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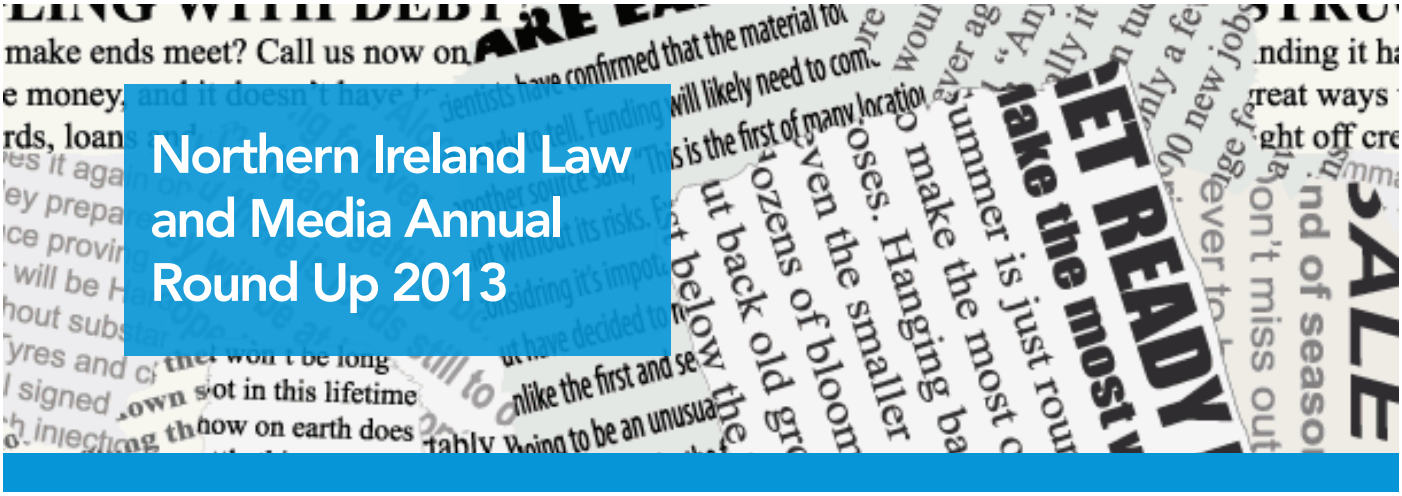

The Innocent Court Reporter

The case of **ZY v. Paul Higgins** ([2013] NIQB 8) was heard on 25 January 2013. It concerned the Article 2 rights of a convicted child sex offender seeking anonymity to continue after conviction in order to safeguard his wellbeing from risk of suicide within the confines of Prison when it appeared a journalist was to write a piece to distributed to the mainstream media.

On 2 September 2011 ZY, a male in his 20s, was arrested and charged with attempting to blackmail a female in relation to an indecent video recording made when she was 15 years of age; engaging in sexual activity with a minor; and possessing indecent images of children. On 7 December 2012 ZY pleaded guilty to the charges and was sentenced to 21 months imprisonment. Following sentencing, representations were made on behalf of the first defendant journalist, Paul Higgins, seeking revocation of the anonymity order which had been made at the first remand hearing.

The Crown Court judge had been provided with copies of psychiatric reports which gave an outline of a previous suicide attempt by ZY which had been regarded as a serious attempt and the expert said that if the matter were to be made public it was **"highly likely to be high suicide risk"**. He had said that the arrest had produced a psychological reaction, but did not believe that ZY was then currently suicidal. The Crown Court judge discharged the anonymity order.

Later the same day ZY was granted an interim injunction by McCloskey J in the High Court against Mr Higgins restraining him from publishing any information disclosing or concerning in any way the identity of ZY or which could conceivably lead to his identification. The case was subsequently tried on affidavit evidence over the period 23-25 January 2013. On 25 January 2013 the High Court granted a permanent injunction prohibiting the publication of anything identifying or tending to identify ZY and the anonymity order was affirmed.

