

Neutral Citation No. [2013] NIQB 25

Ref: MCCL8800

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

Delivered: 01/03/13

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

**BETWEEN:**

**HL (A MINOR)  
BY HER FATHER AND NEXT FRIEND, AL**

**Plaintiff:**

**and**

**FACEBOOK INCORPORATED, FACEBOOK IRELAND LIMITED, THE  
NORTHERN HEALTH AND SOCIAL CARE TRUST, DEPARTMENT OF  
JUSTICE FOR NORTHERN IRELAND, DEPARTMENT OF HEALTH AND  
SOCIAL SERVICES AND PUBLIC SAFETY FOR NORTHERN IRELAND, THE  
HOME OFFICE, DEPARTMENT OF CULTURE, MEDIA AND SPORT,  
ATTORNEY GENERAL FOR NORTHERN IRELAND, ADVOCATE GENERAL  
FOR NORTHERN IRELAND AND ATTORNEY GENERAL FOR ENGLAND  
AND WALES**

**Defendants:**

**McCLOSKEY J**

**INTRODUCTION**

[1] Before turning to the application which this judgment determines, it is necessary to outline the proceedings themselves.

[2] By Writ of Summons issued on 5<sup>th</sup> September 2011 the Plaintiff, suing in anonymised form by her father and next friend, sues the ten Defendants identified

above. The first two Defendants, Facebook Incorporated and Facebook Ireland Limited, are essentially a single entity and I shall describe them as "Facebook". The remaining eight Defendants are public authorities of various kinds. At this juncture, all have entered Appearances to the Writ. The next scheduled hearing in this litigation will determine applications brought by several of the Defendants for Orders striking out the proceedings against them on the ground that no reasonable cause of action is disclosed.

[3] There has been much delay in these proceedings to date, which is highly undesirable *per se*, particularly in the case of a minor litigant. Whereas the Writ was issued some 18 months ago, the application which brings this matter before the Court at this stage postdates the Writ by some 16 months. I note that there has been a change of solicitors and, further, that the Plaintiff has been a legally assisted person since 14<sup>th</sup> December 2012. The question of whether the serious delay in prosecuting this case will bear on the Court's resolution of the present application will be considered *infra*.

[4] The Court has made three previous Orders in these proceedings. First, on 4<sup>th</sup> September 2011 (the day prior to issue of the Writ) an Order was made authorising the Plaintiff to bring proceedings by the anonymised cipher "HL". It is timely to observe again that the mechanism of anonymising any litigant requires a specific application to the Court before or at the commencement of proceedings. The second Order was made by the Master on 9<sup>th</sup> September 2011, requiring the third named Defendant ("*the Trust*") to make discovery of certain documents. Thirdly, on 10<sup>th</sup> November 2011, an Order was made requiring Facebook to make discovery of all documents within its power relating to the Plaintiff's Facebook account.

### **The Writ**

[5] In the moderately lengthy indorsement, it is stated that the Plaintiff, who is aged 12 years, has been engaged in posting and/or uploading sexually suggestive and/or inappropriate photographic images of herself, together with self-orientated literary content, on the Facebook social network website. It is suggested that she has been doing so vis-à-vis several different accounts with differing profile names. Both the Plaintiff and the school which she attends are readily identifiable. She belongs to a group with membership of some 63,000 persons who engage in this conduct. Her postings on Facebook have included content, and stimulated responses and contributions, of an overtly sexual nature, apparently emanating from male persons. It is pleaded that the Plaintiff is at risk of being targeted and/or groomed by paedophiles.

[6] The Plaintiff is described as a particularly vulnerable young lady who is beyond parental control. She is the subject of an Interim Care Order. During the past two years she has continually absconded and has been found in circumstances where she has been consuming alcohol or drugs in older male company. She has

also committed offences and has attempted suicide. From July 2012 to January 2013 she was the subject of a Secure Accommodation Order. She currently resides in a specialised unit, which appears to be a grade below secure accommodation. Her care plan requires all relevant agencies to actively prevent her from absconding or accessing mobile phones or the internet. This has been infringed on occasions.

