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Judgment: approved by the Court for handing down
(subject to editorial corrections)*

Delivered: **05/09/16**

IN THE COUNTY COURT FOR THE DIVISION OF ANTRIM

BY THE DISTRICT JUDGE

GK (a minor) by her father and next friend GK

Plaintiff

v

Paul Frew

Defendant

District Judge Gilpin

Introduction

[1] These proceedings come before the court by way of an Ordinary Civil Bill dated 9 March 2016 in which the minor Plaintiff seeks damages from the Defendant arising out of certain references made to the Plaintiff by the Defendant on Facebook. Ms Ellison BL appeared for the Plaintiff and Mr McHugh BL appeared for the Defendant. I am grateful to counsel for the manner in which they have dealt with this case throughout.

[2] Following issue of the Ordinary Civil Bill, on 14 March 2016 HHJ McColgan QC made, on an ex-parte basis, an injunction which inter alia provided that until further order of the court the Plaintiff be anonymised and furthermore that nothing should be published that would lead to her identification.

[3] The application for the injunction was grounded on an affidavit of the Plaintiff's father sworn on 10 March 2016 in which he claimed the Plaintiff was so fearful of the consequences if the Defendant sought to engage with her that the protection of the court was required. As a result the injunction the Learned Judge then granted included a prohibition, expressed in standard terms, on the Defendant restraining him from "molesting, harassing, assaulting, pestering, inconveniencing or otherwise interfering with the Plaintiff in any manner whatsoever." Remarkably just two days after the Learned Judge had granted the injunction the Plaintiff, despite claiming to be fearful of the Defendant engaging with her, issued a request

to him to befriend her on Facebook. The Defendant did not accept her request and would appear at all material times to have abided by the terms of the injunction.

[4] In opening the substantive case for the Plaintiff Ms Ellison indicated that the Plaintiff had not served any medical evidence to support a claim for personal injuries and did not intend to pursue such a claim. Rather she indicated the Plaintiff intended to confine her claim for damages for breach of the statutory tort of harassment under the Protection from Harassment (NI) Order 1997 and for the common law tort of the misuse of private information. However instead of seeking damages for misuse of private information the civil bill had claimed that the Defendant had breached the Plaintiff's privacy. Therefore at the hearing of this matter Ms Ellison sought to amend the privacy claim to one of misuse of private information. Mr McHugh did not object to such an amendment and I acceded to it.

The Parties

The Plaintiff

[5] In February 2016 the Plaintiff was then 14 years of age and lived in the village of Broughshane, County Antrim. She attended school nearby in the town of Ballymena. In the course of these proceedings she gave oral evidence and was cross-examined. She appeared to me to be an intelligent, confident, mature and articulate young woman.

[6] The Plaintiff could not recall if she had ever met the Defendant but was aware he was of good reputation known for helping young people in his constituency.

[7] Before the issues giving rise to these proceedings occurred the Plaintiff had been aware that the Defendant had a Facebook page and had made a successful request to follow him on Facebook. She gave evidence that this allowed her to be notified on her News Feed of any posts the Defendant might make that may have been of interest to her.

The Defendant

[8] The Defendant is the Member of the Legislative Assembly for the North Antrim constituency which comprises the village in which the Plaintiff resides. At present he is chair of the Assembly's Justice Committee.

[9] Previously the Defendant had worked as an electrician and served in various public offices including as a local councillor.

[10] He gave evidence of the nature and extent of his constituency work including his involvement with community groups, the police and constituents. The Defendant has a Facebook page with some 1682 'friends' who are able to follow the Defendant's posts and to make comment thereon.

Background

[11] Inspector Scott, the Neighbourhood Policing Team Inspector, gave evidence that from in or around Halloween of 2015 the police had been aware of concerns the residents of both Broughshane and the nearby Harryville area of Ballymena had about anti-social behaviour.

[12] It would appear that it is not uncommon at Halloween for fireworks to be used to cause annoyance and disturbance but the usual pattern would have seen such activity peter out as the Christmas season approached.

