Your Witness

Newsletter of the UK Register of Expert Witnesses published by J S Publications

New edition process getting into gear!

Preparations for edition 36 of the *UK Register of Expert Witnesses* have begun. As last year, we will not be routinely sending out paper drafts to every expert witness in the *Register* for checking, signing and returning. Instead, we will e-mail personalised invitations to you during early January with a secure link giving online access to your draft documents. If there are no changes or minor amendments, online renewal is easy and requires no paper printing. More extensive changes can be e-mailed or the draft printed and amended directly on the paper.

Of course, we understand that the vagaries of e-mail systems and spam filters will inevitably mean some of these e-mails will fail to arrive. Accordingly, we will follow up with further attempts to reach members by telephone, e-mail and post, as needed.

The vast majority of members are happy with the online approach to renewal. But if it isn't for you, please let us know and we will mail a paper draft of your entry in the New Year.

If you will be away from work during January 2023, you may wish to contact us now so that we can make appropriate alternative arrangements for your *Register* renewal.

Meanwhile, everyone here at J S Publications sends their very best wishes to you for a happy and safe Christmas and New Year.

Looking ahead

This issue of *Your Witness* spends time looking at forecast changes to the forensic science and data protection landscapes. Big changes are in the pipeline for both in 2023, and we should take a moment to reflect on the background. We look at the Code of Conduct being drafted by the Forensic Science Regulator on pages 4. For Brexit inspired changes to the GDPR regulations, turn to pages 5.

The data protection changes held an interesting point on how the tech giants casual abuses of all our data won't always lead to a remedy for the individual. In was claimed that Google had secretly tracked the internet activity of Apple iPhone users by using the 'Safari workaround' to bypass privacy settings and had sold the data collected without their knowledge or consent. Relying on Civil Procedure Rules 19.6, the respondent claimed to represent everyone resident in England and Wales who owned an Apple iPhone at the relevant time. He contended that it was unnecessary to assess the compensation payable to each claimant because compensation could be awarded under the 1998 Act for 'loss of control' of personal data without the need to prove that any financial loss or mental distress had been suffered as a result of the breach. Following an appeal by Google against the original decision, the Supreme Court overturned the ruling and held that The Data Protection Act 1998 s.13 did not confer on a data subject a right to compensation for any contravention by a data controller of any of the requirements of the Act without the need to prove that the contravention had caused material damage or distress to the individual concerned. The wording of s.13(1) distinguished between "damage" suffered by an individual and a "contravention" of a requirement of the Act by a data controller and provided a right to compensation only if the damage occurred by reason of the contravention.

GDPR Subject Data Access Requests

Whilst on matters GDPR, we continue to receive questions on the Helpline around litigants putting in Data Subject Access Requests to expert witnesses. Handling such requests is not simple.

A formal Data Subject Access Request under GDPR only applies to information about the person making the request. So, to the extent that an expert's notes cover other people, it would not be proper to release them in their entirety. If releasing any material, it would necessarily involve redacting anything that relates to, including identifying, other people.

For any data that comes from the direct interaction of the expert and the person, there is nothing to release as the person already has all that material.

To the extent that any data about the person falls into the category of raw test data – material that takes specialist training to interpret – it may be that the experts professional body has guidance on its release.

The data protection regulation all include exemptions against release of information. The key ones here would be those around legal proceedings and the establishment, exercise or defence of legal claims. But few of these are absolute so a decision about the extend to which any exemption applies would be open to review by the Information Commissioner if the person pursued the matter further.

Finally, it is clear that an expert would always release any material that a court ordered be released. So, it might be worth including in any response, that unless ordered otherwise by a court, this is as far as you can go in terms of responding to the request.

Chris Pamplin

Inside

Issue 110

December 2022

Experts and circumstantial evidence

Aggregation of evidence is for the jury, not the expert

The case of *R -v- Olive*[1] gave the Court of Appeal the opportunity to restate the way experts should handle circumstantial evidence. While jurors can bring together strands of evidence, circumstantial or otherwise, from different experts to form a judgment, to what extent can experts do the same to support their opinions?

The appellant, Micheala Olive, along with two others, had been convicted of murder following a fatal shooting. There were no witnesses to the shooting, but two witnesses had heard the shot, observed a white car with its engine running, and seen four or five unidentified men running from the crime scene. The other evidence in the case was CCTV footage of a similar white car, evidence obtained from mobile phone location tracking, spent firearm cartridges recovered from a drain, and gunshot residue (GSR) recovered from the suspect vehicle and another vehicle believed to have been used by the perpetrators.

