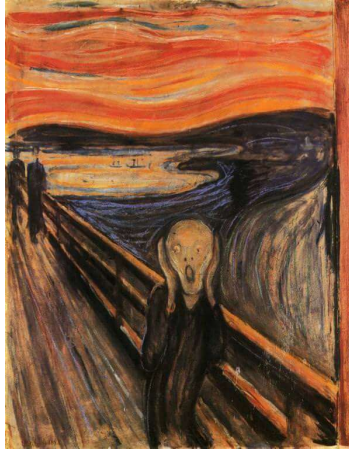


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Anxiety, stress, mental anguish and vexation

Neil Beresford
Chris Cowland
7 September 2021

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Overview

- **Nervous shock at common law**
- **Anxiety as an industrial disease**
- **Human rights claims**
- **New torts**
- **Claims under GDPR**
- **Policy coverage for psychiatric conditions**
- **GL coverage for GDPR events**

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Nervous shock at common law

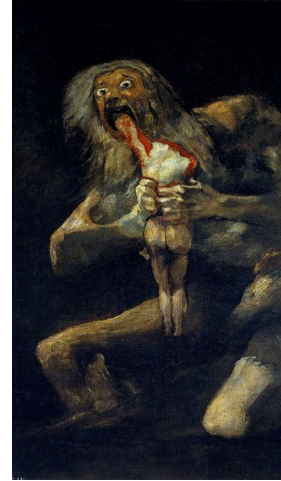
'No damages are awarded for grief or sorrow caused by a person's death'

Hinz v Berry (1970)

Four reasons for treating psychiatric harm differently:

- Complex process of identification
- Litigation as a disincentive to rehabilitation
- Relaxation of rules would greatly expand the class of claimants
- Risk of disproportionate liability

White v CC of South Yorkshire (1999)



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Nervous shock at common law

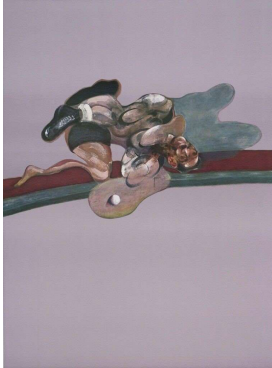
It is classified as an anxiety disorder. It follows on a painful event, which is outside the normal human experience, the disorder involves preoccupation with the event – that is intrusive memories – with avoidance of reminders of the experience. At the same time there are persistent symptoms of increased arousal – these symptoms may be experienced in the form of sleep difficulty, irritability or outbursts of anger, problems with memory or concentration, startled responses, hyper-vigilance and over-reaction to the remainder of the event... Many described an inability or difficulty in carrying out normal life activities such as work, family responsibilities or any activity normally engaged in before the disaster... All those in whom post-traumatic stress disorder was identified appear to have undergone a personality change, the significant features of which included being moody, irritable, forgetful and withdrawn within themselves, and frequent unprovoked outbursts of anger and quarrelsome behaviour were reported.

Alcock v CC of South Yorkshire (1992)

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The *Alcock* criteria



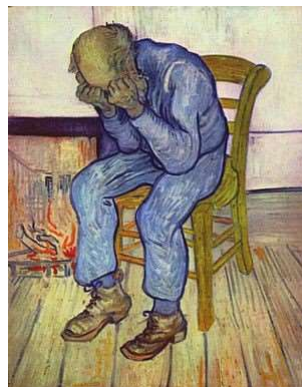
- Recognised psychiatric condition
Vernon v Boseley (1991)
- Claimant not abnormally susceptible
Bourhill v Young (1943)
- Illness or condition caused by shock
Froggatt v Chesterfield NHS Trust (2002)
Attia v British Gas (1986)
- Claimant witnessed event/immediate aftermath
McLoughlin v O'Brian (1983)
- Relationship with victim sufficiently proximate
Chadwick v BRB (1967)
White v CC of South Yorkshire (1999)

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Anxiety as an industrial disease

