'What gives the appearance of substance to the claim is the allegation that Google secretly tracked the internet activity of millions of Apple iPhone users for several months and used the data obtained for commercial purposes' (at [153]). Had Mr Lloyd's claim been framed as compensation for 'damage' suffered by the class as a whole, ie from the top down—which was considered permissible by the UKSC (at [82])—, the seriousness argument would probably succeed. But as was ruled by the UKSC (at [153]), we cannot infer that the seriousness of Google's overall wrongdoing spills over ipso facto to the seriousness of Google's wrongdoing in relation to individual data subjects, let alone to the seriousness of their individual damage.

You may wonder how is this consistent with awards of non-trivial damages 'for an English domestic tort [of misuse of private information (MPI)]' (at [124]) without proof of any actual harm. Why, if the DPA 1998 and the tort MPI both protect the same fundamental right to respect for private life protected by Article 8 of the Convention, is it possible to award damages for illegal phone hacking in the order between £17,500 and £50,000 per person (see *Gulati v MGN* Ltd [2015] EWCA Civ 1291, [2017] QB 149) but not for illegal online tracking? The UKSC stated that 'different legal regimes [that] aim … to provide protection for the same fundamental value … [do not need to] do so in the same way or to the same extent or by affording identical remedies' (at [124]) and thus firmly reject the Court of Appeal's contentious views on this point ([2019] EWCA Civ 1599, [2020] QB 747 [52], [53] and [57]).

The UKSC rightly refused to reason by analogy between the privacy tort and the data protection regime at large (at [113], [129], and [131]). There are material differences between the tort and breaches of the DPA 1998 (at [130]). In particular, the tort requires the claimant to pass a highly individualised and contextualised threshold of a reasonable expectation of privacy in respect of the data, whereas not all data protection duties create such expectations in relation to all kinds of personal data (at [106], [130], and [131]). And whilst it is the reasonable expectation of privacy which, if established, makes the wrong actionable without proof of actual harm, the UKSC clarified that loss of privacy without proof of harm does not itself compel any substantial award (at [124] and [127]). In *Gulati*, it was merely presumed that without evidence to the contrary the damage suffered by reason of the phone hacking was ipso facto non-trivial (*Gulati* [12] and [13]). No proof of actual harm was required because, on the facts, the actual harm was presumed in *Gulati*.

The UKSC in *Lloyd* thus seems to have advanced an unusual reading of *Gulati* according to which a mere contravention of one's reasonable expectation of privacy is actionable per se but does not itself justify substantial compensation. It remains unclear, however, whether such a reading of *Gulati* would apply to reasonable expectations of privacy created by the DPA 1998. Unfortunately, Mr Lloyd did not seek to 'single out a[ny] particular category of breaches of the DPA 1998 by a data controller as breaches in respect of which the data subject is entitled to compensation without proof of material damage or distress' (at [110]) and so we do not learn from the UKSC judgment whether at least some data protection duties may ipso facto

give rise to a reasonable expectation of privacy (at [92] and [133]). This is important, because violations of such duties would be actionable per se, just like the tort of MPI.

It thus awaits to be answered in future disputes whether individual data protection duties owed to data subjects in respect of their personal data (eg a duty not to collect your data without your consent)—as opposed to mere preventive duties not to cause harm by contravention of any of the requirements of the DPA 1998 (s 13 of the Act)—ipso facto create a reasonable expectation of privacy. In any event, after *Lloyd*, it seems unlikely that violations of such duties would attract substantial awards without proof of actual or presumed harm that is more than trivial.

