Judicial Communications Office

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COURT AWARDS DAMAGES OF £125k TO ARLENE FOSTER FOR DEFAMATORY TWEET

Summary of Judgment

Mr Justice McAlinden, sitting today in the High Court in Belfast, awarded damages of £125,000 to the outgoing First Minster, Arlene Foster, in a libel action against Dr Christian Jessen.

On 23 December 2019, Dr Jessen ("the defendant") posted a defamatory statement on Twitter alleging that Mrs Foster ("the plaintiff") was having an affair with one of her Close Protection Officers and that her marriage had broken down. The tweet was retweeted 517 times and "liked" by at least 3,500 Twitter users. On 24 December 2019 the plaintiff's solicitor, who was unable to confirm an address for the defendant, posted a response on the defendant's Twitter page putting him on notice "in relation to a totally false allegation he has tweeted regarding … Arlene Foster.". The response also warned that legal action would be taken against any persons who had retweeted "this highly defamatory allegation". The tweet was posted during a period when negotiations were taking place with a view to the re-establishment of the Northern Ireland Executive. The plaintiff gave evidence that in her opinion the timing of the publication of the "baseless claims" was deliberately chosen to undermine her and impede her ability to successfully conclude the negotiation process.

The defendant's tweet and the plaintiff's solicitor's response to that tweet attracted a large number of responses. On 25 December 2019 the defendant acknowledged these responses by tweeting "lol". On 26 December, the defendant tweeted again and made an oblique reference to the "Streisand effect" which is a social media phenomenon which occurs when an attempt to hide, remove or censor information has the unintended consequence of further publicising that information. Many other Twitter users continued to respond to the original tweet and other responses over the Christmas period and into the early New Year. The court was shown printouts of tweets during this period which it said were "clearly derogatory and disparaging" and contained "gross, base insult".

On 2 January 2020, the plaintiff's solicitor issued a letter of claim in which he restated that the plaintiff categorically and emphatically denied that she had committed adultery and said that the defendant's "acknowledgment and apparent enjoyment" of retweets and online comments and his reference to the "Streisand effect" had encouraged responses to his original tweet and had "further exacerbated the damage caused to" Mrs Foster's "reputation by portraying her as a liar and a hypocrite in her denials." The plaintiff's solicitor's letter concluded by stating that his client required the removal of the tweet from the defendant's Twitter account; his undertaking not to republish or retweet the subject or related allegations; the publication of a "comprehensive retraction and apology"; proposals for compensating Mrs Foster; and the reimbursement of her legal costs. The letter stated that if the defendant failed to contact the solicitor within seven days, proceedings would be instituted in the High Court of Justice in Northern Ireland.

There was no immediate response to the letter of claim and the tweet remained on the defendant's Twitter page along with all the responses. When the defendant responded on 7 January 2020 he noted that the letter of claim had been sent to a general clinic email address which he only viewed

that day. He said that while he did not agree with the suggestion that his tweet gave rise to a claim in defamation, he had removed it from his account that day without any admission of liability and had no intention to republish it. The plaintiff's solicitor replied to the defendant by email on 9 January 2020 saying that the decision to publish the tweet in the first place had been exacerbated by the inordinate delay in removing it and had resulted in serious reputational damage to the plaintiff. The solicitor said the plaintiff required the defendant's immediate proposals for the publication of a comprehensive retraction and apology and proposals in relation to damages. There was no response to this email. Further, there was no response to any of the solicitor's 10 subsequent letters or emails sent between 20 January 2020 and 9 April 2021. No appearance was entered by or on behalf of the defendant when the writ of summons was served and there was no response to the notification of the date for the assessment of damages or to the service of the court papers.

As a result it was necessary for the plaintiff to attend court on 14 April 2021 to give evidence and it was clear from her demeanour in the witness box that when asked about the allegation of adultery, she found the whole experience of giving evidence about such personal matters to be very distressing. The court said it entirely accepted the plaintiff's evidence that the "public trashing of the most precious relationship in her life by a prominent public figure caused her grave upset, distress, embarrassment and humiliation". The plaintiff also gave evidence about her views of marriage and same sex marriage. She specifically denied having any negative attitudes or feelings towards homosexuals and described genuine upset at being tarred with the brush of homophobia. The court accepted the plaintiff's evidence that she is not homophobic and that when such an allegation is levelled at her it causes her significant upset and distress.