- Employees as secondary victims
Dooley v Cammell Laird (1951)
Macfarlane v EE Caledonia (1994)
White v Chief CC of South Yorkshire (1999)
- Apprehension of future disease irrecoverable in England
Johnston v NEI (2007)
- Anxiety from pleural plaques recoverable in Scotland
Damages (Asbestos Related Conditions)
(Scotland) Act 2009
AXA v Lord Advocate (2011)



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Human rights claims



1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

European Convention on Human Rights, Article 8

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Human rights claims



SW v United Kingdom (2021)

- Claim against UK government following judicial criticism of expert witness
- £1m quantum included anxiety, depression and PTSD
- €24,000 awarded for non-pecuniary damage

Milieudefensie v Shell (2021)

- Article 8 obligations incorporated into Dutch law private duty of care

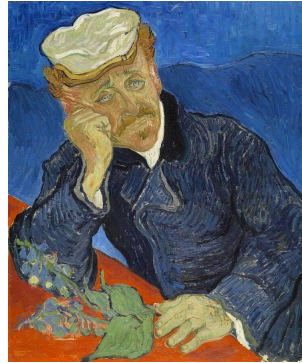
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Human rights claims

Article 5 – liberty and security

- ‘Everyone has the right to liberty and security of person’
- Tort of false imprisonment – strict liability
- Damages awarded for mere intrusion into a person’s privacy independently of any distress caused: see *Murray v Ministry of Defence (1988)*

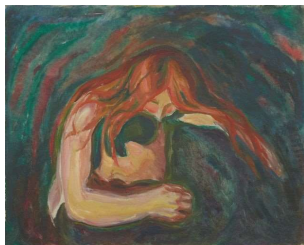


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Human rights claims

Article 8 and privacy



- Art. 8 protects a person’s right to a private and family life
- English law has only recently recognised a civil wrong for intrusions of privacy
- Tort of misuse of private information to protect human privacy, autonomy and dignity
- Balancing exercise

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New torts

Misuse of private information

- Examples of 'misuse':
 - Mirror Group publishing stories and photos of Naomi Campbell attending Narcotics Anonymous meetings: see *Campbell v MGN* (2004)
 - tracking and collating information relating to internet usage via 'cookies' without user's consent: *Vidal-Hall v Google* (2015)
- Overlap with data protection regime? Yes but see *Warren v DSG* (2021) on data breach following cyber attack

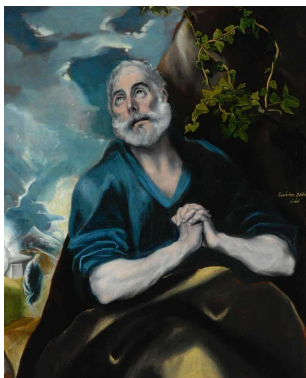


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New torts

Misuse of private information and distress



- Damages for distress?
 - Yes - *Vidal-Hall* (2015)
- Information about mental / physical health and private financial matters attracts higher award
- Damages for the intrusion into privacy itself, regardless of any particular distress? Yes, in principle: see *Gulati v MGN* and phone hacking scandal

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New torts

Claims for distress under DPA

- DPA 1998 still applies to data misuse or theft pre-23 May 2018
- Section 13: compensation for distress if claimant also suffers damage
- However s.13 was an imperfect implementation of EU law: see *Vidal-Hall v Google Inc* (2015)
- Distress recoverable under DPA **without** any other damage

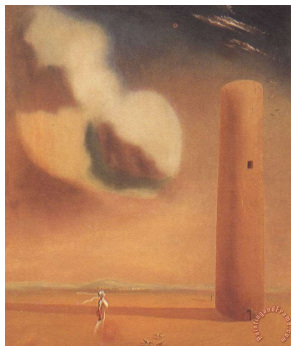


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New torts

Distress under GDPR, DPA 2018



- Data Protection Act 2018 implemented EU's GDPR
- Post-Brexit, UK GDPR and amended version of DPA 2018
- Article 82(1) provides:

'Any person who has suffered material or non-material damage as a result of an infringement of this Regulation shall have the right to compensation from the controller or processor for the damage suffered.'
- Article 82(1) should be read in conjunction with s.168(1) of the Data Protection Act 2018, which confirms that *'non-material damage'* includes damages for distress.