Still, it is not entirely clear from *Lloyd* why it should not be possible to award at least nominal damages to the represented individuals, in case that their harm would turn out to be trivial. My best guess is that non-compensatory nominal damages were not considered as a viable option in *Lloyd* because s 13 of the DPA 1998 offers only the remedy of 'compensation'. If you think nominal damages a compensatory remedy or if you think 'compensation' under the DPA 1998 an autonomous concept of EU law which may include nominal measures of damages, then the best explanation is probably one of policy. The courts are required 'to deal with cases justly and at proportionate cost' (CPR r 1.1) and they can thus strike out the claim if it appears to them that the sum required is disproportionate to the costs and would amount to 'an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings' (CPR r 3.4(2)(b)) or if the award would bring 'no practical benefit' to the claimant (*R (O) v Home Secretary* [2016] UKSC 19, [2016] 1 WLR 1717 [50]). It seems that lower courts know very well how to manage cases of trivial data breaches in this light (*Johnson v Eastlight Community Homes Ltd* [2021] EWHC 3069 (QB), *Rolfe & Ors v Veale Wasbrough Vizards LLP* [2021] EWHC 2809 (QB)).

The third and final issue for the UKSC was whether there was any real prospect—without prejudicing the final outcome of the case—that all members of the represented class suffered the same damage and have thus 'the same interest in [the present] claim' (CPR r 19.6). The answer was in the negative (at [159]) because we cannot presume, without any evidence to the contrary, that each individual member of the represented class suffered the same (or partially the same) non-trivial damage (at [147], [148] and [159]). Thus, even if we accepted that individual claimants may have, in principle, suffered non-trivial compensable damage as a result of the DPA 1998 violation, their compensation claims would never succeed on a representative basis.

For the benefit of future disputes, the UKSC firmly stated in *Lloyd* that the representative procedure is a flexible tool based on convenience in the administration of justice. Unlike in the case of group litigation (CPR r 19.11) or collective proceedings (s 47C(2) of the Competition Act), the flexibility of representative procedure gives the court a discretion to impose various conditions before it allows the claim to proceed on a representative basis. When stretching

this flexible representative rule (CPR r 19.6), the court should 'go as far as possible towards justice than to deny it altogether' (*Cockburn v Thompson* (1809) 33 ER 1005, 1008, (1809) 16 Ves Jun 321, 329, cited with approval in *Duke of Bedford v Ellis* [1901] AC 1 (HL) 10 and in *Lloyd* at [41]).

But, being based on the principle of convenience, the representative rule also gives the court a discretion not to allow the claim to proceed on a representative basis if it would be inconvenient, eg if the claim has no real prospect of success (see also CPR r 24.2). And this was the key problem in *Lloyd*. The way in which Mr Lloyd defined the represented class was thought incompatible with the way in which Mr Lloyd framed the compensation claim (at [150] and [151]). In particular, the UKSC argued that a representative claim framed from the bottom up, ie by reference to individual losses, cannot possibly succeed without proof or allegation of individual harm (at [82], [86], and [151]).

That said, *Lloyd* helpfully outlined the framing of representative claims which would not (prima facie) suffer from such inconvenience. One option would be a bifurcated process 'whereby issues common to the claims of a class of persons may be decided in a representative action which, if successful, can then form a basis for individual claims for redress' (at [48]), though litigation funders may find such process unprofitable (at [85]). Another option would be to frame the compensation claim from the top down, ie by reference to damage suffered by the whole represented class (at [82]), even though this 'radically alters the established common law compensatory principle by removing the requirement to assess individual loss' (*Merricks v Mastercard* [2020] UKSC 51, [2021] Bus LR 25 [76], see also Art 9(5) of the EU Directive 2020/1828 on representative actions for the protection of the collective interests of consumers). We may infer from *Lloyd* that this top-down framing would nevertheless become inconvenient if one would try to establish a reasonable expectation of privacy of the whole represented class (at [106]). Finally, the UKSC made it clear that for reasons of convenience the representative claim may be pursued for only a part of the compensable damage, ie the part in relation to which all the represented individuals have the same interest (at [147]).

Overall, and contrary to what a superficial reading of *Lloyd* may suggest, the UKSC judgment does not mean that illegal online tracking cannot be actionable per se or that representative compensation claims in data protection law have no chance to succeed. The main lesson from *Lloyd* is that such claims should be framed differently from how Mr Lloyd framed his claim and the UKSC shared some very instructive observations in this regard.