A number of experts had been instructed, including one on the nature of the recovered cartridge case and three experts in GSR.

The quantity of GSR recovered from the vehicle consisted of just two particles. The defence had argued that the level of residue was so low that it was not probative of anything, and so was inadmissible. The judge, referring to the cases of *George*[2] and *Gjikokaj*[3], rejected this argument, and accepted the prosecution submission that it could be considered a component in the body of circumstantial evidence.

The experts had initially been told that no firearms officers had been involved in the case, and reports had been prepared on that basis. However, it later transpired that firearms officers had attended. Indeed, bodycam footage showed them entering the house, and in close proximity to the car. Later that day, the scenes of crime officer attended the address. He, too, had been told that no firearms officers had come into contact with the car. He opened the car and leaned inside to take a photograph. He was not wearing a body suit, but a fleece jacket. And he was wearing the same jacket the next day when he went to a police pound to carry out GSR tapings inside the car.

This was put to the experts at a late stage, and just before one of them was to give evidence. The presence of the firearms officers had introduced a further possible explanation for the GSR in the vehicle. The low levels of GSR might previously have been explained by one of the suspects having recently discharged a firearm or that it had got there purely by chance. There was now the third possibility: contamination by the officers.

One question for the court was the extent to which the GSR experts could offer a valid and admissible opinion on the three possible alternatives. If they were unable to do so, was the expert evidence admissible at all?

One of the experts said that she was unable to give an opinion, saying, effectively, that each of the three options was equally possible. Another expert considered that the actions of the officers were likely to have resulted in the contamination of the vehicle, from either themselves or their equipment. Both of these views were put to the jury by the trial judge in his summing up.

The Court of Appeal held that, in this case, the judge had been entitled to admit the expert GSR evidence and that this had not been prejudicial. But the GSR evidence was not the only circumstantial evidence, and the jurors were entitled to consider this alongside the other firearms-related evidence when drawing their conclusions – something the experts involved in the case were not permitted to do.

The Court of Appeal thought that the approach to directing the jury taken by the trial judge in *Gjikokaj* was the correct one. The judge in that case had said that the central point for the jury to bear in mind was that:

> *'... [the expert] can only give his opinion from the evidence at his disposal. He cannot go beyond the evidence relating to the two particles, and because the amount of particles is low, he must necessarily be cautious. You can go further, as I have already observed. You can add one limb of evidence relating to firearms to another limb of evidence relating to firearms. That is your privilege and your right. You can aggregate evidence, [the expert] cannot.'*

The trial judge's summing up in *Olive* had been consistent with this approach. If one expert's conclusion was preferred, then the GSR could not help the prosecution case and should be disregarded. If the other expert's analysis was accepted, then the GSR evidence was a piece of circumstantial evidence that was consistent with the presence of someone connected with the shooting. It was at such a low level that it could not, on its own, lead to a conclusion that the involvement was proved of anyone in the car being connected to the shooting. Neither expert had been able to rule out chance or contamination as an explanation. In those circumstances, then, the weight a jury might attach to it as a piece of circumstantial evidence might depend on its conclusions about other pieces of evidence.

All the experts in these cases had acted properly and within the limits of their expertise. They had reached differing conclusions, but all were entitled to do so. This case does, however, serve as a useful reminder. In cases involving circumstantial evidence, experts must restrict themselves to the primary evidence within their field of expertise. They should not amalgamate evidence, nor look to other forms of circumstantial evidence for corroboration, nor allow this to colour or influence any opinion or conclusions they draw. Inconclusive expert evidence could be admitted where it forms part of a larger body of circumstantial evidence, but any aggregation of the evidence is for the jury alone and not the expert.

Reference

[1] *R -v- Olive (Micheala)* [2022] *EWCA Crim* 1141.

[2] *R -v- George* [2014] *EWCA Crim* 2507.

[3] *R -v- Gjikokaj* [2014] *EWCA Crim* 386.

Disclosure when changing expert

There are, of course, many valid reasons why a party might seek to switch experts, but the court is keen to ensure a party is not engaging in 'expert shopping', i.e. finding an expert whose opinion better suits the party's case. Consequently, it has become common practice (since *Edwards-Tubb -v- Wetherspoon*[1]) for the court to impose a condition requiring the disclosure of any previous expert's report when granting a party permission to change experts.