[7] The gravamen of the Plaintiff's case against Facebook is that it has failed to prevent access by her to this social network site. It is alleged that Facebook, while aware of the extreme risks to children such as this Plaintiff, has failed to require age and identity verification or express parental consent as a precondition to the registration of an account by children. While it is acknowledged that there is a monitoring system, this is condemned as inadequate. The pleading contains the following passage:

*"Facebook is content to request its members to tender credit cards for password verification and purchase of Facebook credits. It has further called upon members to verify their identity by way of birth certificate for formal government identification in certain instances. It is submitted that these identifying checks, alongside express parental consent, can and should be made a pre-requisite to membership."*

In a classic rolled up pleading, the causes of action which the Plaintiff invokes in her claim against Facebook are negligence; acting in breach of her rights under Articles 2, 3 and 8 ECHR; the tort of misuse of private information; breach of confidence; breach of the Data Protection Act 1998; breach of the Harassment (NI) Order 1997; and *"breach of the laws and treaties of the European Union/ European Community and in breach of international laws, norms and guidance"*. The pleading ends with the following flourish:

*"Furthermore, the first and second named Defendants have caused and/or facilitated, or risk the causation or facilitation of, the commission of criminal offences by third parties."*

[8] As regards the Trust, essentially the same causes of action are invoked, with the addition of unparticularised references to the Children (NI) Order 1995 and the Safeguarding of Vulnerable Groups Act 2006. The next four Defendants consist of three Departments of Government of Northern Ireland and the 'Home Office'. The relevant pleading seems to recite that the Plaintiff's main cause of action against these Defendants is a human rights claim [which, as such, would be based on the regime established by sections 6 to 8 of the Human Rights Act 1998], asserting infringements of the Convention Rights listed above. It is pleaded that these Defendants –

*"Have failed to provide adequate means of protection of the rights of the Plaintiff under the ECHR inter alia by failing to properly regulate and/or enforce existing regulation in respect of the breaches of [Facebook]..... [and] ..... have breached the laws and treaties of the European Union/European Communities."*

The 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Defendants are, respectively, the Attorney General for Northern Ireland, the Advocate General for Northern Ireland and the Attorney General for England and Wales. As regards these three Defendants, the pleading recites that the Plaintiff:

*“..... joins the 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Defendants to represent the State and all government departments having duties to the Plaintiff under the Human Rights Act 1998 and the laws and treaties of the European Union/European Communities.”*

At this juncture, no Statement of Claim has been served. A supplementary pleading was prepared at the request of the Court, in an attempt to bring a degree of definition and clarity to what is in truth something of a blizzard.

### **The present application**

[10] By this application the Plaintiff seeks an interim injunctive order against Facebook only. This application does not involve any of the other Defendants. The relief sought is formulated in the following terms:

- (a) An interim injunction restraining Facebook from publishing, distributing, broadcasting or transmitting any information relating to the Plaintiff.
- (b) Further, or alternatively, a mandatory injunction requiring Facebook to *“take all necessary steps”* to prevent the Plaintiff from accessing Facebook.com.
- (c) Further, or alternatively, an interim injunction requiring Facebook *“to take all necessary steps”* to prevent the Plaintiff from posting, publishing, distributing, broadcasting or transmitting any information relating to her on Facebook.com.
- (d) Further, or in the alternative, an interim injunction requiring Facebook *“to undertake steps”* to ensure that the age and identity of **all members or users** of Facebook.com within this jurisdiction, including the Plaintiff, are verified in advance of permitting access to the site.

[11] The supporting evidence includes a series of Orders made in respect of the Plaintiff in the Family Proceedings Court. The period to which the relevant applications and orders belong is June 2012 to January 2013. In brief compass:

- (a) On 11<sup>th</sup> June 2012, the Plaintiff was placed in the care of the Trust for a finite period.

- (b) On 25<sup>th</sup> June 2012, a Parental Responsibility Order was made in respect of the Plaintiff's father.
- (c) By successive orders, commencing on 4<sup>th</sup> July 2012, the Trust was required to keep the Plaintiff in secure accommodation until, ultimately, 1<sup>st</sup> January 2013. By a series of Interim Care Orders, made periodically, the Plaintiff remains in the care of the Trust, at present until 1<sup>st</sup> March 2013.

[12] The affidavit sworn by the Plaintiff's father contains, *inter alia*, a detailed assessment of the various Facebook accounts which the Plaintiff has opened from time to time. This evidence may be summarised thus:

- (a) The Social Services have been involved with the Plaintiff since she was aged 11 years, when the first of her non-family care placements occurred. Her parents are separated. At this stage, there were signs that she was engaged in inappropriate contact with older males.
- (b) At this time, the Trust's care plan prevented the Plaintiff from accessing Facebook.com and mobile telephones. However, she began a new Facebook profile under a different name. Following notification by her father, Facebook deleted this profile within 24 hours.
- (c) Within weeks the Plaintiff established a new profile, stimulating similar reporting and deletion.
- (d) Undaunted, the Plaintiff established another Facebook account and published an inappropriate image of herself, provocatively clad and presented. Her profile stated that she had 485 Facebook friends and provides significant details, including the name of her school. Furthermore, she became a member of a group with a membership of some 63,000 having a sexually provocative title and involving the publication of dozens of inappropriate pictures.
- (e) At this stage, proceedings were issued (in September 2011). Since then the Plaintiff has established a series of further Facebook accounts. This has resulted in further contact with older males and, apparently, sexually active conduct.

