Neutral Citation No. [2016] NIQB 98 | *Ref:* **COL10121**

Judgment: approved by the Court for handing down | *Delivered:* **20/12/2016**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

_____

2013 No. 98281

BETWEEN:

J20

Plaintiff;

-and-

FACEBOOK IRELAND LIMITED

Defendant.

_____

COLTON J

[1] The plaintiff in this action is an unemployed male in his 50s.

[2] The defendant is the entity with whom users outside of North America contract when they register an account on the social networking site "Facebook". Facebook is a social networking site which enables users to post information on dedicated pages or sites. Other Facebook users can access the information on those pages and can then contribute to the page by posting material on it. Facebook describes itself as the world's largest social network service. It claims over 1.59 billion monthly active users worldwide in over 200 jurisdictions. It says that users share approximately 2 billion photographs a day on Facebook's Apps. It and other social networks have revolutionised the way in which members of the public obtain and share information.

[3] In this action the plaintiff brings a claim against the defendant in relation to a series of postings about him on three web pages hosted by Facebook.

[4] In the course of the evidence given at this trial the plaintiff gave evidence about a whole series of postings about which he complains. Some of these were specifically referred to in the medical evidence which was served in support of his claim. It is important therefore at the outset to identify precisely which postings are the subject matter of this action and upon which the court must base its judgment.

[5] The first relates to a web page entitled "Irish Blessings". On that page on 11 September 2013 there appeared a photograph of the plaintiff standing in front of a

Union flag. The plaintiff is named and the words "Meet Sectarian Parade Organiser" is superimposed on the photograph. The flag contains the words "Lower Shankill". The photograph is juxtaposed against a posting calling for people to attend a protest on Saturday 21 September in relation to a decision by Belfast City Council to restrict the flying of the Union flag at City Hall. A number of comments are posted on the page including the following:

> "Another Loyalist bigot exposed. Wee (J20's first name) organises more Loyalist parades and protests than you can shake your fleg at, he is as bitter as the day is long. **#tagsectarianscumbag-** page on 11 September 2013;
>
> My daughter had three children to this scum woman beating snake who can't string two words together, he can only mumble. He deleted his children of his fb page because their names are Catholics. He must be full of Diazepam cause he is the biggest coward I have had the misfortune to meet. Love the page by the way." – post on 12 September 2013 by [X].
>
> He has Catholic children who he doesn't bother with. Probably because they are Fenians" – by [Y] on 12 September 2013."

[6] The second relates to a webpage entitled "Belfast Banter". On 14 September 2013 the page contains a photograph of the plaintiff. He is shown in outdoor gear in a public place holding up a fish in his hands towards the camera. Superimposed on the photograph are the following words:

> "That's a tout so it is. Said the fish."

On the same date there is another photograph of the plaintiff taken in a public place with Union flags in the background with the following words superimposed:

> "I'm not gay but my boyfriend thinks I am."

On the same webpage there also appears a photograph of the plaintiff standing in front of what appears to be the same flag as referred to in the Irish Blessings webpage with the following words superimposed:

> "They said I could be anything So I became a lonely jobless flegger. I'm a woman beater and take the odd Diazepam so I do."

This appears to have been posted on either 14 September or 16 September 2013.

[7] Finally on the webpage "Ardoyne under Siege" exactly the same photograph as appears on the "Irish Blessings" page is posted on 12 September 2013 with the following words posted:

> "(The plaintiff's full name) parade organiser knuckle dragger bigot share and shame people."

This was posted on 12 September.

[8] All the relevant posts were deleted or removed by 9 October 2013.

The Plaintiff's Causes of Action

[9] The plaintiff confines his case to two causes of action namely harassment and misuse of private information. He does not rely on defamation, breach of the Data Protection Act 1998 or breach of the Communications Act 2003. Notwithstanding this I did give consideration as to whether or not the Data Protection Act was relevant in this case. It seems to me issues arise as to whether or not the Data Protection Act applies. An issue arises as to whether or not I am entitled to rely upon the definition of personal data in the 1998 Act to determine whether information was private. Finally, if the Data Protection Act does apply an issue arises as to whether or not the defendant is entitled to the protection of the E-Commerce Regulations against any claims for damages under the 1998 Act. Whilst I did not hear any arguments on this point I should indicate that my consideration of the matter is that it would not have impacted on the decision I have made in this case.