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New torts

Likely source of liability

- Article 32 requires implementation of:
 - ‘appropriate technical and organisational measures to ensure a level of security appropriate to the risk’
- A question of degree and reasonableness
- Liability if secure system but rogue employee? Potentially: see *WM Morrison Supermarkets plc v Various Claimants* (2020)
- Is control of data within the field of activities assigned to the employee?



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New torts

Damages under GDPR, DPA 2018



- Finding of distress is not automatic; de minimis threshold applies: *TLT v SOS for the Home Department*
- Distress subject to witness evidence and cross-examination
- Damages for distress fairly low. Lower end of scale psychiatric scale
- Increasingly large awards? £18,000 in *Aven and others v Orbis Business Intelligence Ltd* (2020)

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New torts

Lloyd v Google and loss of control

- Representative action pursued against Google
- Google allegedly collected and used the browser generated information of over 4m iPhone users in breach of DPA
- High Court – cannot award uniform damages for distress
- CA - everyone has uniformly suffered loss of control over personal data Gives rise to damages regardless of distress
- Applicable to a one-off data breach that was quickly remedied?



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New torts

Atkinson v Equifax



- Representative action for loss of control on behalf of 15 million affected customers after cyber attack
- Equifax's defence: *Lloyd v Google* was either wrong or does not apply where control lost over data:
 - that has no economic value
 - due to a criminal attack by a third-party
- Claim discontinued after pleadings

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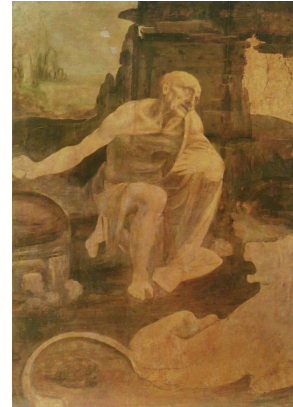
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New torts

Lloyd v Google in the Supreme Court

- Mr Lloyd and ICO: Severity of infringement. If possible in tort of misuse, why not under DPA?
- Google: GDPR contemplates distinction between the infringement and the damage suffered. Art 82 says:

'material or non-material damage as a result of an infringement of this Regulation'
- Is loss of control contravention of a personal or property right?
- Will it open the floodgates?



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New torts

Summary of privacy law

	Distress?	Loss of control?
Tracking and collating internet usage without consent	Yes – in tort and under DPA: <i>Vidal Hall, Gulati</i>	In tort? Yes - <i>Gulati</i> Under DPA? Currently but await <i>Lloyd v Google</i>
Publishing private photographs		
Phone hacking		
Data breach following cyber attack	In tort? No - see <i>Warren</i> Yes – under DPA	In tort? No - see <i>Warren</i> Under DPA? Possibly but await <i>Lloyd v Google</i>

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Policy coverage for psychiatric conditions

- Wide variety of approaches
- Bodily injury more limited i.e. physical or psychological harm
'bodily injury, death, disease, illness, mental injury or nervous shock'
- Personal injury encompasses interference with rights:
'bodily injury death disease illness mental anguish shock wrongful arrest malicious prosecution assault invasion of the right of privacy detention false imprisonment false eviction discrimination libel slander or defamation of character'
- Inadvertent coverage, e.g. invasion of privacy, false eviction, discrimination, libel, slander and defamation

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GL coverage for GDPR events



- Specific DPA extension
'The Insurer will indemnify the Insured and if the Insured so requests any Employee or director or partner of the Insured for damage or distress occurring as a result of an offence under Section 168 of the Data Protection Act 2018'
- Broad personal injury definition under main cover

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