In his affidavit, the Plaintiff's father complains of the "open registration" system operated by Facebook and the risks which this creates for the Plaintiff. Insofar as there is a monitoring regime, it is suggested that this is inadequate. Combining this evidence with other evidence, it is common case that, in total, the Plaintiff has opened four Facebook accounts, all of these have been the subject of a report to Facebook (via its reporting mechanism - *infra*) and all have been closed by Facebook timeously, two within 24 hours. The last - and most recent - of these events occurred in May 2012.

[13] It is apparent that the Secure Accommodation Order made in respect of the Plaintiff on 2<sup>nd</sup> July 2012 was a measure of last resort, as the relevant statutory provision requires. The subsequent course of events can be gauged by reference to the summary of other Orders contained in paragraph [11]. There is no factual dispute concerning the present state of affairs vis-à-vis the Plaintiff. This is outlined in a social worker's report prepared for a Court review hearing conducted on 25<sup>th</sup> February 2013. This documents, *inter alia*, the Plaintiff's interest in consuming alcohol and drugs; her threats to consume excessive quantities of tablets; her severe behavioural problems; absconding from the unit where she has been placed; one incident of overdosing on non-prescription medication; the removal of a mobile telephone from the Plaintiff; and inadequate parental interventions. The report records that the Plaintiff's placement in the unit is ending and she has been in her mother's care during the past two weeks. It is appropriate to advert at this juncture to the very short second affidavit sworn by the Plaintiff's father, which contains the following averments:

*"I can confirm that on 6<sup>th</sup> February 2013 during a contact session [the Plaintiff] stated that she had a new Facebook account but that she had 'blocked' me, my sister and other family members so that 'we couldn't find her if we searched for her'. I have searched under [the Plaintiff's name] and different spellings of her name but have not been able to identify the account. I also requested a friend to search in a similar fashion to no avail. I have spoken to [the Plaintiff] again who denies that she has an account but I believe this to be untrue."*

[14] The third of the three affidavits on which this application proceeds has been sworn by the Plaintiff's solicitor. Drawing on a series of reports and other sources, the solicitor deposes to the following data:

- (a) Facebook has over 900 million active users worldwide.
- (b) There are over 3.2 billion comments per day.
- (c) There are over 125 billion so-called "friendships".
- (d) The average Facebook user has approximately 130 so - called "friends".
- (e) There are around half a million Facebook users in Northern Ireland, a large percentage of whom are children.
- (f) "Open" privacy settings are automatically allocated to registered users who declare themselves aged over 18 years. It is suggested that Facebook operates an "open" registration system, in the interests of maximising profit. The registration mechanism does not require putative new members to read the relevant terms, conditions and policies.

[15] This brings me to the “Facebook Terms and Conditions”, a document consisting of, in downloaded form, 62 pages. This purports to constitute an “agreement” between Facebook and the registered user. Under the rubric “Privacy”, it states:

*“Your privacy is very important to us .....*

*We encourage you to read the Data Use Policy and to use it to help you make informed decisions .....*

*You own all of the content and information you post on Facebook and you can control how it is shares through your privacy and application settings.”*

In the next section it is stated:

*“When you publish content or information using the Public setting, it means that you are allowing everyone, including people **off of Facebook** [sic], to access and use that information and to associate it with you (ie your name and profile picture).”*

Under the heading “Safety”, it is stated:

*“We do our best to keep Facebook safe, but we cannot guarantee it.....”*

In the list of user “commitments” which follows, it is stated:

*“You will not bully, intimidate or harass any user .....*

*You will not post content that is hate speech, threatening or pornographic, incites violence, or contains nudity or graphic or gratuitous violence .....*

*You will not develop or operate a third party application containing alcohol related, dating or other mature content (including advertisements) without appropriate age based restrictions .....*

*You will not use Facebook to do anything unlawful, misleading, malicious or discriminatory.”*

Under the banner “Registration and Account Security” one finds the following:

*“You will not provide any false personal information on Facebook or create an account for anyone other than yourself without permission .....*

*You will not create more than one personal account .....*

*If we disable your account, you will not create another one without our permission .....*

*You will not use Facebook if you are under 13 ... ..*

*You will not use Facebook if you are a convicted sex offender .....*

[My emphasis.]

