Neutral Citation No. [2015] NIQB 61

Ref: **STE9710**

Judgment: approved by the Court for handing down

Delivered: **25/06/2015**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

HL (A YOUNG PERSON)
BY HER FATHER AND NEXT FRIEND AL

Plaintiff

v

FACEBOOK INCORPORATED
FACEBOOK IRELAND LTD
THE NORTHERN HEALTH AND SOCIAL CARE TRUST
DEPARTMENT OF CULTURE MEDIA AND SPORT

Defendants

STEPHENS J

Introduction

[1] These are applications for specific discovery and in relation to interrogatories in respect of an action brought by the plaintiff, acting by her father and next friend, against amongst others Facebook Incorporated and Facebook Ireland Limited. The plaintiff's identify has been anonymised as has the identity of her father and next friend.

[2] The plaintiff's action relates to postings that she made on her Facebook page from the age of 11 onwards. Those postings were of an entirely inappropriate sexual nature and they prompted responses from others of the same inappropriate sexual nature. In short it is alleged that the plaintiff at the age of 11 was exposed to sexual predators on the internet through the medium of Facebook giving rise to liability on the part of Facebook. The plaintiff alleges that Facebook is liable on a number of separate grounds and I will deal with each in turn in outline:

(a) It is alleged that the information which she posted was sensitive, personal data within the Data Protection Act 1998 as it related to her sexual life, see Section 2(f) of that Act. That given her age she could not consent to the dissemination of that material. The defence to that aspect of the plaintiff's claim amongst other matters relies on the data subject, that is the plaintiff, having given her consent to the processing of the data. This raises the important issue as to whether an 11 year old can give consent for the purposes of the 1998 Act. Does a child of 11 have the ability or capacity to sign up to terms for the use of social media that throw away her privacy rights and throw away her expectation of privacy in relation to sensitive private information. A consideration of that issue involves a consideration of the appropriate legal principles informed by the complexity of the terms, the ability or inability of children to appreciate the long term consequences, the ability or inability of children to understand the terms to which they are agreeing and the nature of the social media site which they are joining. Another defence relied upon by Facebook (Ireland) Limited is that the 1998 Act does not apply to it as it is a company incorporated in Ireland. A determination of that issue will involve a consideration of Section 5 of the Data Protection Act and of two issues as to whether:

    (i) Facebook Ireland Limited is established in the United Kingdom by virtue of maintaining an office, branch or agency through which it carries on any activity; and

    (ii) if so whether data is processed in the context of that establishment.

(b) The second basis upon which the plaintiff brings this action against the first and second defendants is that Facebook facilitated her harassment by others who posted replies on the Facebook page.

(c) In addition the plaintiff alleges that Facebook owed her a duty of care and was negligent in that it failed to have a proper system in place for registration of a Facebook account so that it was impossible or at the very least difficult for a child to register by misrepresenting her age. It is suggested that those precautions are to be seen in the context that by registering an account and using Facebook the child might be exposing herself to sexual predators or other grave risks affecting her emotional and physical health such as exposure to videos of beheadings or sites with content of necrophilia, paedophilia or suicide. It is also alleged that the first and second defendants were negligent in that they did not have a proper system in place for monitoring their social network platform for use by children or young persons. The defendants are obviously aware that children who should not be using Facebook are doing so and that they are doing so by the simple device when opening an account of misrepresenting their age. Such misrepresentation on the part of the children, it is submitted, is clearly foreseeable and clearly takes place. The response of the first and second defendants is that they have a 24/7 system of reporting so

that if anyone is concerned about a child having access to Facebook they can report it to Facebook and Facebook will then react by closing the account. Such a system depends on a report. Such a system can be evaded by the expedient used, as in this case, by the child of going on line and opening a new account in her own name but changing the spelling of one or two letters in her name. So the plaintiff alleges that Facebook should have had, but do not have, a system in place for preventing a child adopting such a strategy. That those persons who Facebook employ to deal with reports of under-age use should be trained in the necessary follow-up steps to prevent a child, whose account they have closed down, from immediately opening a new account.