On 16 April 2021, the court office was contacted by a solicitor on behalf of the defendant claiming he had only become aware of the assessment of damages hearing when friends had contacted him following the widespread press coverage of the hearing on 14 April 2021. On 19 April 2021, an application was lodged for leave to enter a late appearance on behalf of the defendant for the purposes of challenging jurisdiction. The defendant attended court to give oral evidence on 23 April 2021. He said he had been suffering from mental health difficulties. He stated he had given up his work at a Harley Street clinic on 10 January 2020, had retreated from public life, had stopped using social media and had moved in with his parents in March 2020 in order to recuperate. As a result, although he had received the writ, he had not received any correspondence after that and had not been aware that a default judgment had been obtained or that a hearing to assess damages had been arranged. He assumed that no steps had been taken to progress the action because of Covid and was under the impression that courts were not operating during the pandemic.

The court, however, noted podcasts which the defendant hosted or took part in between January 2020 and February 2021 and also considered the activity on his Twitter page during this time. It said the evidence provided to the court supporting the existence of a significant depressive disorder was "frankly very weak and deficient". The defendant accepted that the plaintiff's solicitor's tweet did come to his attention over the Christmas period of 2019 but said he had no idea that Mr Tweed was a defamation lawyer and doubted the bona fides of the tweet. Following receipt of the letter of claim on 2 January 2020, the defendant sought legal advice and his solicitors sent a draft response for him to send to the plaintiff's solicitor in an email sent at 17:51 on 3 January 2020. This referred to the defendant having "received your letter, which was sent to my work email address, when I returned to the office today". However, this response was not sent by the defendant to Mr Tweed until 7 January 2020. The court said the response was not factually accurate either when the draft e mail was sent to the defendant or when it was sent by the defendant to Mr Tweed. When questioned about the matter the defendant had "significant difficulty" accepting that the statement was inaccurate, false

and misleading at the time it was sent. Furthermore, the defendant could give no explanation as to why he delayed sending the response, or removing the offending tweets, until 7 January after receiving the draft from his solicitor on 3 January and a reminder on 6 January.

The court noted that the defendant sent the email response to the letter of claim using his work email address despite the fact that he knew he was leaving that employment on 10 January and according to him would have no means of accessing the account after that. It was further noted that even though he was in the clinic on 10 January he stated he was unable to use the computer to log into his email account as he was seeing patients in a different room. He said this was why he had not received the plaintiff's solicitor's email of 9 January 2020. The defendant told the court that, since leaving the clinic on 10 January 2020, he had been unable to access his work email account and did not make an arrangements with his former employer to forward any personal correspondence and emails to him. The court said this explanation was "very peculiar" and the court did not accept that the defendant would not have made arrangements with his former employer to have correspondence forwarded to him particularly when his former employer was aware of the potential for a claim being instituted and when the defendant must have anticipated there would be a reply to his work email address. The court said: "In summary, I find Dr Jessen's evidence about the email from [the plaintiff's solicitor] dated 9 January 2020 to be wholly unsatisfactory and unconvincing".

In paragraphs [59] to [89] of its judgment the court considered issues relating to the service of documents on the defendant at his apartment in London at the time when he claimed he was living mainly with his parents. The court also reviewed the content of two podcasts which the defendant produced in May 2020 which contained comments to suggest that the defendant was not living with his parents at that time as well as tweets from him about graffiti which appeared close to his apartment during the time he had said he was not living there. The defendant returned to given evidence in court on 21 May 2021 and was given the opportunity to address these matters. His evidence was that the accounts had had given in the podcasts concerning his domestic life were entirely fictitious. The court said his explanations were concerning:

> "When one listens to the accounts of domestic life in these two podcasts, there is not a hint or suggestion that these accounts are fictitious and the spontaneous conversational nature of the exchanges and, indeed, the general tenor of the podcasts certainly give the clear impression that these accounts are based on Dr Jessen's recent personal experiences during lockdown. If these accounts are, indeed, entirely fictitious then it is clear that Dr Jessen is very skilled at spontaneously and casually inventing and recounting quite complex and entirely fictitious accounts relating to his personal life. However, even when pressed, neither Dr Jessen nor his counsel, would accept that these accounts were lies. They were invented but they were the produce of "artistic licence" in the context of being contained in podcasts which were intended to entertain. I do not, for one minute, accept this explanation or submission. Having carefully considered his evidence and his demeanour whilst giving evidence, I am convinced that Dr Jessen has deliberately chosen to describe these accounts as fiction in a forlorn attempt to persuade the court that he was not residing with his partner in Walpole House during the time he states he was living with his parents in Fulham. It is not the account in the podcasts that is made up. It is the account in the witness box."

The court concluded, for the reasons set out in its judgment, that it did not accept the evidence of the defendant in respect of the service of the various key documents in the case:

> "Dr Jessen has chosen to ignore these proceedings until shocked into action by the scale of the press coverage of Mrs Foster's evidence. I do not consider that there is any legitimate basis upon which the court could or should exercise its discretion in favour of Dr Jessen by allowing him to enter a late memorandum of appearance. His application to do so is refused."

