

Neutral Citation No. [2014] NIMaster 14

Ref:

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

Delivered: **14/02/2014**

No.11/112626

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEENS BENCH DIVISION

Between:

KG

Plaintiff;

AND

AW SYSTEMS LIMITED
T/A ADULTWORK.COM

Defendant.

Master McCorry

[1] By writ of summons issued 20 September 2011 the plaintiff claimed: (1) an order for anonymity in respect of the proceedings; (2) interim and final injunctions to prevent the defendant from publishing, distributing, broadcasting or transmitting slander, malicious falsehoods and private information/confidential information in respect of the plaintiff, and (3) damages including aggravated and exemplary damages. By order dated 26 September 2011 the plaintiff was given leave to serve the writ of summons and notice of writ out of the jurisdiction upon the defendant at its

address in the United States of America, along with an anonymity order whereby she would be titled KG until further order of the High Court. The defendant having failed to enter an appearance to the writ within the 30 days period from date of receipt of the writ specified in the order, the plaintiff entered judgment in default of appearance on 22 October 2012 and on 18 November 2013 issued a Notice of Appointment for assessment of damages pursuant to Order 37. The defendant has not engaged in the proceedings at all, and did not respond to the notice of appointment, and did not attend at the initial directions hearing on 4 December 2013 or the hearing for assessment on 10 February 2014. I am satisfied that the defendant had due notice of the hearing for assessment by letter dated 5 December 2013 sent by the plaintiff's solicitor at my direction, in which it was explained that damages would be assessed in its absence if it failed to attend.

[2] These claims arise out of the posting upon the defendant's website, by persons unknown, of photographs of the plaintiff of a highly personal and sexual nature along with information, including the range of services of a sexual nature and the cost thereof, offered by the plaintiff. The defendant's website provides a facility, including contact details, for persons searching for the services of prostitutes, and a means for prostitutes to advertise their services. The plaintiff is not, and has never been, a prostitute, the photographs having been taken by a former partner of herself and sent to others in a private context, and no consent had been given by her to their publication. Although the contact details provided were inaccurate and the plaintiff did not actually receive any requests for services as a prostitute, she was significantly distressed when a friend alerted her to the content on the defendant's site. In a copy of the posting exhibited to the affidavit grounding the leave application on 26 September 2011, it is indicated that up until that point the posting had been viewed on 17,054 occasions, and it remained on display for a further one and a half years. In an effort to get the material removed the plaintiff contacted the police who were unable to assist but instead notified social services because the plaintiff had a young child. Concerned at any possible danger to the child if the plaintiff was working as a prostitute, social services carried out an investigation before concluding that the

plaintiff was not engaged in prostitution. However, the investigation further aggravated the distress already suffered by the plaintiff.

[3] The extent of the plaintiff's distress, and the impact of the offensive content posted on the defendant's website, and its failure to remove the material for a period of approximately one and a half years is described in: the affidavit by Hilary Carmichael, solicitor, sworn on 20 September 2011 in relation to the leave application; the affidavit of the plaintiff herself sworn 6 November 2013 for the purposes of the assessment of damages, and the detailed medical report by consultant psychiatrist Dr Peter Curran, based on an examination dated 6th February 2013, in which he concluded at paragraph 14.1:

"Your client describes and indeed displays evidence of very considerable emotional distress, the source of which appears to be the publishing of sexually explicit material on a website which she believes has led others to believe that she is a prostitute. The nature of her Psychological distress and the persistence of it since March 2011 is described within this report."

[4] The plaintiff claims damages under the torts of: (a) libel and malicious falsehood, (b) the statutory tort of harassment pursuant to the Protection from Harassment (NI) Order 1997 and (c) misuse of private information. As the defendant has not sought to defend the plaintiff's claim it is not for this court to scrutinize in detail evidence in relation to liability in respect of any of these torts, although where aggravated damages are concerned it is fair to make the general point that the aggravating factor so far as the conduct of the defendant is concerned relates to its failure to react for a period of one and a half years after being notified that the posting was the result of the malicious conduct of others who have not been identified or sued.

[5] This court has derived considerable assistance in the approach to be adopted in assessment of damages from the decision of McCloskey J in *AB Limited v Facebook* [2013] NIQB 14. As in this case the defendant chose not to defend the

proceedings and an order for judgment for damages to be assessed was made. At paragraph [4] of his judgment McCloskey J observed that the correct construction of this order meant that:

“... the plaintiffs will become entitled only to such damages as this court considers are properly to be awarded. Whilst the defendants have made the elective choice of not participating in these proceedings, they have not waived their entitlement to fairness. This is an inalienable and indefeasible right. It is embedded in the common law and reflected in the Court’s duty of impartiality. In the present context, in the discharge of this duty I have adopted the approach that, notwithstanding the aforementioned order, the plaintiffs bear the onus of proving their respective claims to the requisite standard, i.e. on the balance of probabilities. In considering whether this onus has been discharged, I have taken into account also that the evidence in the trial has been adduced by the medium of affidavits. This is a reflection of both the normal practice in cases where an order under Order 12 rule 2 of the Rules of the Court of Judicature is made and the power conferred on the Court by Order 38, rule 2.”