[10] Whilst the defendant submits that it has a defence to both these causes of action by reason inter alia of the "safe harbour" defence provided by Regulation 19 of the Electronic Commerce (ECD) Regulations 2002 it further argues that on the facts of this case the plaintiff cannot establish a cause of action at all. The defence provided for an information society service provider such as the defendant only arises "if he otherwise would" be liable.

Harassment

[11] The tort of harassment is a statutory one. Article 3 of the Protection from Harassment (Northern Ireland) Order 1997 provides as follows –

> "**Prohibition of harassment**
>
> 3-(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.

(2) For the purposes of this Article the person whose course of conduct is in question ought to know that it amounts to harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other."

[12] Harassment contrary to the Order is rendered both a criminal offence and also a matter which exposes the perpetrator to civil liability. The creation of both criminal and civil liability by the statute is important in understanding the test to be applied in establishing a civil cause of action. In the case of *Conn v Sunderland City Council* [2007] EWCA Civ 1942 the Court of Appeal in England and Wales held that two incidents complained of by an employee in a claim against his employer could not constitute harassment for the purposes of the 1997 Act (which is the equivalent of the 1997 Order in this jurisdiction). The facts found in that case were that a foreman had lost his temper with employees including the plaintiff when they had refused to give him the names of other employees who had left the site at which they were working earlier. In the course of losing his temper he threatened to smash the window of the Portacabin with his fists and threatened to report the employees to the Personnel Department. In a second incident the same foreman lost his temper with the plaintiff and threatened to "give him a good hiding". It was held that this conduct could not constitute harassment because a civil claim could only arise as a remedy for conduct amounting to a breach of Section 1 of the Act, which by Section 2 would also amount to a criminal offence. What constituted the boundary between unattractive and unreasonable conduct; and oppressive and unacceptable conduct might well depend on the context in which the conduct occurred. The touchstone was whether the conduct was of such gravity as to justify the sanction of criminal law.

[13] In the case *Ferguson v British Gas Trading Ltd* [2009] 3 All 304 Jacob LJ said –

"I accept that the course of conduct must be grave before the offence or tort of harassment is proved …

It has never been suggested generally that the scope of the civil wrong is restricted because it is also a crime. What makes the wrong of harassment different and special is because, as Lord Nicholls and Lady Hale recognise, in life one has to put up with a certain amount of annoyance; things have got to be fairly severe before the law, civil or criminal will intervene …"

[14] Referring to *Ferguson* Morris Kay LJ in *Veakins v Kier Ltd [2009] EWCA Civ 1288* said that –

> "Leaving aside the fact that Jacob LJ in Ferguson variously described the necessary level of conduct as 'grave' and 'very severe', it seems to me that since Majrowski, courts have been enjoined to consider whether the conduct complained of is 'oppressive and unacceptable' as opposed to merely unattractive, unreasonable or regrettable. The primary focus is on whether the conduct is oppressive and unacceptable, albeit the court must keep in mind that it must be of an order which 'would sustain criminal liability'."

[15] The test for harassment was considered by our Court of Appeal in *King v Sunday Newspaper Ltd [2011] NICA 8*. Girvan LJ dealt with the matter in this way –

> "(34) In Dowson & Ors v Chief Constable of Northumbria Police [2010] EWHC 2612, … Simon J at 142 usefully summarised what must be proved as a matter of law in order for a claim of harassment to succeed;
>
> '(1) There must be conduct which occurs on at least two occasions
>
> (2) which is targeted at the claimant,
>
> (3) which is calculated in an objective sense to cause alarm or distress, and
>
> (4) which is objectively judged to be oppressive and unacceptable,
>
> (5) what is oppressive and unacceptable may depend on the social or working context in which the conduct occurs.
>
> (6) A line is to be drawn between conduct which is unattractive and unreasonable and conduct which has been described in various ways: 'torment' of the victim of an order which would sustain criminal liability'."

