

Judicial Communications Office

Thursday 7 September 2017

COURT REDUCES DAMAGES AWARDED AGAINST FACEBOOK

Summary of Judgment

The Court of Appeal today reduced the damages awarded in respect of a finding that Facebook had misused private information.

On 11 September 2013 a photograph of the plaintiff (“J20”) standing in front of a Union Jack flag was posted on the “Irish Blessing” Facebook page. J20 was named and the words “Meet Sectarian Parade Organiser” were superimposed on to the photograph. There was a posting on the page calling for people to attend a protest on 21 September 2013 in relation to a decision taken by the Belfast City Council to restrict the flying of the Union Jack flag at Belfast City Hall. A number of comments were posted on the page including one by the grandmother of J20’s children stating that he had deleted them off his Facebook page “because their names are Catholics” and another saying “He has Catholic children who he doesn’t bother with”.

On 13 September 2013 J20’s solicitors faxed a letter to Facebook, referring the post, and asking for it and the associated comments to be taken down immediately. The letter stated that if the offending material was not taken down by 14 September 2013, an application to the court for an emergency injunction to force this would be made and Facebook would be fixed with the costs. There was no response from Facebook.

On 14 September 2013, a photograph of J20 was posted on the Facebook page entitled “Belfast Banter”. He was in a public place standing outdoors, suitably attired, and holding a fish in his hands. The words superimposed on the image were: “That’s a tout so it is. Said the fish.” J20 claimed he used Facebook’s reporting mechanism to complain about the postings but received no reply. The trial judge described him as being extremely vague about what complaints he made and to which precise posts he objected. On 25 September 2013, J20 applied for emergency injunctive relief and on 27 September 2013 he obtained an ex parte injunction which ordered Facebook to remove the posts from the Irish Blessings and Belfast Banter pages. By 9 October 2013 the relevant posts were deleted.

The Court heard that Facebook claims to police all postings by reference to “Facebook Community Standards” which make clear what is and is not permitted by way of freedom of expression. These standards are policed by Facebook’s Community Operations Team who have the power to remove or delete any material which offends against the standards. An affidavit from a member of this team stated that Facebook received “a number of letters and legal correspondence from the plaintiff’s solicitors by fax” but that “community operations is unable to discern, let alone review, any particular post (i.e. photograph) based

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on the vague information provided by the plaintiff.” The team did, however, review the Irish Blessings page and determined that it did not violate Facebook’s terms of service.

The trial judge accepted that the letter of 13 September could and should have been more specific in identifying the precise legal basis of the plaintiff’s complaint. He felt, however, that Facebook should be expected to know the relevant law in relation to such matters and, at a minimum, should consider the material in respect of which there has been a complaint and remove any unlawful content. The judge held that the reference to the religion of J20’s children and to him being referred to as a tout were unlawful and could not be justified. He concluded that Facebook did have actual knowledge of the unlawful nature of the information in question and had sufficient facts and circumstances before it to make it apparent that the publication of the information was private. The trial judge further concluded that this was not a case in which Facebook acted expeditiously in removing the offending material and held that it specifically made a decision not to remove the material when the complaint was made. He ruled in favour of J20 and awarded him £3,000 general damages in respect of Facebook’s misuse of private information.

Facebook appealed the decision of the trial judge on a wide front, including that:

- (a) the action was brought by J20, not by the children or by J20 as their next friend. J20 did not have a reasonable expectation of privacy in respect of the religion of the children.
- (b) the evidence showed that at least two of the children were adults, as the plaintiff complained he had been unable to attend their weddings. No evidence was presented to the court that any of the children were minors at the time of these postings.
- (c) the posed photograph of the plaintiff taken in a public place, engaged in an act of public protest, was provocative and would inevitably attract strong comment.
- (d) the two postings were by the children’s family members and thus were only published to those who sought to access and read the comments on that particular photograph and the children themselves were not infants and were not identified. There was no evidence of any risk of harm.
- (e) in respect of the posting of the photograph of J20 with the words superimposed on the photograph “That’s a tout so it is. Said the fish.”, the judge failed to take into account that there was no serious assertion that the plaintiff was an informer, rather that the use of the word tout was a play on words with trout. Further, there was no evidence that there was any assertion being made that J20 was an informer or that such an assertion might be taken seriously.
- (f) there was no evidence of any threat or harm suffered by J20 or anyone else as a result of the publication of the photograph with the words superimposed.
- (g) finally, the award of £3,000 in general damages was excessive.