Some judges have viewed this disclosure requirement, although discretionary, as being almost mandatory. But there is no doubt that there is wide variation in the way this judicial discretion is exercised. In particular, to what extent should the disclosure of documents, other than the original expert's report, be ordered?

Judge Roger ter Haar KC, sitting in the King's Bench Division (Technology & Construction Court), gave some useful guidance in a case heard at the start of November 2022.

In *University of Manchester -v- John McAslan & Partners Ltd*[2], the court had to consider its discretion under Civil Procedure Rule 35.4(1). This is, of course, the general rule that no party may call an expert or put in evidence an expert's report without the court's permission.

The case involved a claim for breach of contract against a construction company. In support of its claim, the claimant had obtained expert reports from a building research director, a brickwork expert and a structural engineer. Subsequently, though, the claimant had a change of mind and instructed a fourth expert to address all aspects of the claim in a single report.

The defendant considered that the fourth expert's opinion concerning the remedial works was more favourable to the claimant than the views expressed by the previous expert structural engineer, and so claimed this was 'expert shopping'. The defence submitted that permission to adduce the substitute evidence should be granted only upon the (unusual) condition that the claimant disclosed:

(1) any report, letter, email, note or other document produced by the original experts, other than the reports already provided, in which they expressed opinions on the remedial works; and

(2) any attendance note or other document produced by the claimant's solicitors evidencing the original experts' opinions.

Hearing the application, Judge ter Haar noted there was a two-fold purpose to imposing disclosure conditions. This was not merely to prevent expert shopping, but also to ensure the court had all relevant material to enable determination of the issues.

Accordingly, it was usual for the court to order that a first expert's report should be disclosed as a condition of permission to rely on the report of a replacement expert. However, so far as additional documents were concerned, including notes of discussions with the expert, memoranda or documents from the solicitor's file, the court would not normally order their disclosure unless there was a very strong presumption of expert shopping.

Having identified these principles, Judge ter Haar went on to deal with the specifics of the case. First, he was obliged to consider whether the circumstances engaged the discretion to impose a condition. Given that the normal course was to grant permission for relevant expert evidence, it was for the defendant to persuade the court that conditions should be attached, particularly since the claimant had already made substantial disclosure.

In this case, the judge was satisfied that the court's discretion to impose a disclosure condition on the grant of permission to call the substitute expert was engaged. The legitimate interest the parties and the court might have in considering the relevant information and opinion provided in the previous experts' reports had already been satisfied by the extensive disclosure already given by the claimant. He went on to consider whether he should exercise his discretion in favour of the defendant's application for additional disclosure, namely, the emails, notes and other documents that might have been produced by the experts or the solicitor and which may have contained comments and opinions relating to the remedial works and the contents of the original experts' reports.

Although the judicial discretion was wide and the court certainly had the power to order disclosure of these additional documents, the judge considered that it should only do so in particular circumstances and upon examination of the potential reasons for the change being sought. There was, in the instant case, no discernible or significant conflict between the fourth expert and the original building research director and a brickwork expert. While the opinions expressed might appear to be more favourable to the claimant than those expressed by the original structural engineer, there was no credible reason to suspect the claimant of expert shopping. This was especially so given that the original structural engineer was said to be in poor health and not in a position to continue in his expert role.

This, said the judge, was a long way from the sort of abuse of the expert witness process against which the court should be astute to guard its procedure. The classes of additional documents of which the defendant was seeking disclosure were not those the court would normally include in a disclosure order. However, it was made clear that such disclosure remained within the judge's discretion and could certainly be ordered in the worst cases where there was a very strong presumption of blatant expert shopping.

Clear evidence of expert shopping needed before court will release background papers

References

[1] *Edwards-Tubb -v- JD Wetherspoon plc* [2011] *EWCA Civ* 136.

[2] *Manchester -v- John McAslan & Partners Ltd* [2022] *EWHC* 2750 (*TCC*).

New code of conduct for expert witne

Forensic Science Regulator put on statutory footing

For a decade or more there have been calls for the Forensic Science Regulator (FSR) to be given statutory powers. In 2019, the then FSR, Dr Gillian Tully, said in her annual report that constraints on legal aid fees were preventing defendants from accessing high-quality forensic science expertise. She urged the government to put the Regulator on a statutory footing to enforce high standards.