[16] Turning to the facts of this case the conduct about which the plaintiff complains, namely the postings, occurs on at least two occasions. It is targeted at the plaintiff. Objectively the postings are calculated to cause the plaintiff distress. The real issue is whether or not objectively judged they are oppressive and unacceptable. In terms of the photographs there is nothing which would meet this test. The harassment if it exists arises from the text accompanying the photographs which were posted. The plaintiff is described as "a sectarian parade organiser", a "loyalist bigot", "a scum woman beating snake", "the biggest coward I have had the misfortune to meet" and "a woman beater". There is an allegation that he does not bother with his children because they are Catholic and an inference that he is "a tout". Clearly these comments are offensive and distasteful. They are more than what might be described as tasteless humour. However, in my view they do not cross the boundary between what is unattractive and unreasonable as opposed to what is oppressive and unacceptable. It is certainly not conduct of an order which would sustain criminal liability although I accept that the plaintiff does not have to establish that a criminal prosecution would be justified to sustain liability. These comments can be easily contrasted with the comments which form the subject matter of the judgment in *CG v Facebook Ireland Ltd and McCloskey*. In that case there were 150 comments concerning the plaintiff which included violent language specifically targeting the plaintiff and his home. On the facts of this case I have come to the conclusion that the postings which form the subject matter of this claim would be insufficient to establish a tort of harassment.

[17] Even if I am wrong about this there is of course the separate issue as to whether or not the fact that the defendant hosted these particular postings is sufficient to establish that the defendant has pursued "a course of conduct". I note that the Northern Ireland Harassment Order does not have a similar provision to Section 7(3A) of the Protection from Harassment Act 1997 in England and Wales which extends "conduct" to aiding, abetting, counselling or procuring another's conduct. If the defendant has engaged in a "course of conduct" in this case then it must arise from its decision not to remove the postings when they were drawn to its attention. I deal with this issue in the context of the Regulation 19 defence later in the judgment. When the matter was drawn to their attention the question is in my view whether it ought to have known that by maintaining the postings and on the basis of the information available to it judged objectively it should have known that this amounted to harassment under the Order. Whilst I do not agree with the defendant's assessment that the postings did not amount to "annoying and distasteful humour" I have come to the conclusion that the postings did not meet the test for a course of conduct amounting to harassment under the 1997 Order.

Misuse of Private Information

[18] In terms of the applicable law in respect of this tort I cannot improve on the summary provided by Stephens J in his judgment in *Callaghan v Independent News and Media Limited* [2009] NIQB 1 at paragraph [24] where he says –

"(a) The Human Rights Act. The Human Rights Act 1998 requires the values enshrined in the European Convention on Human Rights to be taken into account. The foundation of the jurisdiction to restrain the publicity is now derived from Convention rights of the European Convention on Human Rights in Re S (a child) [2005] 1 AC 593 at paragraph (23). The relevant values in the actions before me are expressed in Articles 2, 3, 8 and 10 of the Convention. The Convention 'values are as much applicable in disputes between individuals or between an individual and non-Government body such as a newspaper, as they are in disputes between individuals and a public authority' see paragraph (9) of Mosley v Newsgroup Newspapers Ltd.

(b) Expectation of privacy. 'The law now affords protection to information in respect of which there is a reasonable expectation of privacy, even in circumstances where there is no pre-existing relationship giving rise of itself to an enforceable duty of confidence', see paragraph (7) of Mosley v Newsgroup Newspapers Ltd. The question as to whether there is a reasonable expectation of privacy is an objective question and a question of fact. The reasonable expectation is that of the person who is affected by the publicity. The question was defined by Lord Hope in Campbell v MGN [2004] UKHL 22 at paragraph [99] as follows:-

> 'The question is what a reasonable person of ordinary sensibilities would feel if she was placed in the same position as the claimant and faced the same publicity.'

The question whether there is a reasonable expectation of privacy 'is a broad one, which takes account of all the circumstances of the case. They include the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place in which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purposes for which the information came into the hands of the publisher' see Murray v Express Newspapers [2008] EWCA Civ 446 at paragraph 36."

[19] What is the information alleged by the plaintiff to be private in this action? In respect of that information had the plaintiff a "reasonable expectation of privacy"? If the answer to these questions is "yes" were the "postings" justified or more accurately, proportionate? For the purposes of this discussion I leave aside for a moment the issue as to whether or not in fact any material complained of by the plaintiff was "posted" by the defendant. In this context "posted" has a similar meaning as "published" in a defamation action.

[20] In relation to the first question the plaintiff identifies the use of his image by photographs, his name, the fact that he was standing in front of a flag with "Lower Shankill" written on the flag and references to his three children who are identified as Catholics.

[21] In respect of each of these matters the defendant says that the plaintiff does not have a reasonable expectation of privacy. Whether this is so is a question of fact for the court. The question is a broad one which requires the court to take account of all the circumstances of the case.