Legal principles in relation to the assessment of compensation in a defamation action

The award of general damages for defamation is intended to serve the following functions:

- To act as a consolation to the plaintiff for the distress the plaintiff suffers from the publication of the statement;
- To repair loss to the plaintiff's reputation; and
- As a vindication for the plaintiff's reputation. This is an aspect of the award so that if the allegations should re-emerge, the damages must be large enough to proclaim the baselessness of the libel. Vindication can also be achieved, either in whole or in part, by an apology or by a categorical statement by the defendant that the statement is unfounded.

A court, in assessing damages, can take into account a wide range of matters and may have regard to this checklist:

- The objective features of the libel itself, such as its gravity, its prominence, the circulation of the medium in which it was published and any reputation;
- The subjective effect on the plaintiff's feelings (usually categorised as aggravating features) not only from the publication itself but also from the defendant's conduct thereafter both up to and including the trial itself;
- Matters tending to mitigate damages such as the publication of an apology;
- Matters tending to reduce damages such as giving evidence of the plaintiff's bad reputation, or evidence given at the trial which the jury are entitled to take into account;
- Special damages; and
- Indication of the plaintiff's reputation past and future.

When determining the appropriate level of general damages for defamation, the court is entitled to take into account matters such as the plaintiff's status and reputation; the mode and extent of publication; the conduct of the publisher; and any injury to the plaintiff's feelings as a result of the defamation or a consequence of highhanded, oppressive or insulting behaviour by the publisher. In this case, counsel for the plaintiff did not argue that an award of exemplary damages was warranted and the court said that the award of damages would be compensatory but that did not mean that the award would not be capable of having some deterrent or exemplary effect.

The court said that the actions and inaction of the defendant in this case meant that it was unable to identify any matters which would tend to mitigate the damages. While the defendant took down the tweet after two weeks this had to be seen in the context of the plaintiff's solicitor highlighting the highly defamatory nature of the allegation at a very early stage and writing a detailed letter of claim thereafter. The court said it must also be judged in the context of other Twitter users taking the opportunity to tweet responses to and comments on the defendant's tweet in the two week period that it remained on the defendant's Twitter page. Further, during the two week period that the tweet remained on the defendant's Twitter page, the mainstream media published stories highlighting the fact that he had failed to take down the offending tweet. The court said that, if

anything, the removal of the tweet after two weeks only served to place a cap on the aggravating factors in this case, rather than constituting a mitigating factor. The court commented that the deliberately inaccurate and misleading email response issued by the defendant on 7 January 2020 to the letter of claim in which he asserted that he had only accessed the e-mail account to which the letter of claim was sent when he attended his clinic on 7 January 2020 did not constitute a valid reason for not taking the tweet down sooner as the he was clearly aware of the plaintiff's solicitor's earlier efforts to highlight the defamatory nature of the tweet.

Any award of damages must bear a reasonable relationship of proportionality to the injury to reputation as suffered. The court said that the award in this case was primarily compensatory and would therefore be based on the plaintiff's loss. As a consequence the means of the defendant were irrelevant to the assessment of damages for the tort. In arriving at the award the court said it was acutely aware of the cautionary advice given in the *Elliot*[1] case when the trial judge stated that there was a danger in making comparisons with other cases:

> "Taking into account conventional awards in personal injury cases as a check on the reasonableness of a proposed award of damages for defamation should not distract from the three functions of damages for defamation and a consideration of aggravating and mitigating circumstances in the particular case. … I will assess damages in accordance with the principles applicable to defamation and seek to maintain that sense of proportion by comparing the proposed award with personal injury awards in Northern Ireland."

The court also took into account that the tweet was made in the context of other earlier anonymous tweets which had been circulating to some extent in the "Twittersphere" for a number of days before the defendant's tweet was published:

> "The defendant's tweet encapsulates the contents of the earlier anonymous tweets. However, there is a very significant difference between a few anonymous Twitter users posting allegations of this nature and a significant public media figure who is also a practising clinician taking up the allegations and publishing them on his Twitter page which at that time had approximately 311,000 followers. There is a lot of force in [counsel's] submission that many of those reading the tweet on Dr Jessen's Twitter page would have thought "if Dr Christian Jessen is tweeting this, then it must be true" especially when the tweet was not taken down and particularly when Dr Jessen subsequently tweeted "lol" and thereafter tweeted his clear enjoyment of comments and responses made by other Twitter users on his Twitter page that Mr Tweed's intervention had precipitated a "Streisand effect" increase in awareness of the original allegations."

Discussion

Following the guidance in the *Elliot* case, the court considered the relevant matters starting with a consideration of the objective features of the libel itself:

[1] In that case the defendant was a Sinn Fein MLA and at the time he posted the offending tweet he had 5,000 followers on Twitter. The offending tweet was taken down within an hour of it being posted. In the limited time that it remained on the defendant's Twitter page it was read 167 times and retweeted 6 times.