[13] However in 2015 for reasons which do not appear clear rather than such behaviour petering out both in Broughshane and Harryville it escalated. Over time the incidents in fact took a more sinister turn with eggs, stones and ball-bearings being thrown at people and property, takeaway food being smeared on houses and property being otherwise damaged.

[14] The Defendant's evidence was that he was aware of the escalation in anti-social behaviour. He said that on occasions he witnessed groups of up to thirty young people both boys and girls aged between twelve and seventeen engaging in anti-social behaviour.

[15] On one occasion his own son had to hide from such a crowd in a church graveyard. When the Defendant had gone out into Broughshane to find him he had overheard a crowd of young people discussing buying eggs and using them to carry out an attack.

[16] The Defendant said that as a result of this anti-social behaviour he was being contacted by various constituents who had been left fearful and frustrated. He said that while some constituents contacted him about this behaviour before they reported it to the police others only reported it to him. The Defendant indicated that when evidence of anti-social behaviour was made known to him he reported this to the police.

[17] The Defendant was concerned about the effects of the escalating anti-social behaviour both on the victims, as they were subjected to attack, and the young perpetrators, whose actions might result in them having a criminal record.

[18] Ronald McMurray of the Harryville Partnership gave evidence of attempts made to address anti-social behaviour including through what he described as diversionary activities. He highlighted the inception of late night football and the successful representations the Defendant had made in obtaining funding for it.

[19] On 28 January 2016 the Defendant attended a meeting at the offices of the Harryville Partnership to discuss what might be done about the ongoing anti-social

behaviour. The police were present at this meeting along with various community representatives.

[20] It would appear that one of the strategies that the Defendant deployed was one of prevention. He sought to engage directly with young persons who might be involved in anti-social behaviour including meeting with them to highlight the effects of such behaviour and the potential consequences for them if their behaviour was criminal in nature. The Defendant recalled in the early weeks of 2016 he may have met in such circumstances with between fifteen and twenty young people.

[21] Mr McMurray gave evidence of being present at one such meeting at which the Defendant met with a young person and their social worker.

[22] As well as engaging in preventative measures the Defendant also sought to assist the police in their detection of crime. His intention to do so can be seen from posts on his Facebook page e.g. on 15 February 2016 at 9.34pm in an online discussion about how the anti-social behaviour was being addressed he posted "All info given to the police…" Inspector Scott gave evidence that as far as she was aware all relevant matters which the Defendant was aware of were passed by him to the police. Ms Ellison correctly pointed out in her written submissions that in relation to the events of 15 February 2016 which I will turn to presently, these were not in fact made known to the police by the Defendant until 29 February.

[23] On 25 February 2016 and then on 2 March 2016 the Defendant convened public meetings in Broughshane attended by both local residents and the police. Inspector Scott asked the Defendant to organise a further meeting in early April with a view to setting up a neighbourhood watch scheme. Inspector Scott described the Defendant as being immensely helpful to the police.

[24] One of the actions the police decided to take in response to the escalation in anti-social behaviour was to issue letters to some parents of specific young people. These letters, in standard form, sought to inform the parents that their children's names had been drawn to the attention of the police in the context of anti-social behaviour and that while no criminal offence was being investigated, the parents were invited to contact the police to discuss these issues if they wanted to do so. The Plaintiff's father was sent one such letter in relation to her presence in Fir Park, Broughshane on 15 February 2016 when allegations of her involvement in anti-social behaviour had been made.

[25] It would appear that from in or about March 2016 the incidents of anti-social behaviour tailed off to a significant degree.

The Facebook exchanges

[26] The Plaintiff indicated that from Halloween 2015 on she was aware that anti-social behaviour had been a problem in the area.

[27] When cross-examined by Mr McHugh the Plaintiff denied that she ever engaged in such activity but crucially she did accept that on a number of occasions she had been present when others engaged in it. She estimated that before the events of 15 February 2016 she would have been present on more than one such occasion but less than ten times.