The next section is entitled “Protecting Other People’s Rights”. This contains the following:

*“We respect other people’s rights and expect you to do the same .....*

*You will not post content or take any action on Facebook that infringes or violates someone else’s rights or otherwise violates the law .....*

*We can remove any content or information you post on Facebook if we believe that it violates this Statement or our policies.”*

[16] The “Statement of Rights and Responsibilities” (reduced to the “SSR” in some of the documents) is described as “the entire agreement between the parties regarding Facebook” and enjoins the user to “comply with all applicable laws when using or accessing Facebook”. The “information that is always publicly available” is listed as name, profile picture, cover photos, networks, gender, user name and user ID. Within this section, it is stated:

*“If you are uncomfortable making your network public, you can leave the network.”*

The terms “user name” and “Facebook URL” are synonymous. Knowledge of a person’s user name or user ID enables third parties to access the user’s public information, age range, language and country. So-called “Platform” applications can be disabled via the Privacy settings. Every user has the ability to restrict the audience which can access anything posted – such as a status update or photograph. Instructions on how to do this are provided. Similarly, the user can opt to make a posting public or to confine dissemination to “friends” or to customise one’s audience. This section continues:

*“As a general rule, you should assume that if you do not see a sharing icon, the information will be publicly available.”*

It is clear that the privacy settings are not effective to prevent a user from being “found”, by reason of the operation of the “search bar” and “through other people and the things they share about you or through other posts, like if you are tagged in a friend’s photo or post something to a public page.” This public exposure is reinforced in the ensuing passage:



*“Your settings do not control whether people can find you or a link to your timeline when they search for content they have permission to see, like a photo or other story you’ve been tagged in.”*

This gives rise to the advice:

*“You should only share information with people you trust because they will be able to save it or re-share it with others, including when they sync the information to a device.”*

The devices of “links” and “tags” are other mechanisms for access by third parties to users. It is clear that a user has no control over the activities of friends and others – for example, in sharing photographs or any personal information. Every member of a “Group” can invite other members to a “subgroup”. The section entitled “Pages” includes the following passages:

*“Facebook pages are public pages .....*

*Because pages are public, information you share with a page is public information. This means, for example, that if you post a comment on a page that comment may be used by the page owner of Facebook and anyone can see it. When you ‘like’ a page, you create a connection to that page. The connection is added to your timeline and your friends may see it in their Newsfeeds. You may be contacted by or receive updates from the Page .. [which] ..may be able to collect information about you, just like any website.”*

[17] There is a separate section entitled “Community Standards”. This contains the following passages:

*“Safety is Facebook’s top priority .....*

*You may not credibly threaten others .....*

*Facebook does not tolerate bullying or harassment .....*

*Facebook has a strict policy against the sharing of pornographic content and any explicitly sexual content where a minor is involved .....*

*We ask that you refrain from publishing the personal information of others without their consent .....*

**Reporting abuse:** *If you see something on Facebook that you believe violates our terms, you should report it to us. Please keep in mind that reporting a piece of content does not guarantee that it will be removed from the site.”*

There is also a series of instructions regarding “settings”. These are rehearsed in appropriate detail. They include the following statement:

*“On Facebook your name, profile picture, cover photo, gender, networks, user name and user ID are always publicly available .....*

*Apps also have access to your friends’ list and any information you chose to make public.”*

This is followed by detailed information about how to make reports of “potential abuse”. Within this section, the prohibition on pornography, hate speech, threats, graphic violence, bullying and spam is repeated. Also repeated is the statement:

*“Any content that is inappropriately sexual will be removed.”*

The issue of a user’s age is addressed again:

*“Facebook requires individuals to be at least 13 years old before they can create an account .....*

*Providing false information to create an account is always a violation of our Statement of Rights and Responsibilities.”*

The mechanism for making an appropriate report is then detailed. The following passage is also of note:

*“Our reporting system leverages the 800 million people using Facebook to report content that may violate our policies. Our trained team of reviewers evaluate and respond to reports around the clock.”*

Facebook’s ability to remove Pages is clearly stated. Within these passages there is no suggestion of any system of proactive monitoring. Rather, the system is portrayed as one that is reactive, responding to reports about inappropriate content. In response to the question “What do I need to know to stay safe on Facebook?”, it is stated:

*“Learn how to use Facebook’s privacy shortcuts and settings to comfortably share and connect with others .....*

*Participate in the Facebook community. Learn how to recognise inappropriate content and behaviour and how to report it.”*

The separate mechanism of making an online report to the Child Exploitation and Online Protection Centre is also detailed.

