Scott v LGBT Foundation Ltd: When Dealing with Personal Information Falls Outside the Data Protection Regime

In *Scott v LGBT Foundation Ltd* [2020] EWHC 483 (QB) the High Court held that "a verbal disclosure does not constitute the processing of personal data" under the Data Protection Act 1998 ("DPA 1998").

The Facts

In May 2016 the claimant sought to access the defendant charity's services by completing a self-referral form. The form provided an option for individuals to consent to information being disclosed to their GP. It also stated that the charity would break confidentiality without the individual's consent if there was reason to be seriously concerned about their welfare. The claimant provided his GP's details and disclosed mental health and substance use issues, including issues relating to suicide and self-harm.

A Health and Wellbeing Officer ("HO") at the charity conducted an oral intake assessment for the claimant in July 2016. She reiterated the charity's confidentiality policy, and explained that information he disclosed during the assessment would be passed on if she believed that he was at risk. The claimant confirmed he understood and agreed to this, and the HO began the intake assessment. The claimant gave further details of his drug use, self-harm and suicidal thoughts. The HO became concerned and paused the assessment to consult a colleague, who advised her to inform the claimant they would be contacting his GP because they had concerns about his welfare. The HO informed the claimant of this and also said that there was no need for him to consent to this given the nature of the concerns about his welfare. The claimant did not raise any objections and left shortly afterwards.

The charity disclosed the claimant's suicidal thoughts, self-harm and drug use to his GP via a telephone call. The call and information disclosed were entered into the claimant's GP records. There was no evidence suggesting that any documents or written records were shared with the GP by the charity, and communications with the GP were entirely verbal.

The claimant later requested his medical records under a data subject access request under the General Data Protection Regulation (EU) 2016/679 ("GDPR").

The claimant subsequently brought a claim against the charity under the DPA 1998, a claim in breach of confidence and a claim under the Human Rights Act 1998 ("HRA 1998") alleging that the non-consensual oral disclosure by the charity of his sensitive personal data had been unlawful and undermined his autonomy and right to self-determination.

The defendant charity applied for summary judgment on, or the striking out of, the claim.

Judgment of the High Court

The High Court granted the charity's application for summary judgment and struck out the claim.

a) Data Protection

A claim can only be brought under the DPA 1998 where 'personal data' has been 'processed'. In order to qualify as 'personal data', the information in issue first needs to satisfy the definition of 'data' under section 1 of the DPA 1998.

The Court, having outlined the definition of 'data' under section 1 of the DPA 1998, noted that the section considers the nature of the processing/recording of information in order to determine whether it is 'data' within the meaning of the Act. The Court also noted that the need for 'personal data' to be recorded in either electronic or manual form was clear from *Durant v Financial Services Authority* [2003] EWCA Civ 1746 and that this basic point was clear from Article 2(1) of Directive 95/46/EC, which the DPA 1998 implemented. Having outlined the above, the Court held that a verbal disclosure does not constitute the processing of personal data and thus cannot give rise to a claim under the Act.

The Court rejected the claimant's suggestion that the information was 'data' as it had been "stored" in the HO's mind with the intention of putting it into an automated record/filing system in due course. Noting that it may seem unfair that oral onward disclosure of orally provided private information is not prohibited, the Court stated that the DPA 1998 is a very specific scheme based around records and processing, so the claimant's suggestion did not fit with the scheme of the Act. Additionally, there are other areas of law (such as the law of confidentiality) that are the appropriate method for making such complaints.

In any event, even if the DPA 1998 had applied to the disclosure, it would have been lawful under the Act as it met Condition 4 of Schedule 2 and Condition 3 of Schedule 3: namely, that it was "necessary in order to protect the vital interests of the data subject" and "necessary in order to protect the vital interest of the data subject […] where […] the data controller cannot reasonably be expected to obtain the consent of the data subject" (respectively). The charity could not reasonably have been expected to obtain the claimant's consent. He was considered to be at material risk of suicide or self-harm and had already been informed that disclosure could be made without his consent in such circumstances, and he had gone ahead with the intake assessment with this knowledge. Although the claimant argued that he had not been at "imminent" risk, the Court held that there was no basis to read the qualifier of 'imminent' risk into the 'vital interests' processing conditions under the DPA 1998.

b) Breach of Confidence

Although the claimant had been owed a duty of confidence in respect of the information, this confidentiality was qualified. The referral forms made it clear that the charity would disclose confidential information to his GP if it had serious concerns about his welfare, and the claimant had completed the form and provided his GP's details. The HO had made the possibility of disclosing information to his GP clear at the start of the intake assessment and the claimant proceeded to discuss his personal circumstances. The HO had also later told the claimant that she would be contacting his GP and he had done nothing to prevent her doing this. Therefore, the claimant would not be able to make out a necessary element of this cause of action at trial.