[28] She could not recall if she had ever reported witnessing others engaging in anti-social behaviour to the authorities. She declined, when invited to do so by Mr McHugh, to provide the names of those she had witnessed engaging in anti-social behaviour.

[29] On the evening of 15 February 2016 the Plaintiff, who was then fourteen, was out in Broughshane. She had walked along Fir Park and made her way to a chip shop in the presence of another girl. When she returned back along Fir Park the two girls had been joined by two boys. While in Fir Park the Plaintiff recalled that three residents sought to engage with them. The Plaintiff was able to recall that one of the boys in her company argued with the residents. The Plaintiff denied swearing at the residents and suggested she took no part in the exchanges. She did not recall any of her companions threatening to set fire to a resident's house. She did not recall seeing anyone smear take away food on the windows of a property although she accepted that one of the boys she met admitted to her he had been involved in anti-social behaviour that evening. She claimed that one of her companions was assaulted by a resident.

[30] The Plaintiff's recollection was that by 11pm she had returned home.

<u>The first Facebook exchange</u>

[31] When at home the Plaintiff said she took the opportunity to view the Defendant's Facebook page. The Plaintiff noted that the Defendant and a number of other people were posting comments about anti-social behaviour in Broughshane.

[32] It is unfortunate that some of the social media evidence put before the court, including from the Defendant's Facebook page and indeed in the other various social media forums which I will turn to later, appear to be less than complete and somewhat disorganised. By way of example, on page 47 of the trial bundle after the Plaintiff posts a comment there would appear to be 14 replies which were made but which were not made accessible to the court. This makes the court's task of correctly understanding the exchanges on social media extremely difficult. It has proved to be akin to being asked to piece together a jigsaw puzzle only to find at the end some of the pieces seem to be missing. When eventually what material there is before the court is collated the factual background they reveal can properly be described as convoluted.

[33] However doing the best with the material before the court it would appear that the first comment the Plaintiff included in the papers before the court was one posted by the Defendant when he posted at 21:01,

> *"3 Dwelling's attacked in Broughshane again tonight. Have met with police again for the third time in as many weeks. People living in fear."*

[34] Thereafter numerous people posted comments on this page some directed to the specifics of what had occurred in Broughshane that evening while others were more general in nature.

[35] A number of these comments, although none by the Defendant, were unpleasant as people vented their frustration about the prevalence of anti-social behaviour and suggested how they would address it. Some of these proposed solutions were extreme and disturbing and are to be condemned.

[36] On reading the posts on the Defendant's Facebook page the Plaintiff believed she was aware of the identity of a young person who some of the posts were implicating in the anti-social behaviour.

[37] At 00:10, by now on 16 February, the Plaintiff 'tagged' i.e. created a link on the Defendant's Facebook page to this young person in an attempt to allow him to see what was being posted on the page. In so tagging this young person the Plaintiff brought herself to the attention of those posting comments on the page in that both her name and a picture of her now appeared on the Defendant's Facebook page in the midst of the ongoing discussion about anti-social behaviour.

[38] Thereafter some members of the Defendant's Facebook page posted questions to the Plaintiff two of which she chose to answer.

At 00:12 a person posted,

"Are you tagging this person as they are involved G? If so thanks for naming and shaming"

The Plaintiff answered this question at 00:16 when she posted,

"no I tagged him cause I know Paul is aiming it at him Chris wasn't even out tonight"

To this at 00:20 someone posted,

> *"Why would you assume such a thing?"*

And then at 00:23 a person posted,

> *"Where does it say his name till u popped it up????"*

Although the precise time is not clear it would then appear a further comment was then posted,

"Not really? Just because your commenting doesn't mean you didn't do it at all, you commented on tagging this chris [surname inserted] and tried to say you knew that was aimed at him so theres clearly a reason why you thought this was about him in the first place"

The Plaintiff then replied,

"Well if I was anything to do with it I wouldn't of been commenting on it and yeah because nathen said the ringleader from fir park that's why I tagged him"

Someone then posted,

"G the best thing you could do is stay clear of them all and that way you won't get blamed for anything, when you're there you're guilty by association. And I'm pretty sure ur mum and dad wouldn't want you in amongst that"

Finally at 00:25 a person posted,

"GK, does that mean YOU were there since you have this evidence??"