[22] In this case the defendant says that the plaintiff is someone actively involved in the parades which were organised in opposition to the Belfast City Council decision to restrict the flying of the Union flag. In his evidence the plaintiff indicated that he attended 4 or 5 protests. The defendant challenged the extent of his involvement in the protests and in particular referred to the plaintiff's conviction in February 2014 for disorderly behaviour arising from his conduct during Loyalist protests at a city park in August 2013 (a matter of weeks before the postings about which the plaintiff complains) over the attendance by the Lord Mayor who was a member of Sinn Fein. This conviction was reported in the local news media where the plaintiff was named and reference was made to his age and actual address in Belfast. It was also pointed out that at that stage he was already serving a prison term for a separate offence. The reporting also quotes the Judge who convicted the plaintiff as making remarks along the lines that what the plaintiff said to police was said to stir up and agitate the crowd, and that abuse towards the Lord Mayor was in general terms abuse of a sectarian nature and motivated by hate.

[23] When questioned about this matter the plaintiff maintained his innocence and argued that he had been innocently caught up in the matter. He indicated that he had attended the park with his two grandchildren and he was not involved in the protest and only became involved when an officer tried to assault him. He was also pressed about references in his medical notes and records to the effect that he had been in prison for 12 or 13 years during which time he had contact with paramilitaries. His evidence about that was that he had been "let into the paramilitary wings" to help make the numbers up. In cross-examination it was also established that the plaintiff had a previous conviction for throwing a stone in the context of civil disorder arising from a protest in the past and also that he had been struck by a plastic bullet again in the context of civil disorder.

[24] The effect of this context according to the defendant is that the plaintiff does not enjoy a reasonable expectation of privacy in relation to his identity in particular. I was referred to the decision in *Jerusalem v Austria* [2003] 37 EHRR 25, where the European Court of Human Rights stated at (38), that private individuals lay themselves open to scrutiny when they entered the arena of public debate. The relevant associations in that case participated in public discussions and co-operated with a political party, and accordingly were active in the public domain and therefore ought to have shown a higher degree of tolerance to criticism. In this case the plaintiff accepts that he was part of the flag protests and was engaged in political demonstrations in a public place. It is a matter of record that these protests on occasions descended into public disorder and sectarian rioting. Not only was the plaintiff engaged in public demonstrations but he was actually convicted of an offence in the context of a demonstration by Loyalists against the Lord Mayor because of the flag issue. Thus those who enter into the affray must have "broad shoulders" when they attract criticism even of the type contained in the postings in this case.

[25] In terms of the evidence I was not impressed by the plaintiff. I believe that he understated the extent of his participation in the flag protests and in particular understated his involvement in the incident which led to his conviction in February 2014. I came to the view that he was someone actively engaged in these protests and was willing to engage and did engage in acts of public disorder both in the past and in particular during the Lord Mayor's visit to the park. This impacts on the evidence he gave about the photographs themselves. In relation to the photographs showing him standing in front of the Union Jack he in essence said that this was a "mocked up photograph" and that he had no idea where it came from. Having heard his evidence I have come to the conclusion that this was indeed a photograph taken in a public place and in the context of the flag disputes. The plaintiff said that he had no memory of the photograph in which he is shown standing beside a prominent Unionist politician and another person but again I have come to the conclusion that this was a photograph taken at a public place on a public occasion. In respect of the photograph in which he is shown holding the fish I accept his evidence that this was taken by a friend although it appears to have been in a public car park.

[26] I turn now to the specific private information in respect of which the plaintiff argues he had a reasonable expectation of privacy. I do not accept that he had such reasonable expectation in respect of the photographs to which I have referred. Equally I reject his argument that he had a legitimate expectation of privacy in respect of his image, his name and the reference to Lower Shankill. His name, age and actual address became matters of public record in the context of his conviction after the protest involving the Lord Mayor. He was of course perfectly entitled to engage in a lawful protest but the point is that these protests were public and in the public domain.

[27] In dealing with a person's identity and appearance I adopt the words of McCloskey J in *McGaughey v Sunday Newspapers Ltd* [2010] NICH 7 –

> "… a person's identity and appearance are unlikely to be capable of misuse in the context of this tort, since, in the vast majority of cases, these are obvious to and are relatively ascertainable by the public at large."

[28] I turn now to the question of the references to the plaintiff's children which are set out in the opening paragraphs of this judgment.

