Determining damages for phone hacking victims

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Litigation: Eight phone hacking victims brought an action for compensation for breach of privacy for having their telephones hacked by a national newspaper group. In a ruling handed down on 21 May 2015 the trial judge ruled in favour of the claimants and determined the appropriate amount of compensation. David Bowden of David Bowden Law comments on the judgment of Mr Justice Mann.

Original news
Shobna Gulati & others v. MGN Limited
[2015] EWHC 1482 (Ch) Mr Justice Mann

Following a 13 day hearing in March 2015, Mr Justice Mann has handed down his reserved judgment. In it he decides on the appropriate amount of damages to be awarded to 8 people who claimed that their telephones had been hacked by the Mirror Group Newspapers (MGN) who publish the Daily Mirror, the Sunday Mirror and The People newspapers. Many of these claimants were well known public figures who included Sadie Frost, Paul Gascoigne and Alan Yentob. There are reporting restrictions still in place and this piece is based on the redacted judgement which the judge has permitted to be placed into the public domain. The newspapers had initially denied liability, then made a series of non-admissions and denied that there had been any systematic phone hacking.

The judge ruled against the newspaper and determined the appropriate amounts of compensation for breach of privacy.

What was the background and what were the key issues in this case?
This was a claim for damages and aggravated damages brought by 8 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 the newspaper about all the claimants with the exception of Mr Yentob.

The Judge found that phone hacking by Mirror Group's newspapers 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.

A lot of the claimants involved in this trial were reluctant to come to Court to relive difficult periods in their lives and to speak of their horror, distaste and distress at the discovery that Mirror group journalists had been listening to all sorts of aspects of their private lives. It is therefore a great relief to them that the Judge has recognised the grave impact the unlawful activity of MGN had on their lives and that the emotions they felt were genuine, not exaggerated and entirely justified.

Until relatively recently, Mirror Group firmly and publically denied knowledge of any phone hacking activities at any of its titles. Its conduct in these claims have been criticised and the apologies it finally made to these claimants, and all other victims of its phone hacking activities, were found to be, at least in part, tactical. It has taken a brave and determined group of claimants to finally bring this newspaper group to account. It has been a long and drawn out battle to bring this initial phase of the litigation to a conclusion and the claimants are pleased to be able to finally close this difficult chapter in their lives.

Was the court's approach to evidence novel or enlightening?
There is nothing novel about the way the judge approached the assessment of the evidence he heard. However the judge said he felt he was only seeing the tip of an iceberg and accordingly had to draw some inferences to arrive at his ruling.

The Judgment of Mr Justice Mann is an important result for all victims of press intrusion. It contains valuable guidance for all future phone hacking claims and for all future privacy claims more generally. This is subject to noting that the Defendant has made an application for permission to appeal the ruling to the Court of Appeal.

The guidance that the Judge gives in his 224 page judgment is based on the evidence he heard at the four week trial in March 2015, as well as the various admissions made by MGN in the course of the first wave of claims brought by victims of phone hacking against them.

Was the court's approach regarding damages novel or enlightening?
At first blush the amount of damages awarded seems large but the judge has not adopted a novel approach but has simply 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.

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.

In assessing damages the judge had to consider and balance 4 key previous decisions:

- *Regina (Lumba) v. Home Secretary* [2012] AC 245 (Supreme Court),
- *Halford v. UK* [1997] 24 EHRR 523 (European Court of Human Rights),
- *Simmons v Castle* [2013] 1 WLR 1239 (Court of Appeal), and
- *Vento v. Chief Constable of West Yorkshire* [2003] ICR 318 (Court of Appeal).

Lumba was considered by the judge. *Lumba* holds that trespassory torts (such as false imprisonment) are actionable regardless of whether the victim suffers any harm. *Lumba* also holds that claimants are not additionally entitled to damages to vindicate the importance of that right and the seriousness of the infringement. *Halford* was applied by the trial judge. Alison Halford had her telephone calls intercepted which violated her right to privacy. The Strasbourg Court awarded her £10,600 damages and costs.

Simmons was a personal injury case funded by a CFA and this was considered by Mann J. The Court of Appeal in *Simmons* declared that from 1 April 2013, the proper level of general damages for (i) pain, suffering and loss of amenity in respect of personal injury, (ii) nuisance, (iii) defamation and (iv) 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 the *Vento* case 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. The Court of Appeal had to decide what in general is the appropriate level of compensation for non-pecuniary loss, such as injury to feelings. *Vento* set down 3 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. Only in the most exceptional case should an award of compensation for injury to feelings exceed £25,000.
- **Middle band:** £5k to £15k. For serious cases which do not merit an award in the highest band.