[18] Other issues addressed in the solicitor's affidavit include the phenomenon of "trolling", which enables Facebook users/members to adopt false identities and engage in conduct such as harassment, abuse and defamation. This mischief is attributed to Facebook's open registration system. The ability of members/users to open a new page following closure of a predecessor is also highlighted. It is suggested that Facebook alters its terms, conditions and privacy policies with some frequency and itself breaches the privacy of users. The Plaintiff's solicitor also makes the following averments:

*"From a technical point of view, amending the registration system to prevent access by children, or at least prevent access by children without express parental consent, ought to be a straightforward process. Many other websites require members to identify themselves and the adoption of age and identity verification by the Defendants is technically a straightforward process."*

The genesis of this averment is not specified. It might, conceivably, lie somewhere in the vast proliferation of materials exhibited to the affidavits filed on behalf of the Plaintiffs, which appear to be the product of energetic internet research on the part of their legal team. These include, in particular, multiple news items and other commentaries emanating from all manner of sources. They appear to be infused with the personal opinion of commentators and contributors of all kinds. Their nature, weight and origins are such that the extent to which the Court can treat them as reliable and weighty is vexed and unclear. From the evidential perspective, I find the compilation and presentation of this application, with its vast supporting bulk, of questionable propriety and utility. Furthermore, the solicitor's affidavit is an unfortunate - and inappropriate - mix of first and second hand hearsay, with inadequate specification of sources of information and belief, as required by Order 41, Rule 5; sworn legal argument; expressions of opinion; and repeated averments seeking to "*put the Defendant to strict proof*" on sundry issues which are, frankly, sterile and fundamentally misconceived, given that these are civil proceedings in which the onus of proof rests on the Plaintiff. The solicitor's affidavit also contains a series of averments couched in terms "*I am advised by counsel and believe .....*", followed by what purports to be evidence. Averments of this kind are always inappropriate in every sphere of litigation, as they confuse the roles of the advocate and the witness and those of solicitor and counsel. Furthermore, they potentially give rise to a series of infringements of the Code of Conduct for the Bar of Northern Ireland [not suggested in this case]. It is for the client and instructing solicitor to assemble the instructions and evidence for counsel, not vice versa. It is also appropriate to record the Court's alertness to a creeping tendency for skeleton arguments to be the source of certain pieces of evidence. This may be linked to the issue of confused roles to which I have referred above: this should never occur under any circumstances.

[19] The last of the four affidavits before the Court has been sworn on behalf of Facebook. This explains that there are two Facebook entities, one incorporated in the United States of America and another incorporated and "*headquartered*"[sic] in the

Republic of Ireland. It is averred that the Facebook website has more than 1 billion monthly active users worldwide who register over 3 billion “likes” and comments and around 350 million photographs **daily**. Anyone who (a) provides a name, (b) furnishes a valid e-mail address and (c) purports to agree to Facebook’s terms and conditions can register, thereby opening an account on the Facebook website. On paper, this entails an acknowledgement that the information provided is genuine and that the applicant is aged 13 years or over. Every user has a “profile page”, wherein information and photographs can be “posted”. As I have already outlined above, reporting of inappropriate content is possible. The deponent suggests that this constitutes an “*appropriate and accessible means*”. Both non-users and users can make reports. A report stimulates consideration by Facebook to determine whether action is justified. On the topic of **monitoring**, it is averred:

*“Facebook cannot proactively monitor the site to prevent an individual from posting content on the website. It would be unfeasible for Facebook to review over 1 billion profiles and millions of uploaded posts to determine if a particular individual has posted content on line. Even more, there are hundreds, if not thousands, of users that share the same names. There is no technical programme or mechanism that exists to prevent an individual from lying about his or her identity and then posting content under a false name. All Facebook can do is act expeditiously every time it receives a report about unlawful or abusive content that violates the terms of the [Statement of Rights and Responsibilities].”*

As regards access by individuals, the deponent avers:

*“Further, Facebook cannot proactively prevent an individual from registering and creating a Facebook account and profile. It is simply not feasible to review over 1 billion profiles to locate a single user who may be lying about his or her name ..... no technical programme or mechanism exists to prevent an individual from lying about his or her identity and/or age .....*

*Facebook has no way to prevent such child from accessing the Facebook website from a new electronic device, a friend or relative’s computer or even a public computer. All Facebook can do is act expeditiously every time it receives a report and disable profiles that violate the terms of the SSR.”*

With reference to the specific issue of a user’s age and identity, it is deposed:

*“It is not feasible for Facebook to verify the age and identity of each individual user .....*

*Facebook could not prevent an individual from lying or providing false documents or information. On top of this, such a procedure would categorically deny access to Facebook to millions of people and implicate privacy law concerns throughout the world.”*