> "To state that a woman, married for 25½ years and the mother of three children, who is a committed Christian and is publicly recognised as such, who has publicly made statements extolling the sanctity and importance of marriage as a sacred relationship between a man and a woman, who also happens to be the leader of the Democratic Unionist Party, its former spokesperson on equality and human rights and a holder of the Office of First Minister of Northern Ireland, was an adulterer, a hypocrite and a homophobe, is a most serious libel and is grossly defamatory. It was an outrageous libel concerning an individual of considerable standing, attacking her integrity at a most fundamental level and it involves the trashing in a very public fashion the relationship that Mrs Foster holds dearest in her life. It affected core aspects of the plaintiff's life, namely, her relationship with her husband and her deep Christian faith. It called into question the plaintiff's fitness and suitability to occupy the Office of First Minister at a time when delicate negotiations were continuing on the re-establishment of the Northern Ireland Executive. In short, I consider that this was an outrageously bad libel."

The court said there could be no doubt that this was a "highly prominent libel". The offending tweet remained on the defendant's Twitter page for two weeks; a Twitter account with 311,000 followers. The tweet was liked approximately 3,500 times and the tweet was retweeted 517 times. The fact that the defendant had failed to take down the offending Tweet was the subject of mainstream media coverage. The Court said the duration of publication of the libel on the defendant's Twitter account, the large numbers who saw the defamatory statement and the significant number who repeated it were important factors to take into account when determining the appropriate award.

The court then considered the subjective effect on the plaintiff's feelings:

> "I readily accept the plaintiff's evidence that this outrageously bad libel cut her to the core, causing very considerable upset, distress, humiliation, embarrassment and hurt. Bearing in mind the time of year and the work-related pressures the plaintiff was under at that time, I fully accept this libel took a heavy emotional toll on the plaintiff despite her experience of having to deal with the heat of robust political debate. Her marriage, her family life and her faith are the most important things in her life. These things provide important pillars of support for her and it was these things that were being publicly trashed. In terms of the timing of the tweet, Mrs Foster is genuinely concerned that the timing may have been deliberately chosen to undermine the negotiations concerning the restoration of the Northern Ireland Executive. For the avoidance of doubt, I do not ascribe to the defendant the knowledge of or interest in Northern Ireland politics which would be a prerequisite to giving any detailed consideration to the possibility that the timing of this tweet was intended to influence the outcome of the negotiations. However, in respect of the anonymous tweets that preceded the defendant's much more prominent statement, such a motivation cannot be dismissed out of hand."

The court said it had also considered how other people treated the plaintiff in the aftermath of this tweet being published as an aspect of the effects on her. It noted, as a positive, that she received the personal support of political opponents during this difficult time. On the deficit side of the balance sheet, constituents were enquiring of other elected representatives in Fermanagh whether the claims were true and some "quite vile" comments were posted on the defendant's Twitter page in response to his tweet. The court said that by tweeting "lol" and "expressing obvious enjoyment in respect of

what was viewed on Twitter as the "Streisand effect" in action, at best he did nothing to discourage such responses, at worst he encouraged them", and, in any event, he knowingly allowed such responses to remain on his Twitter page up to 7 January 2021. The court said these matters constituted significantly aggravating features in this case.

Further aggravating features included the somewhat tardy response to the letter of claim, the "woefully inadequate and deliberately misleading" response when one was finally made, the failure to respond to any subsequent correspondence, the failure to publish any form of apology or retraction, and the defendant's failure to make any offer of compensation, which resulted in the plaintiff being required to give evidence, with such evidence attracting significant press coverage. The court said this was compounded to a significant extent by the defendant's evidence given on 23 April 2021 to the effect that at the time he believed the rumours about the plaintiff were true and he wanted to expose what he saw as the plaintiff's hypocrisy on matters such as same sex marriage.

In considering vindication, the court said the absence of an apology meant that the need for vindication remained unaddressed:

> "It is necessary that any award made in this case is sufficient to convince a bystander of the baselessness of the charge. As I have indicated this was a most serious libel and there should be no doubt as to the baselessness of the allegations. There should be considerable element of vindication in the award and no reduction is warranted bearing in mind the absence of any form of apology".

Finally, the court considered that there was nothing in the defendant's conduct in this case or indeed any other relevant consideration that could constitute a mitigating factor in this case.

Conclusion

The court considered that the appropriate award is £125,000. It said it was satisfied as to the proportionality of the award in this case. The court ordered the defendant to pay the plaintiff's costs.

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 Judiciary NI website (https://judiciaryni.uk).

ENDS

If you have any further enquiries about this or other court related matters please contact:

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