The Defendant also posted two messages to the Plaintiff.

Firstly at 00:24 he posted,

*"Aiming this at no-one **G**! No names have been mentioned on this post. Happy to meet you to discuss what you saw tonight and who were responsible for the attacks on the houses tonight."*

Shortly thereafter at 00:28 he also posted,

"G Can also accompany you to show you the devastation that their action is causing to local families in the area. Maybe you can talk some sense into the culprits to get them to stop?"

<u>The first Messenger exchange</u>

[39] In response to these two posts of the Defendant the Plaintiff initiated contact with him. She chose to do so not on his Facebook page where all who had access to it could see what she wanted to say but rather, by way of Facebook's Messenger facility which restricted sight of the exchanges only to the Plaintiff and the Defendant.

[40] This conversation, initiated by Plaintiff, began at 00:57. In this conversation the Plaintiff asked the Defendant to accept the young person the Plaintiff had earlier

tagged as a Facebook Friend to allow him to see what was being posted. The Defendant cautioned the Plaintiff about implicating the other young person. When the Plaintiff then indicated the other young person wanted to talk with the Defendant he indicated he was prepared to meet with him.

[41] In the course of these exchanges the Plaintiff alleged that she had been present in Broughshane earlier that evening when a male resident had "hit my mate." She claimed all she and her friends had been doing was walking to and from the shop and listening to music.

This conversation finished at 01:23.

The second Facebook exchange

[42] The next mention of the Plaintiff on the Defendant's Facebook page occurred at 08:33 on 16 February 2016 when an individual posted,

"I think since GK knows all about it, the police should be knocking on her door for a statement ??? Or would that be too fxxxxx easy for them to think of?"

Later that morning at 10:13 the Defendant then posted on his Facebook page,

"GK since you have taken part in this conversation I am happy to give you the opportunity to counter claims and information that i and others have been giving that that you and another girl who i will be speaking with soon were involved in an incident in Harryville…"

The Defendant then cut and pasted the allegation that had been sent to him that he was referring to namely,

"Paul FYI in early Jan 2016 on a Sunday nite in Harryville my door was kicked off the hinges. I gave chase on the boys and girls involved. Two girls got confused in the back streets and lost the local lads. I caught them and they were from Broughshane. GK and ---------- . I have list off culprit in both areas as they travel in and out for ABS. I can send you it?"

The Defendant then concluded his post by saying,

"I have that list and other information of further serious incidents that have happened in Broughshane and Harryville, all information will be given to the Police."

The Plaintiff did not make any response to this post.

The Broughshane Residents Facebook page

[43] The second Facebook page at play in these proceedings is one used by some of the residents of the Broughshane ("the Broughshane Residents Facebook page").

Like the Defendant's page only those with the permission of the page administrator can view it. There were forty one people with permission to view this page.

[44] The Plaintiff's father gave evidence that on 18 February 2016 he was informed by a friend that the Plaintiff's name had been mentioned on this page in connection with anti-social behaviour.

[45] It is again unfortunate that the messages taken from the Residents Association page and put before the court were in the form of partial screenshots making the task of correctly understanding them difficult. Doing my best given the quality of the material before me it would appear that on this site:-

i. The Defendant again set out the account of the incident in Harryville that had been sent to him by a Harryville resident namely

"Paul FYI in early Jan 2016 on a Sunday nite in Harryville my door was kicked off the hinges. I gave chase on the boys and girls involved. Two girls got confused in the back streets and lost the local lads. I caught them and they were from Broughshane. GK and - ---------- . I have list off culprit in both areas as they travel in and out for ABS. I can send you it?"

ii. Set out in list form a number of names and some locations including that of the Plaintiff that the Defendant says had been sent to him

"A list compiled from friends in Harryville …….. GK Broughshane…. There are other from Cullybackey, Ant…"

<u>The second Messenger exchange</u>

[46] By 18 February the Plaintiff was aware that a resident of Harryville had alleged she had been present in Harryville in January when an incident of anti-social behaviour had occurred.