Dr Tully's wish was to introduce a quality standard for case reviews. Together with the UK Accreditation Service (UKAS), she conducted an experiment to evaluate whether accreditation against a prescribed standard would provide an adequate level of assurance at a proportionate cost. UKAS concluded that ISO 17020 was an applicable standard for accrediting case review work.

The FSR recognised, however, that not only did this come with a fairly substantial cost, but there were also practical difficulties in implementing a standard for case review work funded primarily by the Legal Aid Agency (LAA). Solicitors, she said, were generally required to award work to the provider offering the lowest quote for the work. This took no account of any formal quality assurance mechanism. She called for urgent legislation to give the FSR statutory enforcement powers. She said that, unless the FSR had such statutory powers, he or she would be unable to ensure compliance across the board. In Dr Tully's view, the likely consequence of this would be that those providers who adopted a quality standard (which would have an associated cost) would be at a competitive disadvantage relative to those who did not. Further, the current LAA rates seemed unlikely to support the implementation of accreditation.

Forensic Science Regulator Act 2021

Despite these calls, and notwithstanding that a consultation process was concluded in 2014, it was to be many years before the FSR's role became a statutory one. However, the *Forensic Science Regulator Act 2021* ('the Act') finally received Royal Assent in April 2021. It created a statutory role and made it a requirement that the FSR should prepare and publish a code of practice. The Act also introduces new statutory powers to investigate and issue compliance notices where the Regulator has concerns about how a forensic science activity is being conducted. Indeed, the Regulator will be able to issue compliance notices requiring forensic practitioners who pose unacceptable risk to the criminal justice system to take remedial action or be prohibited from carrying out a forensic science activity.

The 7-year delay between the FSR first being given assurances that statutory powers would be given and implementation of the Act had previously been described by the House of Lords Science and Technology Committee as 'embarrassing'. This view was echoed by the Commons Science and Technology Committee, who described the long delay as 'a failure of leadership'. The then Regulator, in her 2019 report, concluded that this could only be interpreted as 'a lack of priority being given to forensic science quality by the government'.

Short history of calls for statutory regulation

To examine the wider debate about the statutory regulation of forensic science providers, it is interesting to go back to the 2013-14 consultation and consider the various responses given both for and against the proposed new statutory powers.

The consultation document identified the classes of evidence that were to be subject to the proposed statutory regulation, and these were wide ranging (see sidebar). The majority of consultation respondents thought all these groups should be subject to regulation. However, some respondents made the valid point that several of these disciplines (e.g. accountancy, psychiatry and psychology) were already subject to regulation elsewhere, and therefore there was a risk of conflict. There was some opposition, too, to the regulation of manufacturers of forensic consumables because this was a commercial interest and would be difficult to oversee, especially where reagents were produced overseas. Some reluctance was also expressed to the regulation of the keepers of national forensic databases.

The general view was that regulation should be applied to all stages of the process, and some specific examples were given. For example, it was suggested that the destruction of DNA samples and profiles should also be added to the list of stages that the Regulator oversees.

A minority expressed the view that the then existing level of regulation was sufficient. Concern was expressed that statutory regulation might stifle scientific research and innovation, and may give the FSR's advisors too much power to impose their ways of working on everyone, regardless of whether they were beneficial. It was asserted that this could lead to experts producing very rigidly set out reports (as had, apparently, been observed in other countries). As far as forensic experts were concerned, regulation would add to the bureaucratic burden to which they were already subject. There was also the feeling that regulation was more the remit of the courts, and that it might conflict with other regulatory bodies, such as the General Medical Council.

Preventing the FSR becoming too powerful

Concerns were expressed that regulation would place too much power in the hands of a single individual (i.e. the FSR). As a result, it was recommended that the Regulator should be empowered by statute to consult all court rule-making bodies or office holders (including the Family Justice Council, the Civil Justice Council

Classes of evidence to be regulated

- fingerprints
- toxicology
- footwear comparisons
- trace evidence examination
- facial identification and other CCTV analysis, e.g. gait analysis
- drug identification and analysis
- firearms and ballistics
- gunshot residue
- e-forensics (computer and mobile phone analysis)
- blood pattern analysis
- toolmarks
- tyre examination
- document analysis
- medical forensics
- forensic pathology
- forensic dentistry
- fire examination
- vehicle examination
- forensic anthropology
- forensic archaeology
- forensic palynology
- accident investigation and reconstruction
- disaster victim identification
- forensic accountancy
- forensic psychiatry
- forensic psychology

and the Office of the Chief Coroner) on matters relating to the admissibility and reliability of scientific and medico-legal evidence. Likewise, these bodies and office holders should have the authority under statute to require the FSR to consult them on matters affecting the regulation of scientific and medico-legal evidence within their jurisdictions.