[29] The defendant argues that the fact of the plaintiff having children is not something in respect of which he has a reasonable expectation of privacy. The reference to their religion might give rise to an expectation of privacy but this is something in respect of which the children have an expectation of privacy and not the plaintiff.

[30] This issue was considered by the Court of Appeal in the case *King v Sunday Newspapers Ltd* [2011] NICA. That case involved a newspaper printing a series of articles about the plaintiff alleging involvement in serious criminal activity, including Loyalist activities and the murder of a journalist. The articles about which the plaintiff complained identified him and his partner by name, stating that she and their child were Catholics, identifying the family's address and printing photographs taken on a private occasion.

[31] In relation to the reference to the child the Judge concluded that that did engage the plaintiff's Article 8 rights. At first instance the trial Judge held that there was a reasonable expectation of privacy in respect of the child's details including his identification, his religion and details of the christening. The Judge went on to hold that there was no justification for publishing the information about the child's identity, its religion or details about the christening and he granted an injunction accordingly.

[32] Lord Justice Girvan's judgment contains both a lucid exposition of the general principles concerning misuse of private information and a particularly helpful analysis of the relevant law.

[33] At paragraph [18] of the judgment he states as follows –

> "In the context of a dispute between individuals as opposed to a dispute between an individual and a public authority, a plaintiff's claim is not per se a claim for a breach of a Convention right. It is a tortious claim, that tort claim being sometimes called an action for breach of personal confidence, an action for breach of privacy or in the nomenclature adopted by Sir Anthony Clarke in Murray v Big Pictures UK Ltd [2008] EWCA 446 [2009] Ch 481, an action for misuse of private information. As

> the Master of the Rolls also pointed out in Murray the values enshrined in Articles 8 and 10 of the Convention are now part of the action and should be treated as of general application and as being as much applicable to disputes between individuals as between disputes between individuals and public authorities."

He goes on to say –

> "(19) An individual normally has a reasonable expectation of privacy in respect of information relating to his private, intimate and family relationships. The private and family life of an individual is multifaceted. It is of the nature of any relationship between two or more persons that the relationship has effects on each of the parties to the relationship. The rights arising under Article 8 include the right to establish and develop relationship with others. Where that relationship is that of an intimate partnership or is a parent/child relationship the impact of what happens in respect of one of the parties has clear repercussions and consequences in respect of the relationship generally. In Patton v UK [1991] 3 EHRR 48 the Commission accepted that the applicant as a potential father was so closely effected by the termination of his wife's pregnancy that he might claim to be a victim (within the meaning of Article 25 of the Convention) or the legislation he sought to impugn. In earlier commission decisions in X v Belgium [1970] and Mekrane v UK [1973] it concluded that the widow and children of persons against whom allegedly impermissible actions have been taken fell to be considered victims themselves. In the case of YF's Application [2004] 39 EHRR 34 the European Court of Human Rights in an admissibility decision considered that it was open to a husband to raise a complaint concerning allegations by his wife of violations of the Convention, in that case an enforced gynaecological examination.
>
> (20) Accordingly, the fact that divulging of private information and material in relation to the partner and the child of the appellant may have entitled them to pursue their own claim for remedy does not mean that the appellant himself does not have a claim. The fact that the impact of a breach of privacy may be greater in respect of the other parties in the relationship would be

> reflected in the assessment of any compensatory damages but that does not mean that in the present proceedings the appellant has no cause of action arising out of unjustifiable publication of private information in respect of his private relationships. Furthermore the fact that the appellant has been accused of criminal actions or a crime does not curtail the scope of the protection available under Article 8(c) Sciacca v Italy (Application No 50774-99 [2005] 43 EHRR 400). We conclude that the Judge was correct in concluding that at paragraph [30] of his judgment that the publication of details of family members of a particular person may engage the Article 8 rights of that person."

[34] In this case the plaintiff said that he was "disgusted" by the reference to his children. He said that this has had an impact on his relationship with them and he was unable to attend two of their weddings. It may well be that the background to the history of his relationship with these children is complicated and I note that the postings concerning the children seem to come from the family of the mother of the children. Nonetheless, I have come to the clear view that in respect of the religion of his children he did have a reasonable expectation of privacy. As to whether or not the interference with that expectation constitutes a misuse of private information or whether the publication was proportionate I fail to see how this can be justified. Any fair or objective reading of the references to the children could not possibly be justified even in the context of his participation in Loyalist protests. The reference to these children – who can be identified by reason of the identification of the mother of the plaintiff's ex-partner - in my view does constitute a misuse of private information.