The deponent suggests that the requirement whereby an applicant/user must acknowledge that he/she is complying with the SSR, coupled with the reporting regime constitutes “the most feasible tool for verifying identity and/or age.” The affidavit continues:

*“I believe this is consistent with not only other social media sites but even with websites containing adult only material or products. Facebook expeditiously disables profiles that violate the terms of the SSR.”*

Finally, it is averred:

*“Facebook rejects the notion of broad censorship to prevent a single individual from creating a user account and profile. To the best of my knowledge, no feasible procedure or technology exists to outright restrict a particular individual’s freedom to access a website. At some point, responsibility must rest with a parent or guardian.”*

Finally, it is acknowledged that, with reference to the Plaintiff, four separate Facebook accounts were disabled at intervals during the period March 2011 to May 2012. This action was taken via the reporting mechanism. As noted above, this is common case and there has been no proven recurrence since May 2012.

[20] The causes of action invoked by the Plaintiff may properly be described as diffuse, extensive and imaginative. The following are, in sequence, the ingredients identifiable in the submissions developed on behalf of the Plaintiff:

- The right to an effective remedy under Article 13 ECHR and section 8 of the Human Rights Act 1998 (“HRA”).
- Section 6 of HRA.
- Article 2 ECHR.
- Articles 44 and 50 of the Children (NI) Order 1995.
- Article 3 ECHR.
- Article 8 ECHR.
- Articles 3 and 5 of the Protection from Harassment (NI) Order 1997.
- The Data Protection Directive 95/46/EC (Articles 2, 7 and 8).
- The Data Protection Acts 1988 and 2003 in the Republic of Ireland and the Data Protection Act 1998 (Schedules 2 and 3).
- Unlawful contract.

- Breach of the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contract Regulations 1999.
- Negligence.
- The welfare principle enshrined in Article 3 of the Children (NI) Order 1995.
- The UN Convention on the Rights of the Child (Articles 3, 6, 16, 20, 34, 36 and 37).
- The Commission of Criminal Offences by Third Parties.
- The Communications Act 2003 (section 127).
- The decision of the Tribunal Superieur de Paris in **France - v - Yahoo** [22<sup>nd</sup> May 2000].
- Sundry provisions of the (Lisbon) Charter of Fundamental Rights of the European Union.
- A recent libel decision of the English Court of Appeal in **Tamiz - v - Google** [2013] EWCA Civ 68.

To summarise, the ingredients in the compendium conjured up on behalf of the Plaintiff by Mr Girvan (of counsel) include (inexhaustively) the common law [the torts of negligence and misuse of confidential information], statutory torts, breach of contract, the Human Rights Act 1998, statute law, EU Law, international law, certain laws of the Republic of Ireland, criminal liability and French jurisprudence. In support of this beguiling mix, the Plaintiff's materials included a vast quantity of reported decisions, both national and international, which was ultimately whittled down to approximately 40.

[21] The arguments on behalf of Facebook highlight, *inter alia*, the expeditious responses to previous reports; the vintage of the evidence on which the application for interim injunctive relief is based; the timing of this application; the apparently positive impact of the secure accommodation facility; the extant interim care order and associated Care Plan; the evidence that the Plaintiff has made use of a series of other communication mechanisms – Blackberry messenger, Facetime, Hotmail and MSM messenger via her mobile telephone – over which Facebook cannot possibly exert any control; the related causation frailties in the application; the lack of efficacy of the injunctive relief sought by the Plaintiff; and the inappropriate terms in which the proposed interim injunctions are framed. The submissions of Mr Hopkins (of counsel) also highlighted the paucity of current evidence and the intrinsic inadequacies thereof as a foundation for the interim relief pursued.

## Consideration and Conclusions

[22] This being an application for interim injunctive relief, there are two fundamental questions for the Court. The first is whether the Plaintiff has established a good arguable case to the grant of the substantive relief claimed. The second is how the balance of convenience is to be struck. The substantive relief claimed by the Plaintiff is diffuse and imaginative. It consists of a variety of permanent injunctions, declarations, damages and an order for delivery up of phones, computers, lap tops and other like equipment. The causes of action invoked on behalf of the Plaintiff may also be similarly described .