The Judge performed the balancing exercise between ZY's article 2 right to life and, on the other hand, the principle of open justice, and the qualified right to freedom of expression under article 10, coupled with consideration of section 12(4) of the Human Rights Act. He said that this balancing exercise had **"a certain tinge of unreality"** because the right to life was absolute, whereas the other rights were qualified. He ultimately came to an unequivocal conclusion that the right to freedom of expression and the principle of open justice must both yield to the right to life.

Libellous Online Trolls

The case of **AB Limited & ors v Facebook Ireland Limited, Ann and Alan Diver** ([2013] NIQB 14) concerned internet libel. There were four plaintiffs: a Limited company, two of its officials and a member of staff. An order granting anonymity to all four plaintiffs was granted on 17 August 2012 and extended and made permanent at the substantive hearing.

The plaintiffs complained that libellous statements had been published on the social networking site Facebook which included personal and commercial matters. The Judge described the publications as **"a campaign of vilification and abuse which ebbed and flowed during a period of some few months"**. The words complained of had been published by individuals known as Ann and Alan Diver, these names are pseudonyms for the unknown individuals who created and published the libels. The proceedings were ultimately discontinued against Facebook Ireland Limited.

The libellous statements expressly identified two of the plaintiffs and by reference and implication the remaining two were considered to be identified by the **gratuitous and malicious slurs** that were made against their **character and reputations.** The statements were considered as an attack against marital fidelity, morality, integrity and honesty of the plaintiffs and accused JW of an **'unbridled licentious lifestyle and practice'.**

Within all the circumstances of this case and in light of the compensation that was awarded to the two Company officials, SM £10,000 and CM £5,000 the court took the view that the corporate reputation of AB Limited had been adequately vindicated. JW was awarded £20,000. Judgment was therefore awarded against the unknown defamers in the sum of £35,000 which can of course be enforced against them if and when their identities are revealed.

The court was sending a clear message to internet trolls: it would **"protect the interests of those whose legal rights are infringed by the cowardly and faceless perpetrators of this evil"** and the courts would **"penetrate the shields and masks of anonymity and concealment".**

Knowledge = Removal = Exoneration in the Wild West

The case of **HB (A minor) v. Facebook Ireland Limited** ([2013] NIQB 25) concerned an application for interim injunctive relief. The plaintiff who was aged 12 years and considered vulnerable had been engaged in posting and / or uploading sexually suggestive and / or inappropriate photographic images of herself with self orientated literary content on the Facebook social network website. Both she and her school were readily identifiable and she belonged to a group of some 63,000 who engage in this conduct. The plaintiffs legal guardians claimed that she was at risk of being targeted or groomed by paedophiles.

"The gravamen of the plaintiff's case against Facebook is that it failed to prevent access by her to this social network site" and the monitoring system it operated was claimed to be inadequate. Her claim against the social networking giant included her Convention rights to include the right to life, freedom from torture or inhumane treatment, her right to privacy and the torts of misuse of private information, breach of confidence, negligence and her statutory rights pursuant to the Data Protection Act 1998 and Protection from Harassment (NI) Order 1997.

Reference is made to various statistics relating to Facebook users and regard was had to its terms and conditions and registration system. Four affidavits deposed by Facebook to assist the Court. These informed the court on the corporate structure of the various entities of the defendants and to set out its monitoring capabilities:

[19] **"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 n line . . . thousands, of users share the same names . . .There is no technical programme or mechanism that exists . . .All Facebook can do is act expeditiously every time it receives a report about unlawful or abusive content that violates the terms of the…cannot proactively prevent an individual from registering . . . no way to prevent such child from accessing the Facebook website…not feasible to verify the age . . . rejects the notion of broad censorship . . ."**

Facebook had in fact disabled four separate Facebook accounts belonging to the plaintiff via the reporting mechanism. The Court concluded that the plaintiff could with ease conceal her true identity under millions of guises and it would not order any of the Defendants to **"take all necessary steps"** nor any type of interim injunctive relief as to do so would result in an order which is **"incapable of effective supervision and enforcement by the Court"**. Facebook had made good its defence which reflected Regulation 19 of the Electronic Commerce (EC Directive) Regulations 2002.