[3] It is submitted on behalf of the first and second defendants that the issues between the parties in relation to negligence are limited because it is accepted by the plaintiff that she misrepresented her age when she opened the Facebook accounts and that after a report was made in relation to each of the plaintiff's Facebook accounts the accounts were closed. However, I consider that to be a misapprehension of the nature of the plaintiff's case which is that it is alleged that there are inadequate controls at the stage when an account is opened and inadequate monitoring by the defendants of Facebook to find children or when alerted to a particular child inadequate monitoring of attempts by that child to open a new Facebook account. That the risks that a child can encounter on Facebook should inform the precautions to be taken by Facebook.

[4] The outcome of those issues will be informed by the evidence at trial but in preparation for trial the plaintiff seeks an order for specific discovery of documents and wishes to secure answers to further interrogatories. I say further interrogatories because Gillen J in this case in his judgment under citation [2014] NIQB 101 has already ordered interrogatories.

[5] The issues presently for my determination are:

(a) Whether the plaintiff's interrogatories dated 9 April 2015 should be withdrawn pursuant to Order 26 Rule 3(2).

(b) Whether I should order specific discovery against the first and second defendants pursuant to Order 24 Rule 7.

(c) Whether there should be a trial of a preliminary issue in relation to the question of consent.

[6] On the hearing yesterday of these matters it became apparent that the interrogatories as drafted on behalf of the plaintiff needed to be amended. If I was minded to allow interrogatories I consider that they are insufficiently precise. It was agreed by both counsel that I should decide in principle whether the interrogatories should be permitted, reserving to a hearing on 30 June 2015 a final consideration of

the form of the interrogatories. When I state that the interrogatories needed to be amended and were insufficiently precise I advert to a number of factors in relation to them. The first is that a number are prefaced by the words: "Is it admitted that" as opposed to "did". The question "is it admitted that" permits of the answer "No" in the sense that it is not admitted but nevertheless it is true. If I am to allow interrogatories they have to be focussed and it could also be suggested that the present interrogatories are diverted into an analysis of the press articles which are evidence of the need for these interrogatories rather than an analysis of the issues in the action. As is apparent one of the issues is what, if any, steps did the first and second defendants take, or could they have taken, to prevent children opening accounts. The relevant issues are whether the first and second defendants take any steps, if so, what are they, have they carried out any research or enquiries into what steps could be taken, if so, when did they carry out the research. Who carried it out, what options were considered, was any action taken as a result of that research or those enquiries. Other potential deficiencies in the interrogatories are that they refer to the defendants when they are directed to the first and second defendants only. There are more than two defendants in this action. They are sought to be answered by both defendants and that will require the deponent to make enquiries of any corporate entity for which he does not work and I consider that that issue has not been considered in the present form of the interrogatories.

[7] I was assisted by counsel's agreement that I should decide the issue in principle first and then look at the actual form of interrogatories once they have been amended.

[8] I should also record that the Facebook defendants did not object to a preliminary issue but counsel on their behalf had no authority to agree to it.

[9] Counsel on behalf of Facebook did not seek to oppose a specific discovery order in relation to the issues arising under Section 5 of the Data Protection Act 1998 but had no authority to consent to an order.

[10] Mr Fitzgerald QC and Mr Girvan appeared on behalf of the plaintiff, Mr Shaw QC and Mr Hopkins appeared on behalf of the first and second defendants. I am grateful to both sets of counsel for their succinct and well-structured submissions.

Factual Background

[11] In support of the application for interrogatories the plaintiff has referred to 5 newspaper articles which were published following an appearance by a Mr Mozelle Thompson in March 2011 before the Australian Federal Parliament Cyber-Safety Committee. Mr Thompson is described in those newspaper articles as being the chief privacy advisor of Facebook. It is asserted that he informed the Australian Federal Parliament Cyber-Safety Committee that:

> "There are people who lie, there are people who are under 13 accessing Facebook. Facebook removes 20,000 people a day, people who are under-age."

[12] I consider that it is important also to look at the articles themselves and they contain a number of other quotations. Mr Thompson is reported as saying that while the social networking site had mechanisms to detect liars, Mr Thompson said it is not perfect. The chair of the Cyber-Safety Committee, Dana Wortley, said:

> "We know there are potential risks that young people face including cyber-bullying, identity theft and privacy issues, illegal contact and contact from online predators.

So in that statement Dana Wortley identified the risk which is being considered in this case of online predators.

[13] In the article 'Facebook Privacy Chief defends cyber-safety measures' there is an account again of the online risks including cyber-bullying, unwanted contacts, scams and fraud and offensive or inappropriate material.