[47] At 12:37 on 18 February the Plaintiff again initiated contact with the Defendant using the Messenger facility and asked him to provide further details of the January incident in Harryville.

[48] The Defendant indicated in reply he would be passing on all information to the police but was affording the Plaintiff the opportunity to tell her side of the story given the number of people who were aware of what was being said about her presence in Harryville.

[49] In response the Plaintiff in a message, sent at 12:56, denying ever being present when a door was kicked in but accepted she did go to Harryville to see her friends. She then asked the Defendant to disclose to her the name of the girl she

"was with because I really can't remember this…."

In response the Defendant did name one other girl and wrote,

"Same names keep cropping up G"

The Plaintiff sought to find out who the Defendant was referring to and wrote

"Like who?
??"

Without the Defendant replying it would seem the Plaintiff next wrote at 16:05 and said,

"Look I know the two girls that were in harryville that night but they were there but it wasn't them that did it im not saying there names Cause I'm not getting myself in bother with them and one of them is always mistakn for looking like me but I can tell u rn that it wasn't me Paul."

This exchange then ends when the Defendant says in response,

"No one suggested the girls in question or you kicked the door in. The problem you have G is that it is your name being mentioned as being there when it happened and being in the company of people who did the act. So if you were not there why did some one else use your name? And how do you feel about that because you could find yourself in very serious trouble."

The distress the Plaintiff alleges

[50] The Plaintiff alleges that as a result of the Defendant :-

i. Posting on both his own Facebook page and on the Broughshane Residents page the allegation made by a resident of Harryville that she had been present in Harryville in January when a door had been kicked in;

ii. Posting on the Broughshane Residents page, in the context of a discussion about anti-social behaviour, the Plaintiff's name and home village; and

iii. Not deleting promptly some of the comments made by others on his Facebook page until after receipt of a letter before action dated 26 February 2016;

she was upset and annoyed to the extent she felt "branded." She said that people walking along the street and driving by in their cars threw dirty looks at her with the result her father now collected her when she got off the school bus and drove her home.

[51] Under cross-examination she accepted no one had ever actually directly challenged her and that one reason some people may be acting towards her as she described was because she did hang around with others who did on occasions engage in anti-social behaviour.

The Plaintiff's harassment claim

[52] The Protection from Harassment (NI) Order 1997 ("the 1997 Order") provides both criminal and civil remedies for someone who is subjected to harassment.

Harassment is prohibited by Article 3 of the 1997 Order

> "3. - (1) A person shall not pursue a course of conduct-
> (a) which amounts to harassment of another; and
> (b) which he knows or ought to know amounts to harassment of the other."

Article 5 establishes civil liability.

> "5. - (1) An actual or apprehended breach of Article 3 may be the subject of a claim in civil proceedings by the person who is or may be the victim of the course of conduct in question.
> (2) On such a claim, damages may be awarded for (among other things) any anxiety caused by the harassment and any financial loss resulting from the harassment."

There is no definition of harassment in the 1997 Order.

[53] In Dowson v Chief Constable of Northumbria Police [2010] EWHC 261, Simon J when considering the equivalent legislation that pertains in England and Wales, set out the elements which must be established to find liability for harassment.

[54] These are summarised by Tugendhat and Christie in Privacy Law and the Media at para 6.06 as

i. There must be conduct which occurs on at least two occasions,
ii. Which is targeted at the claimant [although the Court of Appeal has since held that conduct merely needs to have been targeted at an individual (see Levi v Bates (2015) EWCA Civ 206
iii. Which is calculated in an objective sense to cause alarm or distress, and
iv. Which is objectively judged to be oppressive and unacceptable.
v. What is oppressive and unacceptable may depend on the social or working context in which the conduct occurs.
vi. A line is to be drawn between conduct which is unattractive and unreasonable, and conduct which has been described in various ways:

'torment' of the victim, 'of an order which would sustain criminal liability'.