[23] I conclude that this application suffers from the following infirmities which, either individually or collectively, are fatal:

- (a) The first injunction is not viable since the Plaintiff could with ease conceal her true identity under millions of guises.
- (b) As regards the other interim injunctions pursued, the Court will not order any Defendant, by the medium of an injunction, to “*take all necessary steps*” to do something or to “*undertake steps*” to like effect. Such an injunction is incapable of effective supervision and enforcement by the Court. While citation of authority in support of this principle should be unnecessary, it suffices to recall the analysis of Lord Hoffman in **Co-Operative Society - v - Argyll Stores** [1997] 3 All ER 297, pages 303 - 304, which, with appropriate adjustments, I consider to apply fully to the present context. The fundamental lack of precision in the interim injunctive relief sought by the Plaintiff is manifest.
- (c) Evidentially, this application for interim injunctive relief is impoverished. There is no evidence that any offending publication has exposed the Plaintiff to risk since the summer of 2012. Furthermore, there is no direct evidence of any impending detrimental publication and I consider the evidence insufficient to warrant the inference of a risk of this nature.
- (d) The evidence suggests that the various care measures and interventions vis-à-vis the Plaintiff and the associated Care Plans, particularly those pertaining to the most recent period of around 9 months, have been reasonably efficacious to protect the Plaintiff against the risks in question.
- (e) The evidence establishes that the Plaintiff has the ability to access Facebook by a variety of mechanisms over which the

Defendant has no control whatsoever and which would lie outwith the scope and effect of any feasible, reasonable and proportionate interim injunctive order.

- (f) The evidence further establishes the Plaintiff's willingness and ability to engage in inappropriate behaviour which is in no way dependent upon access to Facebook.
- (g) At this stage, I accept the Defendant's evidence to the effect that there are no efficacious mechanisms for preventing access to Facebook by or on behalf of the Plaintiff.
- (h) The diffuse nature of the Plaintiff's case and the profusion of causes of action upon which she purportedly relies, to which I have referred above, combine to create a blur which is not conducive to the construction of a serious issue to be tried.
- (i) Allied to the last observation, it seems in the highest degree unlikely, at this stage, that the Plaintiff will successfully make good any case based on breach of contract, breach of the laws of another jurisdiction (the Republic of Ireland), breach of unincorporated international treaty provisions, breach of section 6 of HRA 1998, "*breach of the laws and treaties of the European Union/European Community*", breach of "*international laws, norms and guidance*", or breach of the Safeguarding of Vulnerable Groups Act 2006 or the Childrens (NI) Order 1995 (neither of which, to my knowledge and understanding, contains provisions creating a private law cause of action). I find all of the multiple causes of action invoked enshrouded in a swirling mist of obscurity and uncertainty. I would add that while this assessment is, of course, provisional, it is also inexhaustive, taking into account the broad sweep of the Plaintiff's case, as formulated.

[24] As appears from the above, there is a series of ingredients in the court's assessment at this stage. They include the Plaintiff's lifestyle, her evident mindset and desires, the parenting problems, the various means of access to the internet which the Plaintiff can secure with appropriate cunning and determination and the intrinsic human limitations in supervisory and restrictive measures. The evidence establishes that any person can secure access to the Facebook website via electronic devices, any other person's computer, any person's mobile phone and public computers. Furthermore, anyone can provide false information about identity and age. The fact sensitive conclusion in the present case is that the Plaintiff's application for interim injunctive measures against Facebook is not made out. However, this does not exclude the possibility that, in an appropriate case, the



defence which Facebook has presented to this Court will be rejected. The essence of this defence consists of an admission by Facebook that it has created something of a monster which, it alleges, it cannot control. Whether upon the full trial of the present case or in some other appropriate case, it is inevitable that this plea of impotence will be subjected to intense judicial scrutiny, not least because the proceedings involve a child. This purely interim judgment is not to be construed as an endorsement for vindication of Facebook's defence or an acceptance of its plea of impotence. The interim rulings and final judgments of any court belong to distinct terrains.

[25] The courts, in this jurisdiction and others, are increasingly alert to the dangers of the "internet wild west" in the acquisition, provision and dissemination of information in the contemporary world. In *R - v - McCartney* [2009] NICA 52, the Lord Chief Justice stated:

"[16] *The internet has revolutionised the way in which we live. It has provided us with ready access to information and facilitated social contact .....*

*Although it is clear that there is much that is positive about the internet, this case demonstrates the dangers to which children can be exposed as a result of which they may be corrupted or indeed in some cases exploited .....* This case illustrates graphically the dangers faced by adolescents with unsupervised access to the internet and the need for parents to be aware of the requirement for a high degree of supervision of the use of computer equipment. It also raises serious questions as to whether service providers are doing enough to prevent the dissemination of this type of dangerous and degrading material on the internet and indeed whether there is in fact a legal obligation on them to do so."

