Neutral Citation: [2016] NIQB 76 | *Ref:* **STE10055**

Judgment: approved by the Court for handing down | *Delivered:* **09/09/2016**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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AY, a minor acting by FY as next friend

Plaintiff:

v

FACEBOOK (IRELAND) LIMITED & others

Defendants:

_____

STEPHENS J

Introduction

[1] The plaintiff, whom I shall refer to as AY, has brought this action against, amongst others, Facebook (Ireland) Limited ("Facebook"). She alleges that when she was 14 she met at a friend's house, the third defendant, whose identity I do not reveal to maintain the anonymity of the plaintiff. The third defendant was then over 18 and the plaintiff alleges that he induced her, by the use of threats, to send sexualised and indecent digital images of herself to him, including one digital image in which she was totally naked. She also alleges that upon receipt of those images the third defendant started to threaten the plaintiff with the photographs stating that he would publish them on Facebook unless the plaintiff complied with his demands to meet in person.

[2] In November 2014 the plaintiff alleges that the third defendant posted the digital image of her in which she was naked, on a Facebook account which proclaimed in its title that it was a "shame page". Thereafter and from November 2014 onwards, the plaintiff alleges that, at a time when she was not in receipt of legal advice, reports were made to both Facebook and to the PSNI. That the digital image was taken down by Facebook and the shame page account was either discontinued or disabled but thereafter and intermittently similar shame pages appeared on Facebook on which the digital image was re-published. This resulted in further reports to Facebook and to the PSNI with the image being repeatedly taken down by

Facebook, culminating in the plaintiff instructing solicitors and their sending a pre-action protocol letter to Facebook dated 16 June 2015. Proceedings were issued on 22 June 2015 in which the plaintiff claims that Facebook is liable on the basis of breaches of the Data Protection Act 1998 and of the Data Protection Directive 95/46/EC, on the basis of the tort of misuse of private information and negligence and also on the basis of a breach of the Protection from Harassment (Northern Ireland) Order 1997.

[3] Facebook not only deny liability to the plaintiff but in this application contend that the plaintiff's Statement of Claim should be struck out under Order 18 Rule 19(1) of the Rules of the Court of Judicature (Northern Ireland) 1980 on the grounds that it discloses no reasonable cause of action, it is frivolous or vexatious in the sense of being obviously unsustainable and it is an abuse of the process of the court. In mounting that application Facebook relies on Directive 2000/31/EC of 8 June 2000 ("the E-Commerce Directive") and on the Electronic Commerce (EC Directive) Regulations 2002 ("the 2002 Regulations"). It is common case that Facebook is an information society service and accordingly even if the plaintiff has a sustainable cause of action, which for purposes of this application only and not otherwise is conceded by Facebook, it is contended that Facebook has an unanswerable defence under Regulation 19 of the 2002 Regulations because on each occasion that the digital image was posted and upon notification Facebook acted expeditiously to remove or disable access to the image. Furthermore, any part of the plaintiff's claim that requires Facebook to undertake a general obligation to monitor the information which it transmits or stores or requires Facebook to undertake a general obligation actively to seek facts or circumstances indicating illegal activity is contrary to Article 15 of the E-Commerce Directive.

[4] In response the plaintiff contends that the E-Commerce Directive and the 2002 Regulations do not apply. That issue will be determined by the Court of Appeal in the case of *CG v Facebook*. The plaintiff wished to proceed with the hearing of this application in advance of the Court of Appeal's judgment in *CG* contending that even if the E-Commerce Directive and the 2002 Regulations do apply that this is not a suitable case for striking out the plaintiff's claim. The parties agreed that if the Court of Appeal held that the E-Commerce Directive and the Regulations did not apply then Facebook's application should be dismissed. That issue should be left until the judgment was delivered in *CG*. That the application should proceed before this court on the basis that both the Directive and the Regulations did apply. I proceeded on that basis.

[5] Mr Lockhart QC and Mr Hopkins appeared on behalf of Facebook, Mr Fitzgerald QC and Mr Girvan appeared on behalf of the plaintiff. I am indebted to both sets of counsel for their careful and thorough written and oral submissions.

Regulation 19 of the 2002 Regulations

[6] Regulation 19 provides as follows:

"19. Where an information society service is provided which consists of the storage of information provided by a recipient of the service, the service provider (if he otherwise would) shall not be liable for damages or for any other pecuniary remedy or for any criminal sanction as a result of that storage where—

(a) the service provider—

(i) does not have actual knowledge of unlawful activity or information and, where a claim for damages is made, is not aware of facts or circumstances from which it would have been apparent to the service provider that the activity or information was unlawful; or

(ii) upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information, and

(b) the recipient of the service was not acting under the authority or the control of the service provider."

[7] Mr Fitzgerald contended that under Regulation 19 it was for Facebook to allege and prove that:

(a) it did not have actual knowledge of unlawful activity or information and was not aware of facts or circumstances from which it would have been apparent to Facebook that the activity or information was unlawful; and

(b) that upon obtaining such knowledge or awareness it acted expeditiously to remove or disable access to the information.