[14] In the article 'Facebook Booting 20,000 underage users per day' it is recorded that nearly half of all 12-year-olds in the US are using social network sites despite not meeting the minimum age requirements for sites like Facebook. If that is an accurate account of the problem then that is the nature of the problem or the extent of the problem which Facebook is or ought to be addressing. The article goes on to say that Facebook's Chief Privacy Advisor, Mr Thompson, agreed that under-age users were taking advantage of the site, "after all, any user no matter his or her age, can register for the site by simply lying when signing up. Facebook has no mechanisms to detect whether a teen is telling the truth or not". That quotation appears to contradict the earlier quotation that there are methods that Facebook have of detecting liars. There is also a reference to Senator Franken meeting with Facebook CEO, Mark Zuckerberg, over privacy issues in which Mr Franken, argued that:

> "These younger users are the most vulnerable to predators on Facebook and the rest of the internet and it should be impossible for them to inadvertently share their phone numbers and home addresses with anyone and that is not even taking into consideration the users who are younger than 13."

So again there is a reference to risks being brought to the attention of Facebook at a political level.

[15] Mr Shaw informed the court that it was not presently known by Facebook as to whether Mr Thompson has or had any connection with Facebook. He was unable

to provide an assurance that he was not connected and there appeared to be on-going steps to investigate whether he was connected. I have some difficulties in understanding how the first and second defendants do not know or cannot find out whether an individual is or was its chief privacy advisor by checking its records or making enquiries at the least an enquiry of the individual concerned.

[16] In setting out this part of the background I seek to explain the nature of the interrogatories which in principle the plaintiff wishes to have answered arising out of Mr Thompson's appearance before the Australian Federal Parliament Cyber-Safety Committee. In essence the interrogatories are as to how Mr Thompson is aware of the number of underage children who are removed from Facebook. If there is a specific number then this gives rise to the inference that Facebook are taking precautions, are collating statistics, are generating procedures which may or may not be working to remove children from access to Facebook. It is just those procedures, those precautions, that awareness which the plaintiff asserts are relevant to the issues at the trial of this action.

[17] The plaintiff has also referred to an article in the Daily Telegraph dated 2 March 2012 entitled 'The dark side of Facebook' which features an interview between Gawker, an American media outlet, and a 21-year-old Amine Derkaoui. Mr Derkaoui informed Gawker that he had spent 3 weeks working in Morocco for an organisation known as "oDesk" an outsourcing company used by Facebook. The job which he claimed that he performed and for which he claimed that he was paid around $1 per hour involved moderating photos and posts flagged as unsuitable by other users. He is alleged to have informed Gawker that once something is reported by a user the moderator sitting at his computer in Morocco or Mexico has 3 options, delete it, ignore it or escalate it, which refers it back to a Facebook employee in California, who will, if necessary, report it to the authorities. Moderators are told always to escalate certain specific threats.

[18] The article continues that it is of course to Facebook's credit that they are attempting to balance their mission to make the world more open and connected with a willingness to remove traces of the darker side of human nature. The article goes on to say that:

> "The biggest worry for the rest of us however is that the moderation process is not nearly secretive enough. According to Derkaoui there are no security measures on a moderator's computer to stop them uploading obscene material themselves. Despite coming into daily contact with such material he was never subjected to a criminal record check. Where then is the oversight body for these underpaid global police?"

That passage then finishes with the tag "who guards the guardians".

[19] The issue arising out of that Article is the issue of monitoring. Are those who are entrusted to monitor capable of doing so? Are they properly trained? Are they given proper guidance? Are they properly supervised? Is their work audited? The individuals have access to private information. Are there proper precautions in place to ensure that the monitors do not misuse that private information?

[20] The defendant's case is that the plaintiff's account was closed whenever a report was made. That report would have been considered by a monitor either in-house or outsourced. They would have had access to her private information so the interrogatories that the plaintiff wishes to have answered all relate to monitoring of Facebook and the quality of that monitoring. The interrogatories are also designed to obtain evidence as to the nature of the social site that the plaintiff was joining and as to whether there are paedophilia, necrophilia and beheadings on the Facebook site. There is no allegation that she did access that information but it is asserted that when considering the question of consent of a young child to joining a site evidence should be available as to the negative aspects of that site as well as the positive and the benign.