The Court also rejected the claimant's argument regarding the construction of the referral forms. They were not to be read as contractual instruments and they indicated to the user that confidentiality might, in extreme circumstances, be broken if required to help the individual "stay safe". Individuals seeking the charity's assistance would know that a limited disclosure (to their GP) might take place in such circumstances, even if they did not agree or were not asked for consent. Even on the claimant's construction of the referral forms, if he had been asked for consent and declined, the charity would have been acting lawfully in making the disclosure to his GP.

c) Human Rights

Applying the authorities on the question of hybrid public authorities, the Court concluded that the charity was not a 'public authority' within the meaning of section 6 of the HRA 1998. The charity has no statutory powers, duties or functions, and is not in any way 'governmental': it is simply a charity that attracts public funding, in addition to funds from other sources, and the fact that it helps members of the public on health issues takes matters no further. Therefore, the claimant had no claim under the HRA 1998.

Commentary

This case highlights that, contrary to popular belief, not all dealings with personal information constitute the 'processing' of 'personal data' and fall under the data protection regime. The Court's reasoning went back to basics and looked at definitions in order to establish what is contemplated by, and afforded protection under, data protection legislation. Thus it is important, in data protection cases, not to forget the basics and to first establish whether the subject matter does, in fact, fall within the terms of the legislation.

However, the High Court's finding that "a verbal disclosure does not constitute the processing of personal data" should not be taken as a general proposition, but one that is limited to specific facts. The case appears to have been decided on the basis that the information provided by the claimant was not 'data' as it was not recorded in either electronic or manual form. Consequently, whether the information was 'personal data' or the oral disclosure constituted 'processing' did not fall to be, and was not, addressed. Therefore, the Court's finding should, perhaps, read '***the*** verbal disclosure did not constitute the processing of personal data'. Indeed, had notes been taken during the intake assessment (and it is surprising that they were, apparently, not) with the intention of creating or updating an internal record for the claimant, then it is likely that the information provided during the assessment would have been 'data' under the DPA 1998 – indeed, 'personal data' - and the oral disclosure may have constituted the 'processing' of 'personal data'. The claim would still have been struck out, however, as the disclosure would have been lawful under the Schedule 2 and 3 conditions.

The claim would also likely be struck out under the GDPR, albeit on slightly different reasoning. The information provided by the claimant would constitute 'personal data' under the GDPR (it does not provide an explicit definition of 'data' which 'personal data', as a subset, has to satisfy), and oral disclosures to GPs would constitute non-automated 'processing' of 'personal data'. The argument would concern the scope of the GDPR; specifically, whether such disclosures were "processing other than by automated means of personal data which form part of a filing system or are intended to form part of a filing system". The answer would turn on what was done with the self-referral form, and what was done or intended to be done with the information provided during the intake assessment. The judgment contains insufficient information to address this. However, even if no notes were taken during the intake assessment, if the intention was to create/update an internal record, and the disclosure was made to the GP prior to the record being created/updated, then arguably the oral disclosure falls within the scope of the GDPR. Therefore, purely oral disclosures of orally provided information can constitute the processing of personal data and may fall within the scope of the GDPR, but it will depend on the facts of the case. In the present case, if the oral disclosure did fall within the scope of the GDPR, it appears that there would be a lawful basis for it under Articles 6 (necessary in order to protect the vital interest of the data subject) and 9 (necessary for the provision of health or social care, or for reasons of substantial public interest). Therefore, whether based on scope or lawfulness of processing, the claim would likely be struck out under the GDPR.

Where non-consensual disclosures of personal data do not fall within the data protection regime, individuals may still find protection and remedial action under the common law duty of confidentiality. This covers a wider range of situations than the DPA1998 and GDPR, which are specific regimes covering specific types of information being dealt with in specific ways.

This case should also serve as a salutary reminder to read terms and conditions etc. to ensure awareness of what can, and may, be done with personal information/data.

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