Similar sentiments were expressed by this Court in **AB Limited and Others - v - Facebook Ireland Limited and Another** [2013] NIQB 14, paragraphs [13] - [14]. As these passages make clear, the essence of the mischief, increasingly coming to the attention of the courts, is the misuse of social networking sites. One manifestation of this mischief is the exposure to children of serious risk of exploitation and degradation. In **AB**, the Court observed:

*"The solution to this mischief is far from clear and lies well beyond the powers of this Court. Self regulation and/or statutory regulation may well be necessary."*

While I repeat that effective remedies will be granted by the Court in appropriate cases, the present case is not an appropriate one (at this stage of the proceedings) on account of the factors highlighted above, including the inefficacy of the remedy sought.

[26] In a rapidly changing world, the jurisprudence in this sphere is both dynamic and evolving. This is illustrated in the recent decision in **Tamiz - v - Google** [2012] EWHC 449 (QB), where Eady J, relying on Google's stated policy of non-

intervention, held that, applying established principles of the common law, Google is neither a publisher nor an entity which authorises publication. Rather, its role as a platform provider is a purely passive one: see paragraph [39]. Applying essentially the same reasoning, the Judge further held that Google does not constitute a “commercial publisher” within the meaning of section 1 of the Defamation Act 1996. The Judge’s third conclusion was that Google would, in any event, be exempted from liability in accordance with regulation 19 of the Electronic Commerce (EC Directive) Regulations 2002, which derive from the E Commerce Directive and have a link with the Amended Technical Services Directive [98/48/EC]. It is appropriate to highlight regulation 19 in the present context as it will doubtless feature more fully in argument at the substantive trial:

*“Where an information society service is provided which consists of the storage of information provided by a recipient of the service, the service provider (if he otherwise would) shall not be liable for damages or for any other pecuniary remedy or for any criminal sanction as a result of that storage where:*

- (a) The service provider -*
  - (i) Does not have actual knowledge of unlawful activity or information and, where a claim for damages is made, is not aware of facts or circumstances from which it would have been apparent to the service provider that the activity or information was unlawful; or*
  - (ii) Upon obtaining such knowledge or awareness, acts expeditiously to remove or disable access to the information, and*
- (b) the recipient of the service was not acting under the authority of the control of the service provider.”*

The extent to which Facebook can, ultimately, make good its defence by reference to this provision of EU Law remains to be seen. At this juncture, it is clear that Facebook places substantial weight on this provision.

[27] In passing, I am mindful that in **Tamiz**, the Court of Appeal opined that while Google plainly facilitates the publication of blogs and associated comments, it is not to be considered a primary publisher and is not to be equated with the author or editor of a defamatory article or the corporate proprietor of a newspaper. Richards LJ also expressed grave doubts about whether Google could be considered a secondary publisher, particularly in advance of notification of a complaint: see paragraph [26]. He did, however, differ from Eady J on the issue of publication **after** receipt of a complaint. Without determining the issue, the appellate court recognised the potential viability of an argument that, in this discrete situation, it might be inferred that Google had associated itself with, or made itself responsible for, the continued presence of the material on the blog, thereby becoming a publisher thereof: see paragraphs [27] – [34]. Significantly, however, Richards LJ added:

*“[35] I do not consider that such an inference could properly be drawn until Google Inc had had a reasonable time within which to act to remove the defamatory comments.”*

I observe that defamation does not count amongst the multiple causes of action currently promoted in the current case.

[28] For the reasons elaborated, I consider the Plaintiff’s application for interim injunctive relief misconceived. It is refused accordingly.

### **Further management of the proceedings**

[29] I shall defer the next scheduled interlocutory hearing to allow a period of reflection in respect of the following matters:

- (a) The proliferation of Defendants sued in these proceedings.
- (b) The viability and sustainability of the multiple causes of action invoked.
- (c) The advisability of discontinuing the action against certain Defendants.
- (d) The particulars to be pleaded of any realistically sustainable cause of action.
- (e) Subject to (c), any applications to be made to the Court by any Defendant at this stage.
- (f) Any other necessary interlocutory applications of any kind.
- (g) The management of this litigation generally in accordance with the overriding objective.

At this interim and uncertain stage, I emphasise that no further pleadings are to be prepared by any party. Furthermore, any interlocutory application of any kind to be pursued by any party should be notified through the medium of a simple letter, containing brief particulars, to be transmitted by 4<sup>th</sup> April 2013 at latest. The Plaintiff’s solicitors will have responsibility for assembling any further materials of this kind in a suitably compiled booklet.

[30] As this is a publicly funded action, the Court is entitled to expect a realistic, responsible and fully professional approach to these issues, which are not designed to operate as an exhaustive menu.

[31] The next scheduled interlocutory/review/case management hearing will be deferred until 11<sup>th</sup> April 2013.