[55] In Majrowski v Guy's and St Thomas's NHS Trust [2007] 1 AC 224. Lord Nicholls dealt with the nature of the required conduct:

> "Courts are well able to separate the wheat from the chaff at an early stage of the proceedings. They should be astute to do so…Where ... the quality of the conduct said to constitute harassment is being examined, courts will have in mind that irritations, annoyances, even a measure of upset, arise at times in everybody's day-to-day dealings with other people. Courts are well able to recognise the boundary between conduct which is unattractive, even unreasonable, and conduct which is oppressive and unacceptable. To cross the boundary from the regrettable to the unacceptable the gravity of the misconduct must be of an order which would sustain criminal liability."

[56] Following Majrowski on a number of occasions the Court of Appeal revisited the issue of when the conduct complained of has crossed over the boundary from the regretable to the unacceptable. (Conn v The Council of the City of Sunderland [2007] EWCA Civ; Allen v London Borough of Southwark [2008] EWCA Civ 1478, [2008] All ER (D) 113; Ferguson v British Gas Trading Ltd [2009] EWCA Civ 46, [2009] All ER (D) 80 and Veakins v Kier Islington (2009) EWCA Civ 1288)

[57] These cases shed further light on the relationship between civil and criminal liability under 1997 Order.

[58] In Veakins Maurice Kay LJ said

> *"The primary focus is on whether the conduct is oppressive and unacceptable, albeit the court must keep in mind that it must be of an order which "would sustain criminal liability"."*

[59] It is a matter of judgment on the facts whether the impugned conduct in the instant case constitutes harassment within the meaning of the Order. In relation to her harassment claim the Plaintiff argues all of the matters referred to above as causing her distress are in play.

[60] I have come to the view that the impugned conduct does not constitute conduct of such seriousness that an actionable remedy can be provided. Some of the comments made by others on the Defendant's Facebook page while undoubtedly unpleasant and unattractive in nature were neither targeted at the Plaintiff nor any other individual. No-one is named by any of those posting messages nor in my view could otherwise have been identified. Furthermore having read some of them they did not deter the Plaintiff from making her presence known to others by first tagging a friend and then engaging in exchanges with others.

[61] In addition the post made by the Defendant on his own Facebook page when he relayed an allegation that had been made to him about the Plaintiff's involvement in an incident in Harryville in January was made in the context of the Plaintiff having already voluntarily exchanged messages with others on this site about anti-social behaviour. The content of this post amounted to no more than making it known to the Plaintiff what was being said about her involvement in one episode and affording her the opportunity to respond.

[62] The Defendant repeated this allegation on the Broughshane Residents page, to which the Plaintiff did not have access, and in addition listed her name there along with others. I have already expressed my dissatisfaction at the quality of the evidence that has been put before the court in relation to postings. The messages which I have scrutinised at pages 101 and 102 of the trial bundle are truncated, partial and devoid of context. In the absence of the full context in which these posts appear on this page I am unable to conclude they are to be considered as oppressive and unacceptable. The full context might well show them to have been posted entirely reasonably or perhaps even unreasonably but on the evidence the Plaintiff has put before me I cannot conclude, as I am required to do, that they were oppressive and unacceptable.

[63] As Lord Steyn commented in ex parte Daly (2001) 1 WLR 2099

> *"In law context is everything."*

Defence to harassment

[64] If I am wrong in reaching the conclusion that the Defendant did not harass the Plaintiff I would nevertheless have dismissed the Plaintiff's claim as far as it relates to the impugned posts made by the Defendant by reason of the defence open to the Defendant in Article 3(3)(a) of the 1997 Order.