Proposed Code of Conduct

Turning to the proposed statutory code of conduct, most respondents thought it would be beneficial for this to be applied to all relevant groups, including individual experts, organisations for the provision of forensic services, police forces and other law enforcement agencies, e.g. the Serious Organised Crime Agency, the military police, the LAA, the Crown Prosecution Service and the Home Office (as the organisation responsible for the national DNA and fingerprint databases).

It was the conclusion of the consultation that admissibility of the Code in court, the ability to levy contractual penalties and a power to investigate serious breaches would be sufficient to ensure compliance. However, some dissenting voices thought that the net effect of this kind of sanction would drive many small or independent forensic service suppliers out of business.

There were misgivings, too, about an all-encompassing code of conduct. This was seen to be focused on high-volume crime-related forensic science. It was a view expressed that this failed to take account of the needs and value of niche experts in private practice or small organisations. Such experts were a critical part of the criminal justice system and should be afforded some flexibility of approach. If it became a requirement for all sole practitioners to seek ISO accreditation, for example, this would risk losing the services of many small or niche providers because it would likely fall outside their financial ability.

Consultations on the range of sanctions to be available to the FSR generally supported those outlined, namely: the powers to refer organisations to UKAS for a review of accreditation status; suspension of an organisation from the procurement framework; a financial penalty per day for non-compliance; removal or suspension of work written into any public sector contract; and the requirement for contracts with forensic science practitioners to comply with any FSR investigation.

There was also a specific question about powers of entry and access to information (documents and records). A majority of respondents agreed that the FSR should have these powers, although a sizeable minority disagreed with giving the Regulator a power to enter premises.

There was also significant opposition to the power to impose fines. The view of the Faculty of Forensic and Legal Medicine within the Royal College of Physicians was that sanctions should not include financial penalties because this may be draconian for smaller organisations.

It was also pointed out that many of the proposed sanctions would have no effect on those individual experts who generally operate outside the procurement framework.

It was recommended that all experts used in court were regulated by either their organisation or an alternative system (e.g. a professional body). It was suggested that there was a need to exercise caution where a failure to follow the FSR's Code was not entirely due to the expert or other provider.

Code of Conduct due March 2023

Of course, most of the above is now of historical interest only. It does, though, serve to illustrate the advantages and disadvantages of a code of conduct, and the potential dangers of such a statutory system of regulation. It is, perhaps, relevant to note that the majority of respondents to the original consultation were judges, lawyers and court users, as well as organisations involved in one way or the other with the provision of forensic science services. However, it was not necessarily a process that canvassed the views of smaller organisations or individual experts.

As referred to above, the *Forensic Science Regulator Act 2021* is now on the statute book. We must await the Code of Conduct that the Act requires the Regulator to produce. The current FSR, Gary Pugh, acknowledged that there had been delays. However, it has been revealed recently that, following conclusion of the consultation on the content of the statutory code, a response is being produced. It will be taken first to the Home Secretary for approval, before being placed before Parliament for ratification. Subject to that process, the Code of Conduct should be in force by the end of March 2023. When it comes into force, all expert witness bodies will be expected to be compliant with the statutory code.

The Regulator confirmed that the details of the new Code of Conduct will be made known 'well in advance'. This will enable those likely to be affected to put in place provisions for compliance. However, given that there are now less than 5 months to run on the projected timescale, one wonders what 'well in advance' is likely to mean!

It will be interesting to see if, and to what extent, the new Code of Conduct takes account of any of the concerns expressed earlier.

The Regulator has already said that when Parliament endorses the Code, he will be able to issue compliance notices and exercise 'the ultimate power of prohibition'. Specifically commenting on his powers to prohibit experts, he is reported as saying: '*I hope I never have to go there. It'll be a sad day if I do.*'

Work to publish a Code of Conduct goes on apace

Fears persist that the FSR is building a system hostile to the independent expert witness

Data protection in the UK post Brexit

Brexit is ushering in a simplified data protection framework

We have now been living with the *Data Protection Act 2018* (DPA) for nearly 5 years. The DPA did, of course, incorporate into UK legislation the *General Data Protection Regulation (2016/679)* (GDPR). Together with existing data protection laws, it established a framework of rights and obligations designed to safeguard the personal data of individuals.