I have adopted the same approach in the present case, and I am satisfied on the balance of probabilities that the plaintiff has established that she has been defamed by the plaintiff, and that she has suffered a misuse of private information.

[6] As to the claim under the statutory tort of harassment pursuant to the Protection from Harassment (NI) Order 1997, Article 2 of the Order states:-

“2(2) In this Order references to harassing a person include alarming the person or causing the person distress.

(3) For the purpose of this Order “a course of conduct” must involve conduct on at least two occasions and “conduct” includes speech.”

In the present case there have not of course been 2 separate incidents, but rather a continuing course of conduct which by analogy with defamation has the character of continuing publication, so that each time the posting is viewed the conduct is repeated.

[7] Article 3 provides:-

“(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”

As to what constitutes harassment, in *Majrowski v Guy's and St. Thomas* [2006] UK HL 34, Lord Nicholls stated:

“Where ... the quality of the conduct said to constitute harassment is being examined, the Courts would have in mind that irritations, annoyances even major upsets, 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.”

I am satisfied that to wrongly portray a young woman as a prostitute is in the eyes of any reasonable person more than just an annoyance or even a major upset, and is oppressive and unacceptable behaviour. The very reaction of the police and social services is testament to this. However, in assessing damages the court must take into account the actual conduct. In this case the more outrageous and malicious conduct was by the unidentified persons who posted the information on the website in the first place, with the defendant's conduct being failure to remove it for a period of one and a half years after they had notification of its wrongful nature. I am therefore satisfied on the balance of probabilities that the plaintiff has proven her cause of action in harassment.

[8] As to the assessment of amounts to be awarded in respect of the defendant's tortious actions, plaintiff's counsel has referred this court to a number of earlier awards of which the court has taken cognisance, though I am mindful of the principle in defamation cases that juries are not told about previous awards unless they have been approved or ordered by the Court of Appeal (Gatley on Libel and Slander, 11th edition at 9.7). Damages for defamation are at large and are intended to compensate for the effects of the defamation, including: (a) consolation for the distress suffered, (b) repair of the harm to reputation, and (c) vindication. The level of damages will reflect the seriousness of the libel or slander, the range of publication and the conduct of the parties. In particular the third of these factors may give rise to an entitlement to aggravated damages, where conduct such as repetition and refusal to apologise may be taken into consideration.

[9] Harassment cases tend to be taken in the County Courts and there are relatively few written judgments but in this jurisdiction in *McGettigan v Short Brothers Plc* [2011] NI Ct 4 an award of £11,000 damages was made against an employer who failed to take action to prevent harassment of an employee by other employees with sectarian undertones and suggestion of involvement by persons with loyalist paramilitary connection. No award for aggravated damages was made in that case. In *Choudhary v Martins* [2008] 1 WLR 617, a racial abuse case, the English Court of Appeal made an award of £12,500 for psychiatric injury and an additional sum of £10,000 for injury to feeling. This reflected the impact of the harassment on the claimant's life, the extent of his upset, mental distress, fear and humiliation, characteristics present in this case, although it must be noted that in his report Dr Curran did not diagnose any definable psychiatric condition, but did note the "very considerable emotional distress" and psychological distress suffered by the plaintiff. There were no aggravated damages awarded in *Choudhary*.

[10] As to the appropriate level of damages in the instant case, I will deal firstly with damages for defamation. The factors to take into account in assessing the compensatory damages are the slur on the plaintiff's character, the duration of the offending conduct, the range of publication, the impact upon her life and the

emotional and psychological distress caused to her. However this must be balanced by the fact that as she was not named in the posting, the number of people who would have identified her would have been small but nevertheless awareness could quickly have spread by word of mouth. Taking these factors into account I assess the appropriate level of compensatory damages at £15,000. As regards aggravated damages, the only aggravating factors so far as the defendant sued is concerned is the prolongation of the plaintiff's distress by the defendant's refusal to remove the offending material for a year and a half and the lack of an apology. Those are however factors which justify the making of an award of aggravated damages which I assess at £10,000. The total damages for defamation therefore are £25,000.

[11] In respect of the claim for harassment the court must take care to avoid double counting, or the duplication of the awards under different torts or headings but in respect of the same conduct and injury. The factors which the court must take into account are broadly the same as in the assessment of the award for defamation, and I conclude that the level of both compensatory and aggravated damages should therefore be the same, that is a compensatory award of £15,000 and aggravated damages of £10,000 totalling £25,000. However, of course the plaintiff cannot recover the same damages twice so there will be a single award of £25,000 in respect of both heads of claim. Finally, as regards the claim under the tort of misuse of private information, this is still a developing area of law and authority is relatively sparse, and largely relates to actions against celebrity magazines by the famous. Damages have tended to be modest and in the context of the present case I would assess them at £3000. There is however no issue of double counting in respect of a discrete award of damages under this heading.

[12] I therefore give judgment for the plaintiff against the defendant in the sum of £28,000, with High Court costs to be taxed in default of agreement, and I order a 6 week stay.