[21] Another aspect of the factual background arises out of my judgment in the case of *CG v Facebook (Ireland) Limited* [2015] NIQB 11 in that case I set out the Section 5 Data Protection Act 1998 issue about which Facebook (Ireland) Limited had not given adequate discovery. There has not been adequate discovery in this action and yet the response of the first and second defendant is to state that they do not seek to oppose an order for specific discovery but do not consent to it. That is to misunderstand or to ignore the continuing obligation to give discovery. All relevant documents in relation to this issue should have been discovered and it is not appropriate for any party to litigation not to adopt a pro-active role in relation to its continuing discovery obligation.

[22] As another part of the factual background I will address the size of Facebook and the problems that are generated by its size. I was informed that on a world-wide basis there are some one billion users of Facebook although some estimates are as high as 1.2 to 1.3 billion users. That the monitoring of Facebook is not undertaken on a country by country basis but rather that the division is on the basis of language. These numbers and the variety of languages give rise to the needle in a haystack argument, there is just too much to monitor. That the task of dealing with underage users is impossible. Furthermore, it was argued before Gillen J on the evidence of the first and second defendants' solicitor that Facebook do not have a specific department or individuals that focus exclusively on underage reports and that Facebook cannot specifically identify individuals that deal primarily with such reports.

[23] Therefore, and I emphasise the word therefore, it was contended that it would be difficult to provide specific policies or guidance to monitors in relation to underage use of Facebook and how to control it. I disagree with that logic. The premise of no specific department existing does not lead to the conclusion that it is

difficult to provide whatever policies Facebook have in relation to the guidance, training and supervision of its monitors in respect of the tasks of dealing with underage use of its social media platform. I reject any such contention. Rather I prefer the plaintiff's submission that in the internet age at a single click on its own computer system the first and second defendants are highly likely to be able to divulge highly relevant documents in relation to that issue. Also in relation to the problem self-evidently being too big there are at present no discoverable documents supporting that proposition or any analysis of how the problem of underage use of Facebook could be addressed.

[24] Also in relation to the factual background it is necessary to consider what documents have been provided on discovery and what documents are potentially missing. That is a part of the context in which the plaintiff resorts to interrogatories. There is a problem of underage use of Facebook. On an internal basis Facebook must have been addressing the social, technical and financial issues arising out of that problem. No document has been discovered by Facebook. Also Facebook have not discovered any document relating to the reports that were actually made about the plaintiff in particular and how those reports were dealt with internally and what if any steps were taken to prevent the plaintiff opening a new Facebook account.

[25] A question arose during the hearing of these applications as to the Training Manual produced by Facebook for their monitors, it was asserted on behalf of Facebook that the question arose as to whether there was such a Training Manual. For a party to give appropriate discovery proper enquiries should be made of it.

[26] The question whether a witness can be cross-examined at trial depends upon whether the witness is called at the trial. In *CG v Facebook (Ireland) Limited* no oral evidence was called by Facebook (Ireland) Limited and therefore it is suggested by the plaintiff that it should be anticipated that no witness will be called in this action or that if a witness is called it will be on a discrete and limited area. It is suggested, and I agree, that the entitlement to cross-examine is valueless if the relevant witnesses are not called and at present it can be assumed that they will not be called. The position would be different if the first and second defendants indicated that witnesses would be called but invited to do so they declined to give that assurance.

Specific Discovery

[27] I turn then to consider the issue of specific discovery. The schedule of specific discovery has six categories of documents. The plaintiff is not proceeding with category (i). I make no order in relation to that. Categories (ii) and (iii) are in the following terms:

> "(ii) All agreements in the period 2011-2014 between the first defendant and Facebook (UK) Limited, 21 St Thomas Street, Bristol, BS1 6JS, Company No:

> 06331310 in relation to the control and/or processing of data of Facebook users within the United Kingdom.
>
> (iii) All agreements in the period 2011-2014 between the second defendant and Facebook (UK) Limited, 21 St Thomas Street, Bristol, BS1 6JS, Company No: 06331310 in relation to the control and/or processing of data of Facebook users within the United Kingdom."

[28] One can see from the structure of those two categories that the only difference is that the agreements are between Facebook Inc on the one hand and Facebook (Ireland) Limited on the other with Facebook (UK) Limited. Those documents are clearly relevant to the issues that arise under the Data Protection Act 1998. I consider that they should have already have been discovered and I make a specific order for discovery in relation to both of them. In doing that I again record that those categories were not opposed by the first and second defendants though there was no specific consent to discovery being given.