The Reference to the Plaintiff as "a tout"

[35] I am troubled by the assertion in one of the postings that the plaintiff was "a tout". The suggestion that a person is an informer is one that has particular resonance in this jurisdiction. A person so identified may be placed in danger from paramilitaries and may be ostracised from his community. As a matter of principle it should not be regarded as defamatory given that a member of the public should not be criticised for providing information of value to the authorities. In his opening Mr Lavery QC on behalf of the plaintiff submitted that calling a person "a tout" can never be justified, true or not.

[36] This issue was considered by the Court of Appeal in the case of *AB v Sunday Newspapers* [2014] NICA 58.

[37] That case concerned an application for an interim injunction preventing the defendant from publishing certain material concerning the plaintiff including the alleged provision by him of information to state authorities. The plaintiff was

described as a "dissident tout" who "supplied the police with bugging devices and audio tapes planted in cars provided to dissident leaders".

[38] In the appeal the appellant placed considerable emphasis upon the assertion in one of the articles complained about that the appellant was a confidential human intelligence source for the PSNI in respect of dissident republicans. The appellant argued that the relationship between the police and an informant is a confidential relationship so that disclosure of the identity of an informant constitutes a breach of the obligation of confidentiality. The appellant relied on passages from *An informer v A Chief Constable* [2012] EWCA Civ 197 and *Attorney General v Guardian Newspapers Ltd* (No:2) [1998] UKHL 6.

[39] The court accepted that there had not been a breach of any Article 2 rights but focussed on the issue concerning what were in effect republication of allegations that the appellant was an informer.

[40] The court dealt with the issue in the following way:

> "[20] We considered that the only substantive issue in this appeal concerned the republication of allegations that the appellant was an informer on the basis that such republication would constitute a breach of confidence and misuse of private information …
>
> [21] The aspect of the claim appears to have received only modest attention in the submissions of the parties and in the judgment. It has been argued more fully before us. It is accepted by both parties that the truth or falsity of the information is irrelevant in considering whether there has been a breach of the duty of confidence in respect of which interim measures should be granted. If the allegation is untrue there is clearly no public interest in asserting it.
>
> [22] The first question is whether or not such information gives rise to a duty of confidence. We are satisfied that quite independently of the Human Rights Act 1998 a duty of confidence arises where information of this nature comes to the knowledge of another person. The issue was discussed in the House of Lords in Attorney General v Guardian Newspapers Ltd (No:2) [1998] UKHL 6. The House noted and accepted the evidence of Sir Robert Armstrong that the confidence of informers who relied on their identity and activities being kept confidential would be damaged if publication of that information were not prevented. Accordingly, there was

> a considerable public interest in preventing disclosure of their identities.
>
> [23] That public interest has in our view been given statutory support by the provisions of Section 29 of the Regulation of Investigatory Powers Act 2000. That section deals with the authorisation of covert human intelligence sources, colloquially referred to as informers. The fact that the source is covert is, of course, part of description and by virtue of Section 29(5) those responsible for the source have an obligation to ensure that there is a person with day to day responsibility for the source's security and welfare.
>
> [24] We are satisfied, therefore, that a person acting as a covert human intelligence source or informer has a reasonable expectation that his confidential relationship will not be disclosed. It is well recognised that many informers have criminal backgrounds and belong to a criminal social environment. Their motives for giving information to the police may be ambiguous or mixed (see An Informer v A Chief Constable [2012] EWCA Civ 197 per Toulson LJ at para 61). Those features do not, however, diminish the reasons for protecting the confidentiality of the relationship which are firstly, to secure the welfare of the informer and secondly to encourage the supply of information to the police by people who are unlikely to come forward unless they can be confident that their confidentiality will be protected. We do not accept, therefore, that it is in the public interest that investigative journalism should be free in all cases to reveal the full nature of the criminal activity of someone acting as an informer."

[41] In the circumstances the court imposed an interim injunction preventing the publication, distribution or transmitting of any information by any means that suggested that the plaintiff provided information to the state authorities about any criminal activities.

[42] Of course the facts of this case are significantly different from those in *AB*. The allegations were more detailed and specific than the general accusation that the person was a "tout" in this case. They were published in a national newspaper. Thus, the posting complained of here is of a different scale and seriousness but on the authority of *AB* I have come to the conclusion that referring to the plaintiff as a "tout" does constitute a misuse of private information.