[65] Article 3(3)(a) of the 1997 Order provides

> *(3) Paragraph (1) does not apply to a course of conduct if the person who pursued it shows –*
> *(a) that it was pursued for the purpose of preventing or detecting crime;*

[66] In the Hayes v Willoughby [2013] UKSC 17, Lord Sumption stated, at [15]:

> *"Before an alleged harasser can be said to have had the purpose of preventing or detecting crime, he must have sufficiently applied his mind to the matter. He must have thought rationally about the material suggesting the possibility of criminality and formed the view that the conduct said to constitute harassment was appropriate for the purpose of preventing or detecting it. If he has done these things, then he has the relevant purpose. The court will not test his conclusions by reference to the view which a hypothetical reasonable man in his position would have formed. If, on the*

other hand, he has not engaged in these minimum mental processes necessary to acquire the relevant state of mind, but proceeds anyway on the footing that he is acting to prevent or detect crime, then he acts irrationally…. The effect of applying a test of rationality to the question of purpose is to enable the court to apply to private persons a test which would in any event apply to public authorities engaged in the prevention or detection of crime as a matter of public law. It is not a demanding test, and it is hard to imagine that Parliament can have intended anything less."

[67] Having considered all of the evidence I am satisfied in the instant case the Defendant acted throughout in good faith in making considerable attempts to address the issue of anti-social behaviour in certain areas of his constituency.

[68] One of the strategies deployed by him in conjunction with the police and other community representatives for the benefit of young people was one of prevention namely to identify those who may be involved or might become involved in such behaviour and having done so to then engage directly with them with a view to preventing further episodes occurring. This benefitted not only those young people but also the residents of the areas in question.

[69] I am also satisfied on the evidence before me that the Defendant assisted in the detection of criminality by passing relevant information to the police. Inspector Scott's evidence was that he had done so.

[70] The twofold strategy adopted by the Defendant was known to the police who were supportive of it and furthermore according to the evidence it was effective.

[71] I am therefore satisfied that the Defendant had thought rationally about the impugned posts and had formed the view that to publish them as he did was for the permissible purpose namely to prevent and to detect crime.

The Plaintiff's misuse of private information claim

[72] While in this jurisdiction there is no generalised tort of invasion of privacy the tort of misuse of private information has developed to embody the values enshrined in Article 8 (Right to Respect for Private and Family Life) and Article 10 (Freedom of Expression) of the European Convention on Human Rights.

[73] The tort of misuse of private information makes it unlawful to disclose private information about a person without lawful authority to do so.

[74] Tugendhat and Christie on Privacy Law and the Media set out at 5.14 the two essential elements of the misuse of private information

"a cause of action for misuse of private information will exist whenever:

(a) the particular information at issue engages Article 8 by being within the scope of the claimant's private or family life, home or correspondence; and;

(b) the conduct or threatened conduct of the defendant is such that, upon a proportionality analysis of the competing rights under Article 8 and 10, it is determined that it is necessary for freedom of expression to give way."

[75] In relation to the first limb of the test, the touchstone of when information is to be considered as private is whether the person concerned has a reasonable expectation of privacy

[76] In Campbell v MGN (2004) 2AC 457) Lord Nicholls of Birkenhead warned,

"…..in deciding what was the ambit of an individual's "private life" in particular circumstances courts need to be on guard against using as a touchstone a test which brings into account considerations which should more properly be considered at the later stage of proportionality. Essentially the touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy." (Emphasis added)

[77] In Murray v Express Newspapers plc (2009) 2 AC 457 Sir Anthony Clarke MR said when discussing whether there is a reasonable expectation of privacy,

"As we see it, the question whether there is a reasonable expectation of privacy is a broad one, which takes account of all the circumstances of the case. They include the attributes of the Claimant, the nature of the activity in which the Claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the Claimant and the circumstances in which and the purposes for which the information came into the hands of the publisher."

[78] In relation to her misuse of private information claim the Plaintiff argues that the allegation made by an unnamed person that the Defendant posted on both his own Facebook page and on the Broughshane Residents page amount to misuse of her private information.