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Misuse of private information

The Court of Appeal said there was no dispute about the applicable law which states that a person is entitled to have his reasonable expectation of privacy protected. The question of whether there is a reasonable expectation of privacy is a broad one, which takes account of all the circumstances of the case. In this case, J20 particularised the information which was said to give rise to a reasonable expectation of privacy as being the religion of three of his children and his identification as a tout.

The Court, however, noted the evidence was that the oldest of the children was 31 and the respondent had not seen the children since 1997/98. The youngest was at least 16. There was no evidence from the children and no evidence about their circumstances. Case law highlights that the issue of whether or not information is private is highly dependent upon the factual circumstances surrounding that information. A person's identity and appearance are unlikely to be capable of misuse because as a matter of everyday occurrence people engaging with the person will be aware of those factors and there is nothing private about them. The same may also be true of a person's religion. Many religious people engage in regular acts of worship in the company of large numbers of worshippers of a similar persuasion. Where that is the case the publication of the fact that the person adheres to that religion would almost invariably not be private information. Whether or not to disclose one's religious persuasion, if any, is a matter for the person holding that opinion. That is an aspect of personal autonomy:

“Where a litigant pursues a claim on the basis that there is a reasonable expectation of privacy in respect of the information it is for the plaintiff to set out the information and the facts and circumstances upon which he or she relies in order to establish that this is information in respect of which he or she has a reasonable expectation of privacy. There was no such evidential base laid in this case. There was simply no material upon which the judge could come to the conclusion that the information was private.”

J20 further contended that the breach of privacy related to the publication of his relationship with the children. It was submitted that this was not in the public arena and that any complaint about that relationship should not be brought into the proceedings. It was claimed that the children's grandmother breached J20's Article 8 rights by posting that he had not seen the children for 16 years. The Court of Appeal said it did not have to determine whether there was any proper basis for that allegation as the case pleaded by J20 was only that the disclosure of the religion of the three grown-up children was information in respect of which he had a reasonable expectation of privacy. The nature of the relationship between J20 and the children was not explored in the pleadings, the evidence or the judgment, was not before the learned trial judge and could not now be raised on appeal.

In defence of the claim in relation to the publication of J20's children's religion, Facebook relied on the case of King v Sunday Newspapers Ltd which concerned the publication of

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articles involving allegations of serious criminal activity and in the course of those articles the Catholicism of the plaintiff's partner, the baptism of their child as a catholic and the location of the church were disclosed so as to identify the partner and the child. The Court of Appeal held that that the background in that case was completely different from this case involving disclosure by a grandmother of the religion of her adult grandchildren. It said there was no question of reputational damage to the children and if there was reputational damage to J20 it was because of his conduct towards children but there was no pleading or case made that this was private information.

The other issue which J20 complained about was the reference to "tout". The trial judge was satisfied that this reference constituted misuse of private information. The Court of Appeal concluded that he was entitled to come to that decision:

“An allegation that a person is a tout or informer automatically gives rise to the allegation that there has been a confidential relationship between the person and some agency that he is assisting. A person who had provided confidential information to a relevant agency would as a matter of course reasonably expect that the fact of this communication of the material would be private. The very allegation, therefore, lays a basis for the required level of privacy.”

Publication

The Court of Appeal noted that an application had been made to the trial judge before the start of the proceedings to amend the pleadings to rely upon the inadequacy of the online reporting system in order to fix Facebook with knowledge of the posting of the tout allegation on the Belfast Banter page. In light of the late stage at which this application was made, this matter was not therefore before the Court of Appeal but it noted that this was the second case in which there has been judicial criticism of the effectiveness of the Facebook online reporting system and said that in another case the Court may have to review its effectiveness and the consequences of any inadequacies found.

In this case, the letter written by J20's solicitors only referred to the Irish Blessings page and did not contain any reference either to the Belfast Banter page or to the suggestion that the respondent was a tout. The first intimation to Facebook about that allegation was the service of the material on 25 September 2013 which led to the making of the injunction on 27 September 2013. The Court of Appeal, however, held that once this material had been supplied Facebook was required to act expeditiously. It concluded that Facebook failed to do so as the material was not taken down until 9 October 2013. The Court agreed, therefore, that Facebook was liable for the publication of the tout allegation from a date around the end of September until 9 October 2013 and assessed the damages in respect of that publication at £500 having regard to the limited period of time during which the post was available to be viewed. Facebook had no liability in relation to any viewing of the allegation between 14 September 2013 and the end of the month.

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Conclusion

The Court of Appeal allowed the appeal in relation to the publication of the religion of J20's three children and reduced the award of damages to £500.

NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Court Service website (www.courtsni.gov.uk).

ENDS

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