Much of our data protection law implemented, or was required to comply with or reflect, EU legislation. However, a lot has happened in the short time the Act has been on the statute books, not least the UK's exit from the EU. So how does Brexit change the data protection landscape?

GDPR post Brexit

Although some aspects of data protection law may continue to reflect changes that follow a general European pattern, it is now also subject to amendment and interpretation under UK law and legislation which will be subject to the construction of the UK courts. Alterations will inevitably be made to avoid conflict with other UK law, such as the provisions of the *Freedom of Information Act (2000)*.

Even the most fervent admirers of the GPDR will probably recognise that, like many of the regulations formulated by the EU, it is complex, very far-reaching and, in some respects, quite dictatorial in its application. But these are 'blanket' provisions. Despite their complexity, they do little to distinguish between the large data processing organisations and the small business, sole trader or private individual.

Every organisation in the UK was required to comply, from the largest muti-national to an expert witness undertaking a few instructions a year. The GDPR will be remembered as having caused a bit of a stir (not to say panic) when it came into force, but it is probably true to say that it has not been quite the beast it was feared to be.

Its development from this point will depend on UK legislation and how claims are dealt with by the courts. And it is now distinguished from EU regulations by being designated (UK)GDPR.

Plans to drop record keeping rules for small businesses

The first moves are already being made. On 18 July 2022, the *Data Protection and Digital Information Bill 2022-2023* was introduced to Parliament. This followed publication of the Government's consultation paper '*Data: a New Direction*'. The aim of the Bill is to create primary legislation that '*will harness our post-Brexit freedoms to create an independent data protection framework*'.

In an Impact Statement published earlier this year, the Government identified the purpose of the intended legislation, the problem under consideration and why action or intervention was necessary. It appears that relaxing the controls and restrictions on data use and data sharing, or, as the statement puts it, '*unlocking the power of data*', is one of the Government's ten 'Tech Priorities'.

The Government's *National Data Strategy* identifies data as a strategic asset. Its responsible use should be seen as a huge opportunity to embrace. The Government believes that the complexity of the current regulatory regime means that firms, public sector organisations and consumers are not able to take full advantage of the benefits that could be available to them through the effective use of data and data sharing. Consequently, it was considered necessary for Government intervention to allow for the realisation of all benefits derived from more effective data use.

A number of policy objectives were identified in a new data protection regime, including, amongst other objectives, to:

- support vibrant competition and innovation to drive economic growth
- maintain high data protection standards without creating unnecessary barriers to responsible data use
- keep pace with the rapid innovation of data-intensive technologies
- help businesses use data responsibly without uncertainty or risk, in the UK and internationally
- ensure the Information Commissioner's Office (ICO) is equipped to regulate effectively
- build on the high watermark for data use during Covid-19 that saw the public and private sectors collaborate to safeguard our health security, and
- make it easier for public bodies to share vital data, improving public service delivery.

There are to be 'tailored' exemptions that apply to research, financial services, journalism and legal services.

The new Bill, accordingly, seeks to update and simplify the UK's data protection framework and the role of the ICO, while focusing on protecting individuals' data rights and generating societal, scientific and economic benefits.

The Bill, assuming it is passed, will usher in some considerable changes to existing law. Perhaps of most interest to expert witnesses will be the proposed relaxations of the regulations for processing data for scientific or research purposes. There will also be a broadening of exemption for data processed in the 'public interest'. Clarifications are to be made to the 'public task' lawful basis in Article 6(1)(e), and the Bill introduces a new ground too. It provides a lawful basis for processing where it is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller. It also creates a new lawful ground for processing personal data where it is necessary for a recognised legitimate interest.

Clause 10 of the Bill inserts a new section 45A into the DPA 2018. It explicitly introduces an exemption from a data subject's rights to information for material that is subject to

legal professional privilege or, in Scotland, to confidentiality of communications. Legal professional privilege protects all communications between a professional legal advisor and their clients.

Important changes are also proposed to the obligations of controllers and processors. These amendments will give data controllers more flexibility in terms of the measures they put in place to demonstrate and manage risk.