The circumstances of the case

[79] I have kept in mind that although the Plaintiff is a minor this of itself is not a reason for departing from the test of whether there was a reasonable expectation of privacy. However it is a potentially relevant factor in its application. At the material time the Plaintiff was 14 years old. As she gave her evidence in court I formed the view that she is an intelligent, confident, mature and articulate young woman. In my view at the material time applicable in this case, namely in February of this year, she had a sufficient appreciation of the concept of privacy.

[80] In Re JR 38's Application for Judicial Review (NI) 2015 UKSC the Supreme Court had to consider whether Article 8 was engaged in the case of a child, also aged 14, who was suspected of involvement in rioting. CCTV images of the child at a riot were published by the PSNI in two newspapers as part of an attempt to identify those involved in rioting and to deter such behavior occurring in the future. The majority of the Justices held that Article 8 was not engaged, since there was no reasonable expectation of privacy which was the sole, objective criterion.

[81] In his majority judgment Lord Toulson said

> *"… it is necessary to focus both on the circumstances and on the underlying values or collection of values art 8 is designed to protect."*

[82] While the instant case is not on all fours with the facts identified in JR38 important similarities exist at least in as far as the public setting the Plaintiffs in each case were present at and the general nature of the activity that was going on when they were there. In the instant case the context in which the Defendant made the impugned posts was one of anti-social behaviour being occasioned by young people in public view within his constituency. Some of this conduct was in all likelihood criminal in nature. The Plaintiff accepted in her evidence to this court that on occasions she was present with these young people when they carried out such acts in public places. When the Plaintiff allowed herself to be present on a number of occasions in such public settings with others carrying out such acts she cannot claim to enjoy an expectation of privacy in relation to postings about it. Such activities by the Plaintiff are not the values Article 8 is in place to protect.

[83] It is also of importance to take into account the nature of what the Defendant actually did in the impugned posts. The Defendant did not himself make an allegation against the Plaintiff. Rather he only repeated an allegation that someone else had made to him and afforded the Plaintiff the opportunity to respond to it.

[84] The Defendant made it clear both in the impugned post on his Facebook page and also during the second Messenger exchange that his purpose in posting the allegation was to allow the Plaintiff to "explain or at least tell us your side of [the] story" since according to the Defendant the allegation had been made not only to him but to others. Such a purpose is a further factor this court takes into account.

[85] Prior to the Defendant posting the impugned posts the Plaintiff had voluntarily chosen to involve herself in the conversation on the Defendant's Facebook page about the anti-social behaviour that had been occurring in the area including tagging the name of one person who she considered was being accused by others of being a ringleader and commenting that she knew this person could not have been involved in the incident in Fir Park on 15 February. Furthermore she initiated an exchange with the Defendant on Messenger including giving details of her presence at certain events in Fir Park on the evening of 15 February. In my view such posting by the Plaintiff is such as to indicate inferred consent being given by

her to taking part in online discussions about anti-social behaviour in the area. The Defendant clearly had also formed this view since in his introductory comments in the first impugned post the Defendant began with the words

> *"GK since you have taken part in this conversation….."*

[86] The Defendant claimed both in the first impugned post and in the second Messenger exchange that in relation to the incident in Harryville in January that the allegation had been made both to himself and to others. Indeed in the second Messenger exchange he referred to it being "in the hands of a large number of people." On the evidence before me I accept this as being true. As such it is questionable if the postings made by the Defendant significantly affected the position of the Plaintiff given others already knew of the allegation concerning her presence in Harryville in January.

[87] Having considered all the circumstances of this case I have come to the view that the Plaintiff has failed to establish that she enjoys on an objective basis a reasonable expectation of privacy.

[88] In light of my decision is respect of the first limb of the test it is not necessary to reach a finding on the second namely the proportionality exercise of the competing rights under Article 8 and 10 of the Convention.

Disposal

[89] For the reasons outlined in this judgment the Plaintiff has failed to establish liability against the Defendant and her claim against him will therefore be dismissed.