[43] The issue therefore is whether or not the defendant is liable for this misuse of private information that I have identified.

Is the defendant liable?

[44] The defendant submits that even if the plaintiff is able to establish any of the underlying causes of action he asserts (and I have found that he has) in any event as an Information Society Service Provider ("ISSP"), Facebook is not liable for damages because it can avail itself of the defence provided by Regulation 19 of the Electronic Commerce (EC Directive) Regulations 2002.

[45] Directive 2000/31/EC at Article 15 provides that:

> "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 services with whom they have storage agreements."

[46] Regulation 19 of the Electronic Commerce (EC Directive) Regulations 2002 provides as follows:

> "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, it 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 disable access to the information, and

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

[47] Regulation 22 provides that, in determining whether the service provider has actual knowledge, a court shall take into account all matters which appear to it in the particular circumstances to be relevant and, among other things, have regard to whether the service provider has received a notice through a specified email address and the extent to which any such notice includes:

(a) the full name and address of the sender of the notice;

(b) details of the location of the information; and

(c) details of the unlawful nature of the activity or information in question.

[48] Having considered these regulations and the well-established line of authority in relation to the liability of ISSPs for publications by third parties in the law of libel I conclude that there can be no liability in this case against the defendant prior to it being put on actual notice of the matters giving rise to a cause of action. There is no obligation to proactively monitor sites.

[49] The issue therefore is whether or not the defendant had "actual knowledge" of the misuse of private information I have identified or was aware of facts and circumstances from which it would have been apparent to the service provider that the activity or information was unlawful.

[50] Regulation 6(1)(c) of the Regulations requires that the ISSP make available to the recipient of the service in a form and manner which is easily, directly and permanently accessible the details of the service provider, including his electronic mail address, so as to make it possible to contact him rapidly and communicate with him in a direct and effective manner. The 2002 Regulations clearly envisage a scheme which provides an easily accessible notice and take down procedure so that a complainant can utilise the Regulation 22 provision to establish actual knowledge and thereby establish liability against the ISSP if there is a failure to take down an unlawful posting. The defendant employs such a mechanism. In the course of the hearing I was referred to "Facebook Community Standards" which sets out the type of expression which is acceptable to it and what type of content may be reported and removed. The reporting mechanism to which I have referred permits members of the public to report abuse which violates these standards which are then reviewed by Facebook's Community Operations Team who can remove or delete the material

if it violates policy. In this way it says it complies with the requirements of Regulation 19 of the E-Commerce Directive.

[51] The plaintiff in his evidence indicated that he availed of this reporting mechanism. To use his term he "ticked the box" categorising his complaint about the posts as being "annoying and distasteful humour". He was extremely vague about precisely when he made this complaint and to which precise posts he referred in his complaint. He indicated that he did not receive any reply from the defendant.

[52] It was also alleged via his pleadings that friends of his had reported the posts to the defendant as being "offensive" using the defendant's automated system but none of these witnesses were available to give evidence at the trial.

[53] In addition he gave evidence that he instructed his then solicitors in relation to the matter. Arising from those instructions on 13 September 2013 his solicitors wrote to Facebook by fax and post in the following terms:

> "Dear Sirs, Re J20
>
> We confirm we are instructed by J20 that a photograph and comments have been posted on Irish Blessings www.Facebook.com/Irishblessings page dated 11th September 2013 stating that another Loyalist bigot is exposed. The comments go on to call 'wee J20 organises more loyalist parades and protests that you can shake your fag at, he is bitter as the day is long #sectarian scumbag'.
>
> Thirteen offensive sectarian comments have been posted and J20 has advised us that he is in genuine fear of his life. There is no question that this article puts our client's life and physical well-being at risk. Please confirm you will ensure that the offending material is taken down immediately. If the offending material is not taken down by 5.00pm on 14th September 2013 we have instructions to make an application to the court for emergency injunction to force same and to fix you with the costs of the same."

[54] This correspondence was described as "extremely urgent". There was no response to this letter.

[55] The plaintiff's solicitors subsequently made an application for emergency interim injunctive relief by way of a motion on 25 September 2013. On 27 September 2013 the plaintiff obtained an ex-parte injunction on foot of this motion which inter alia ordered:

> "… that the respondent must remove forthwith from the 'Irish Blessings' web page of his website (having the URL http://www.Facebook.com/Irishblessings/page) the 'Ardoyne under siege' webpage (https://www.Facebook.com/#/pages/Ardoyne-underseige/505163022903072?fref=ts and the Belfast Banter web page (https://www.Facebook.com/#!/pages/Belfast-banter/207797202729326) references to pictures of the applicant, to include all entries and comments on same."

