



DATA BREACHES, VICARIOUS LIABILITY OF EMPLOYERS & THE IMPACT ON THE INSURANCE INDUSTRY

The recent judgment in the Morrisons case [*Various Claimants and WM Morrisons Supermarket PLC*](#) concerning the vicarious liability of employers for the actions of employees involved in breaches of data is potentially highly significant for the insurance industry – both for the insurer and the insured.

The group litigation claim which was brought against the supermarket chain arose from a situation where a rogue employee placed on the internet the personal and sensitive data of other employees he had gained access to when playing a part in auditing the payroll of the business. The rogue employee was subsequently convicted and received a substantial term of imprisonment for his criminal acts.

The basis of the claim against Morrisons was founded upon three causes of action – breach of statutory duty under the Data Protection Act 1998; misuse of confidential information and breach of confidence. It was asserted by the employees of the company that Morrisons was liable for the actions of their employee either directly and/or on a vicarious basis.

The High Court ruled that Morrisons were vicariously liable for the actions of their rogue employee on the basis of the “social justice” principle due in part to the connection and control that the employee had on behalf of his employer of the leaked sensitive data.

Whilst all cases in this field must be viewed on a fact specific basis, the potential impact of this ruling on employers is considerable as it extends their risk of exposure to liability for the actions of their employees when they have committed illegal acts without their knowledge.

Group action litigation involving thousands of claims brought against a company is not cheap to defend through the civil courts and also if not defended successfully, will lead to substantial payments of damages.

As a result, some tough economic questions are going to be asked by the insurance industry arising from the details of this judgment and how it inter-relates to the forthcoming implementation of the GDPR in May 2018.

Due to the potential level of exposure for the insurance industry in this field, I can foresee the possibility that if the insured parties are unable to ensure and demonstrate to their insurers satisfaction that they have undertaken extensive compliance with the existing data laws, the new GDPR and have ensured they have undertaken thorough cyber security procedures, then they run the risk that their insurers will void their policies for non compliance if regulatory or civil action is brought against them.

The impact on a company facing either regulatory action brought by the Information Commissioner's Office and/or the Financial Conduct Authority as well as group civil litigation for breaches of statutory or tortious duty arising out of data breaches, could be financially devastating for the body Corporate as well as for directors if they have failed in their fiduciary duties to their shareholders

In order to address and stop this scenario unfolding, I am of the opinion that employers will have to radically address their internal procedures, ensure they are

fully compliant in relation to data protection and have sufficient security measures in place to either prevent data breaches occurring either from rogue employees or by external third parties and further engage in a constructive and purposeful manner with their insurers to ensure they are fully protected and comply with the terms of their insurance policies.

Counter-balancing the work that needs to be addressed by employers is the fact that the insurance industry themselves may well view the judgment in the Morrisons case with some considerable concern due to its potential impact upon their profits.

It may well be that the insurance industry as a whole starts to review and revise their existing coverage in relation to data breaches being committed by their clients which will inevitably lead to more restrictive coverage being offered, increased premiums being required to be paid and some industries or companies having their coverage withdrawn or limited due to the perceived high risk nature of their business or the industrial sector they operate in.

Challenging times lie ahead for all those involved in the corporate and insurance world. The nature of risk and how it is to be assessed and quantified in the world of data has altered considerably. It will be interesting to see who can adapt and survive in this new world.

Ian Whitehurst, Six Pump Court Chambers, 31st December 2017

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