What is in a Name?

In the case of **Carlin's (Daniel Martin) Application** ([2013] NIQB 40) the Lord Chief Justice for Northern Ireland provided useful guidance when the courts are considering anonymity applications:

[4] …It is essential, other than in exceptional circumstances, that a member of the press also be available to ensure that the press have an adequate opportunity to make representations and to take any further steps that they consider are appropriate in relation to the application. That is a minimum requirement of open justice and it is important that all of those involved in the justice system are aware of it. One of the issues that may need to be considered is the extent to which the press should be free to report the application even where the application is granted. Any restriction on public access to information about what happens in the justice system must be kept to the absolute minimum.

[5] …We consider that where it is proposed to make an application for anonymity for a defendant there should be at the earliest possible time notification to the court, the police and the prosecution setting out the circumstances of the application. This should include any statements upon which the applicant may wish to rely. The police should be asked to comment on whether there is any reason to consider that there is a risk or threat to the individual concerned and if possible to give some indication as to what, if any, steps have been or might be taken in relation to it".

"Before I Go On... I should Say That Anyone Who Uses Facebook Does so at His or Her Peril"

The case of **Martin v. Giambrone** ([2013] NIQB 48) case involved a Mareva injunction to prevent a defendant from dissipating certain assets pending the outcome of litigation. Whilst the Mareva injunction was in force the defendant posted on his Facebook site the following comments:

"They thought they knocked me down, now they will see the full scale of my reaction. F*** them, just f*** them. They will be left with nothing."

The plaintiffs asked the trial Judge if they could rely upon the Facebook posts during the course of their separate legal proceedings against the defendant and the latter was objecting to its use and objecting to the comments being put before the Judge dealing with the Mareva Injunction.

The defendant claimed that use of the comments would breach his confidence as his Facebook site is restricted to communications to his friends only and that the material was private.

The Court held that the comments were relevant and could be disclosed and shared with the trial Judge and any Judge dealing with the Mareva Injunction.

The court was not presented with any evidence as to how many friends the defendant had and what his relationship was with each of them. Neither did the defendant suggest that those friends were in any way restricted as to how they used any information given to them by the defendant. The court concluded that the information viewed by the defendant's friends would not have been considered by them as confidential. Furthermore, no evidence was adduced to suggest the information received by the plaintiffs would have been known to them as confidential or private. Finally, the court did not consider that Article 8 rights of the European Convention had been engaged.

Horner J noted:

"Before I go on … I should say that anyone who uses Facebook does so at his or her peril. There is no guarantee that any comments posted to be viewed by friends will only be seen by those friends. Furthermore it is difficult to see how information can remain confidential if a Facebook user shares it with all his friends and yet no control is placed on the further dissemination of that information by those friends."

The case of J19 & J20 v. Facebook Ireland ([2013] NIQB 113) concerned two emergency injunctions. The first ordered the defendant to remove from the "Irish Blessings" webpage of its website, the "Ardoyne Under Siege webpage" and the "Belfast Banter webpage" references to and pictures of the plaintiffs to include all entries and comments on it. By the time of the substantive hearing the postings had been removed.

The second was to restrain the defendant from publishing the plaintiff's name, or similar material identifying the plaintiff and which associates him with the activities alluded to in the first injunctions material, such as accusing him of being, inter alia, a 'Loyalist bigot'. The plaintiff relied upon Article 2, 3 and 8 of the European Convention on Human Rights, the Data Protection Act and the tort of misuse of private information.

The Court considered on the evidence before it that Article 3 and 8 were engaged but Article 2 had not been. Given that the first injunction had been complied with and in regard to the generality of the second injunction and of the legal framework the latter would be dismissed. The Senior Queens Bench Judge, Gillen J held that the second injunction was too imprecise and the court held that monitoring all the websites could impose a disproportionate burden on the defendant.