[29] I turn to consider categories (iv) and (v). The aim of these categories is to obtain documents passing between the two Facebook defendants and an outsourcing company, namely oDesk and so the categories are:

> "(iv) All agreements in the period 2011-2014 between the first defendant and oDesk in respect of the moderation of user content.
>
> (v) All agreements in the period 2011-2014 between the second defendant and oDesk in respect of the moderation of user content."

[30] As I have explained oDesk is the outsource moderation service. The agreements are likely to contain material as to the service that oDesk was to provide and that is relevant to the issue of monitoring, training, supervision and control of the Facebook website specifically in relation to underage use. I consider all those documents to be relevant and I consider that an order for specific discovery should be made in relation to both of them.

[31] The final category of specific discovery is of all account details and data of the plaintiff's account and then it gives a URL or related URLs in respect of this account. This is, as I understand it, a new account set up by the plaintiff. It should be provided as should all the details in relation to every account which the plaintiff set up that have been held by the first or second named defendants. If they do not have those documents still in their possession, custody or power they should say what has become of them and when they last had it in their possession, custody or power. So I make those orders in relation to specific discovery.

Interrogatories

[32] I turn to the question of interrogatories. I consider that the defendants' opposition in principle to the interrogatories is based on a misunderstanding of the plaintiff's case which I have explained. I consider that in principle interrogatories 1-9 and 10-25 are necessary for disposing fairly of the action. In relation to interrogatories 28 and 30-32 the plaintiff has withdrawn the application for those interrogatories. In relation to interrogatory 29 the first and second defendants do not object but do not consent to this interrogatory. I consider that it is necessary for disposing fairly of the action but subject to amendments which have to be made to it and I will deal with those amendments on Tuesday 30 June.

[33] The exact wording of the interrogatories will be finalised next Tuesday but I will deal now with the issue as to whether the answers should be restricted to Facebook content in Northern Ireland or Facebook in English or worldwide Facebook content. The first and second defendants have not assisted the court by stating whether it is possible to deal with the answers if the questions are restricted to Northern Ireland and it is anticipated that if the questions are restricted to Northern Ireland then the answers will be that it is impossible to provide answers. On that basis I consider that the answers to be given should be restricted to the English language sector of Facebook.

Preliminary Issue

[34] I turn now to consider the question of a preliminary issue. Initially, I was attracted to the concept that this was a case in which it was appropriate to deal with the question of consent by way of a preliminary issue. I was minded to give directions that the preliminary issue be reduced to writing, that how it would have impacted on the rest of the issues was also reduced to writing and that there should be a trial of that preliminary issue. However, these applications have demonstrated the interplay between the facts and the question of consent. The issue as to what the plaintiff was consenting to join as well as whether she understood the terms and conditions will arise. I envisage issues as to the risks to which she might have been exposed which may impact on the question as to whether at the age of 11 or at the age of 13 or at the age of 16 she could consent. So I remain to be convinced that the issue is suitable to be heard by way of a preliminary issue. At present I am not minded to proceed on that basis. If there is to be an application for the hearing of a preliminary issue then it is to be formalised properly and an application launched.

Conclusion

[35] Finally, I would say that it is a matter of regret that the ambition of Mr Justice Gillen that this action should be heard and determined in the latter part of 2014 has not been met. I understand that there has been delay on the part of the plaintiff in obtaining expert evidence. There may be good reasons for that given the unusual nature of these proceedings. The matter has not progressed in the way that was

originally anticipated. The first week of next term was set aside for the hearing of this action and it is now submitted on behalf of the first and second defendants that they will not be in a position to meet that trial date given the late service of expert evidence by the plaintiff. A determined attempt must be made by Facebook Incorporated and by Facebook Ireland Limited to obtain expert evidence in time for the action to proceed at the beginning of September. If it is not possible to do so then of course the action will have to come out of the list but in order to take the action out of the list I will need to be persuaded of the attempts made to obtain expert evidence and as to the timescale in which the expert evidence is to be obtained and as to the reasons why if the timescale is longer than is presently available that the timescale cannot be met.

[36] I will hear counsel in relation to the period now within which the specific discovery is to be given and also in relation to the issue of costs.