Mr Lockhart conceded that the burden of proof in relation to (b) was on Facebook.

[8] Regulation 22 provides that

"In determining whether a service provider has actual knowledge for the purposes of regulations 18(b)(v) and 19(a)(i), a court shall take into account all matters which appear to it in the particular circumstances to be relevant and, among other things, shall have regard to—

(a) whether a service provider has received a notice through a means of contact made available in accordance with regulation 6(1)(c), and

(b) the extent to which any notice includes—

(i) the full name and address of the sender of the notice;
(ii) details of the location of the information in question; and
(iii) details of the unlawful nature of the activity or information in question.

The position is that Facebook contends that it did not have knowledge or awareness until it received notification on each occasion and thereafter it acted expeditiously. The fact that Facebook had knowledge or awareness is a permissible inference from the primary fact that the plaintiff alleges that Facebook was notified and from the primary fact that the image and the particular Facebook accounts on which they appeared were removed or disabled not once but on a number of occasions by Facebook.

[9] The issue is whether Facebook acted expeditiously and in that respect I accept the concession that it is for Facebook to allege and to prove that it did so. There is no basis to the requisite standard on which I can conclude at this stage that Facebook acted expeditiously. They may have done so, but that will depend on the evidence at the trial as to when the notifications were received and how Facebook responded to them. Insofar as Facebook seek to strike out the plaintiff's claim on the basis that it has an unarguable case that it acted expeditiously I refuse the application.

Article 15 of the E-Commerce Directive

[10] Article 15 is in the following terms:

"1. Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.

2. Member States may establish obligations for information society service providers promptly to inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements."

[11] Facebook contends that it has no legal obligation to utilise PhotoDNA as this is a form of "*monitoring*" and to require monitoring is impermissible under Article 15. The plaintiff states that on the first occasion that the digital image was notified to

Facebook the image ought to have been "*blocked*" by Facebook utilising PhotoDNA and that blocking does not involve *monitoring*. *Mosley v Google Inc* [2015] EWHC 59, [2015] 2 C.M.L.R. 22 involved an application to strike out a claim on, amongst other grounds, that PhotoDNA involved impermissible monitoring. In that case Mitting J held that there was insufficient evidence to enable the court to decide whether the steps required would amount to impermissible monitoring within the meaning of Article 15 of the E Commerce directive and that it was possible that the trial judge might conclude, having regard to existing technology, that blocking could be achieved without impermissible monitoring. Accordingly, even if monitoring was not permissible in a data protection case, the claimant had a viable case on the issue, which might succeed without falling foul of Article 15. Therefore, the claimant had a viable claim which raised issues of general public interest and should proceed to trial. In particular at paragraphs [51] and [52] of his judgment he stated as follows:

> "51 In my judgment, no lesser standard is to be expected in upholding the rights of individuals to have sensitive personal information lawfully processed. The evidence which I have is not such as to permit a judgment to be made now on whether or not the steps required by the claimant would involve monitoring in breach of art.15(1) of the E-Commerce Directive.
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> 52 Given that it is common ground that existing technology permits Google, without disproportionate effort or expense, to block access to individual images, as it can do with child sexual abuse imagery, the evidence may well satisfy a trial judge that it can be done without impermissible monitoring. Accordingly, even if monitoring is not permissible in a data protection case, as to which I express no view, the claimant has a viable case on this issue, which might well succeed."

[12] PhotoDNA in the context of sexualised images of a child may amount to "blocking" as opposed to "monitoring." The position will be different in relation to images of trademarks where whether the image was a lawful or unlawful use of a trademark would depend on an analysis of the particular Facebook account. I respectively agree with Mitting J that at this stage of the proceedings it is not appropriate to strike out those parts of the plaintiff's claim that allege that PhotoDNA should have been used after Facebook was first notified of the image in November 2014.

[13] There is another aspect to the plaintiff's claim which I consider should be struck out. It is alleged that Facebook ought to have blocked pages with the title 'Shame Page' or with that title combined with another identifying issue which I will

not mention to maintain the anonymity of the plaintiff. At paragraph 36(xvi)(a) and (b) of the Statement of Claim it is alleged that the defendant Facebook was in breach of the Data Protection Directive by permitting each of the pages profile specified to be registered under a pseudonym and failing to take any tactical and/or organisational measures to prevent the operation of shame pages upon its network. It is in relation to (b) the allegation that they ought to have prevented the operation of shame pages on its network that I consider involves inappropriate impermissible monitoring. The title 'Shame Page' is consistent with both lawful and unlawful activity and to block all shame pages would be an interference with the Article 10 rights of freedom of expression of others unless Facebook monitored the individual pages and monitoring is impermissible. Accordingly, I consider that paragraph 36(xvi)(b) should be struck out from the Statement of Claim.

Conclusion

[14] In conclusion I have decided that there is insufficient grounds to strike out the plaintiff's claim on the basis of Article 15 of the E-Commerce Directive and also insufficient grounds to strike out the plaintiff's statement of claim on the basis of Regulation 19 of the 2002 Regulations except in respect of one particular.