Identification: Wrong Face, Different Spelling, Same Name

The libel case of Glenn Irvine v. Sunday Newspapers Limited ([2013] NIQB 126) involved an issue of identification. A group of men were photographed standing on a balcony of an Orange Hall depicting them filming a Republican Parade taking place below them. On that balcony was a man named Winston Irvine amongst others. Each of the men were named and an article accompanied the photograph. One of the other men was described as Glen Irvine (one 'n').

The plaintiff was not the man depicted in the photograph, but Winston Irvine was his uncle who was photographed and who was referred to in the article. The plaintiff submitted that there was some resemblance between himself and the man photographed. Moreover, he claimed that the spelling of his forename regularly fluctuated between "Glenn" and – as in the caption – "Glen."
The plaintiff contended that the article constituted a defamation of him. He described distressing comments made by a work colleague in the aftermath of publication, to the effect of **"did you know there's a guy in Woodvale from the UVF called Glen Irvine?"** Mr Irvine's partner, Ms Charlene Davidson, also adduced evidence that one of her friends had later asked her: **"what was your Glenn doing on the balcony recording that Republican parade?"**

Although a jury had been sworn, the parties agreed that liability be determined by Judge alone. The Court concluded that photograph and caption was indeed capable of referring to the plaintiff that reasonable persons would and did reasonably refer to Glen Irvine as the plaintiff even in spite of Glen Irvine being a reasonably common name.

The use of the plaintiff's name in close proximity to a photograph of his uncle Winston Winky Irvine meant that those who were acquainted with the plaintiff and were casually reading the article would consider it possible that it was indeed Winston Irvine's nephew stood on the balcony beside him. Furthermore, the Judge agreed that there were similarities to the plaintiff and the man photographed in the newspaper.

The judge concluded that the ordinary fair-minded reader would conclude that this article meant that the plaintiff took part in an activity conducted by two members of the UVF on the occasion depicted in the photograph. This was a defamatory meaning.

Libel tourism will not be accepted in Northern Ireland

In Ewing v. Times Newspapers Ltd ([2013] NIQB 74) Northern Ireland Court of Appeal dismissed a privacy and defamation claim arising out of a newspaper article published on 11 February 2007 both in the Northern Ireland edition and on the Times On Line website entitled 'Heritage Fakers Hold Builders to Ransom'.

The article contained allegations that, inter alia, despite claiming to campaign to protect Britain's architectural heritage, a non-profit group known as the Euston Trust had accepted a secret payment to drop objections to a development in a seaside town in England. This group was said to be suspected of taking money in similar circumstances from other builders in return for withdrawing objections to proposed developments. The Trust was described in the article as being run by the appellant who was said to have studied planning law while serving a prison sentence for theft and forgery in the 1980s. The article contained a reference to another individual named Mr Hammerton who had been the secretary of the Euston Trust and who had apparently said that he suspected the appellant of having received payments from developers to pull out of intended judicial review challenges. The article recorded that the appellant had emphatically denied ever having been offered or taking payments from developers. An article in the same terms had been published on the same day in the editions of the respondent's newspaper published in England, Wales and Scotland. A small photograph of the appellant allegedly taken surreptitiously also appeared in the hard copy article.

The Court held that the mere fact of covert photography is not sufficient to ground a claim in privacy and even if there was the public interest would outweigh this. On the facts the Court concluded that there was no reasonable expectation of privacy and as such the claim was an abuse of the court's process.

With regard to the defamation claim the Court of Appeal rejected it on the principles governing **Jameel v Dow Jones & Co** ([2005] QB 946). The appellant has no connection to Northern Ireland and he and his friend travelled there to download a copy of the article. There was no evidence put before the Court to suggest that anyone in Northern Ireland who read the article knew the appellant.

"In short the argument is that he has no reputation in Northern Ireland and that any damage that may have been done to him occurred as a result of the publication in Great Britain, where he resides".

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