- **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.

The Defendant's submission was that damages should be assessed by reference to these *Vento* bands with an uplift to take account of inflation. The Claimants' submission was that damages should be assessed by reference to previous breach of privacy cases such as *Mosely*, *Naomi Campbell*, *Paul Weller* and *Douglas v Hello*. The Claimants submitted that each wrongful act was a separate breach which should have its own award of damages. Whilst the judge makes a cumulative award which appears large the individual components of that award are not in themselves overly generous.

Mann J preferred the Claimants' submissions and 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. Mann J found that these actions of the Defendant to be aggravating factors:

- Its practice of phone hacking had been:
  - widespread,
  - institutionalized,
  - long-standing,
  - covert
- Its posture of denial.

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.

Did the judgment clarify any hitherto grey areas of law?
The judgment is useful as the judge has to decide what inferences can be drawn:

- where there has been deliberate wrong doing,
- documentary evidence has been destroyed, and
- the court has an incomplete picture.

Mann J said the court had to compensate a claimant properly and fairly for the wrong sustained. In some cases a global award would be appropriate and it others a more divided up approach would meet that aim. Mann J said each article published about a Claimant should be treated separately in terms of a damages award. Mann J also said a separate award should be made in relation to private investigators used by the Defendant who provided intelligence to it on a Claimant.

Mann J also ruled that an award should be made to reflect general levels of distress including distrust of and damage to a claimant's personal relationships arising out of the Defendant's conduct. In making this finding, Mann J had evidence from him that Claimants had initially falsely accused members of their family, friends or inner circle in being the source of the stories about them.

Mann J ruled that he would use the following 8 factors in assessing compensation payable to the Claimants:

- Certain disclosures of private information was more significant than others,
- Information about mental or physical health was more significant than that about financial matters,
- Information about social meetings attracted a lower level of privacy and compensation,
- Information about matters internal to a relationship would be treated as private. Disclosures which disrupted a relationship or adversely affected a couple's attempt to repair it were likely to be treated as serious deserving substantial compensation,
- Compensation would depend on the nature of the information, its significance and its effect disclosure had on the victim,
- The effect of repeated intrusions could be cumulative,
- The "egg shell" principle applied so that thick-skinned people would receive less compensation (and correspondingly thin-skinned would receive more), and

- For each year of serious phone hacking the starting point was an award of £10,000.

Should lawyers advising in this area of law take particular note of any elements of the judgment?
The Defendant had framed its settlement offers by reference to the *Vento* bands. It had therefore offered the various claimants compensation varying in amount from £10,000 to £40,000. The Claimants had claimed far more on the basis of the various aggravating factors. The claims varied in amount from £125k to £529½k. The judge found that *Vento* was not the correct comparator for these sort of breach of privacy cases. The judge award compensation varying in amount from £72½k to £260,250.

Here Mann J had to confront the scale of the wrong doing and the different types of wrongdoing too. Following Mann J's ruling it should now be easier to assess a damages calculation. In *Mosley v Newsgroup Newspapers Ltd* [2008] EMLR 20, the Claimant was awarded £60,000 damages by Eady J for breach of privacy. It is possible to get a lot more money in breach of privacy cases where the breach is of a *Mosley* type.

Overall the amounts awarded were closer to the amounts claimed by the Claimants than the Defendant's *Vento* offers. The amounts of compensation were very substantial. Lawyers advising in this area which had previously assessed compensation by reference only to the *Vento* bands will need to take stock and re-assess either claims or offers by reference to the criteria set out by Mann J.

What trends are emerging in this area? Do you have any predictions for the future?
As for the future of this litigation, Atkins Thomson is currently co-ordinating a number of other claims being brought against Mirror Group Newspapers, and there may be more to come. At the moment there are 73 other claims presently pending. A total of 15 different law firms act for the various claimants. A Case Management Conference for new cases is being arranged to enable the Judge to decide how to manage the much larger second wave. These other claims are not just against the Defendant in this case but also against other publishers.

An increasing amount of data is held electronically and so we may see more privacy type claims emerging. At one end of the scale this could be from private clients or employees whose emails have been read by their employers to corporate espionage at the other end of the spectrum. Parties who apply the Mann J ruling correctly will be able more easily to assess the compensation properly due but whether this makes these cases more prone to settle remains to be seen.

There may be an appeal against the decision of Mann J. If there is, then whatever an appeal court rules on this case will also have to be carefully considered.

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