Perhaps most importantly, there is recognition of the difficulties posed to small organisations. A new Article 30A(9) provides that a controller or processor that employs fewer than 250 individuals is exempt from the duty to keep records, unless they are carrying out high-risk processing activities.

A new section 61A(8) sets out the factors that data controllers and processors must consider when deciding what is an 'appropriate' record. They include elements such as:

- the nature, scope and context of the processing
- the risks their processing poses to individuals, and
- the resources available to the controller or processor.

GDPR in the courts

The role of the UK courts in acting to temper some of the less desirable consequences of the GDPR is also worthy of note. Although there have been some high-profile cases that have seen the imposition of some very hefty fines, there has also been a tendency to discourage some lesser claims that have been seen as frivolous, or where the amount of any damages was outweighed by the time and cost of proceedings.

The courts have made clear, however, that for a valid claim to be made, there must have been some significant measurable damage or loss. The case of Google *LLC -v- Lloyd*[1] sounded the death knell on any prospect of class actions by groups of individuals based purely on misuse of their personal information by big tech giants.

The court has also acted to restrict claims by individuals for limited data breaches unlikely to cause significant loss or distress. Indeed, claims are unlikely to be admitted where the distress caused was *de minimus* (see *Rolfe -v- Veale Wasbrough Vizards LLP*[2]).

In *Johnson -v- Eastlight Community Homes Ltd*[3], it was questioned whether an advantage to a litigant could be so disproportionate to the expense and court resources incurred in proving it that 'the game was not worth the candle'. The *de minimis* principle applied to such a claim, so that entitlement to damages did not arise unless a threshold of seriousness was reached.

The case involved a claim against a social housing provider by one of its tenants. In an email to a third party, the defendant inadvertently disclosed the claimant's name, email address and recent rent payments. The third party notified the defendant of the error and deleted the email. The disclosure period was less than 3 hours. The defendant admitted the mistake, informed the claimant, apologised and reported the matter to the Information Commissioner, who confirmed that no action would be taken. The defendant applied for a strike out/summary judgment of the claim on the basis of the *de minimis* principle.

The court followed previous case law and said that, contrary to the claimant's arguments, the *de minimis* principle applies to cases involving data protection breaches. Although there was a temptation to strike out the claim entirely, the court had heard some evidence on the mental distress caused to the claimant. It decided instead that the claim should be heard in a court more appropriate to dealing with low-value claims. Accordingly, the court required the data protection claim to be transferred to the county court's small claims track.

Simplification for most experts on the way

It will be apparent that the general trend is towards a more balanced and considered approach to GDPR, and it is a trend likely to continue.

Those engaged in expert witness work have, for some time, struggled with the vagaries and complexities of the GDPR. Among the questions raised with us have been '*Am I a controller or a processor of data?*' or '*With whom can I share data*' and '*What provisions must I put in place to safeguard data in compliance with the regulations?*' And experts are not alone.

The same questions are asked by employers, housing associations, law enforcement bodies, local authorities, on-line businesses and almost everyone else involved in day-to-day dealings with other people's personal data. These would appear to be simple questions. But unless you are an expert in the GDPR, they are perplexing. Clarity is what is chiefly needed.

One of the objectives identified in the Government's *National Data Strategy* paper is to allow businesses to **use data responsibly without uncertainty or risk**. The key word here is 'uncertainty'. Indeed, one of the provisions contained in the new *Data Protection and Digital Information Bill* focuses directly on the obligation of the ICO to issue regular, clear codes of guidance, some of which will be directed towards particular groups and bodies. These codes are to be approved by Parliament and will be admissible in evidence in legal proceedings. This will ensure that a court or tribunal, and the Commissioner, take any relevant provision of the code into account when determining a question arising in proceedings or in connection with the carrying out of the Commissioner's functions.

Change, then, is definitely on the way. Let us hope that, when it arrives, the labyrinthine intricacies of the data protection laws will become a whole lot easier!

Move towards a more balanced and considered approach to GDPR

References

[1] *Google LLC -v- Lloyd* [2021] *UKSC* 50.

[2] *Rolfe -v- Veale Wasbrough Vizards LLP* [2021] *EWHC* 2809 (*QB*).

[3] *Johnson -v- Eastlight Community Homes Ltd* [2021] *EWHC* 3069 (*QB*).

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