This motion was supported by an affidavit from the plaintiff setting out the photographs and posts about which he complained which included all the posts set out in paragraphs 5-7 of this judgment.

[56] A further injunction was granted in relation to future publications.

[57] As indicated at paragraph 8 above the relevant posts were deleted by 9 October 2013.

[58] Thereafter the defendant successfully obtained an order discharging the injunction in so far as it related to future publications, the first injunction being academic given that the relevant postings had been deleted or removed.

[59] The defendants are critical of these notices and say they were deficient and did not fix it with "actual knowledge". The defendant did not call any evidence on this point but rather relied on an affidavit sworn by a Mr Mike Gagne on behalf of the defendant on 10 March 2016 and on submissions.

[60] In his affidavit Mr Gagne describes himself as a Global Escalations Manager, Community Operations at Facebook Inc.

[61] He confirms that Facebook received "a number of letters and legal correspondence from plaintiff's solicitors by fax". This refers to the solicitors' letter of 13 September 2013. He contends that "community operations is unable to discern, let alone review, any particular post (i.e. photograph) based on the vague information provided by the plaintiff. However he goes on to state that the community operations reviewed the following page as a whole namely https://www.Facebook.com/Irishblessings/page, and determined it did not violate Facebook's terms of service.

[62] He then goes on to consider the injunction papers which he confirms were received by the defendant on 25 September 2013. Again he is critical of the information provided.

[63] In relation to the Irish Blessings page (notwithstanding that it appears Facebook had already determined it did not violate its terms of service), he asserts URL is invalid, likely due to a typographical error, and does not lead to a Facebook page. This obviously refers to a misspelling of blessing.

[64] In relation to the Ardoyne Under Siege site again he asserts that this URL is invalid, likely due to a typographical error (the ellipses) and does not lead to a Facebook page.

[65] In relation to Belfast Banter he asserts that he was told that this page was not an issue in the litigation.

[66] In relation to the alleged online reports allegedly made by the plaintiff and his friends he avers that these posts are not sufficiently described nor is there a URL provided that would allow Facebook to investigate what, if any, reports were made. He did refer to some screen shots provided by the plaintiff in which Facebook Community Operations had reviewed the content complained of and found that it did not violate Facebook policies.

[67] In relation to the issue of the online reports and responses from Facebook the plaintiff had already provided in the course of the proceedings a screenshot in response to a report dated 12 September which referred to the Irish Blessings photograph referred to in paragraph 5 of the Statement of Claim with the following response from Facebook.

> "This photo wasn't removed.
>
> Thank you for taking the time to report something that you feel may violate our community standards. Reports like yours are an important part of making Facebook a safe and welcoming environment. We reviewed the photo you reported for annoying and distasteful humour and found it doesn't violate our community standards."

In the course of the hearing I was also referred by the defendant to a bundle of screenshots from Facebook which clearly are a response to online complaints.

[68] These included a response to a complaint concerning Ardoyne under Siege for containing credible threats of violence.

[69] The response was that this "page wasn't removed" and that "it doesn't violate our community standards". It is not clear if this was in response to J20 or to another plaintiff in related proceedings J19. Much of the remainder of the material is difficult to make out but it is clear that the defendant received a complaint in relation to the Belfast Banter website and in particular to the photograph referred to in paragraph 6 of the Statement of Claim which was held not to violate the defendant's

community standards. The complaint was "annoying and distasteful humour". Similarly the other photographs about which the plaintiff complains in Ardoyne Under Siege, Belfast Banter and Irish Blessings were all the subject matter of a complaint which were not upheld as they didn't violate the Facebook's community standards.

[70] I was unable to discern the exact dates upon which these complaints were made or the dates of the responses, but in light of the evidence it seems that they must have been in or around the same dates.

[71] The defendant submits that the material to which I have referred was insufficient to fix the defendant with actual knowledge under the E-Commerce Regulations. In relation to the criticisms about failure to provide URLs and a failure to identify the material about which the plaintiff complains I reject this submission. Irrespective of any deficiencies it is abundantly clear that the defendant reviewed the entire web page involving Irish Blessings "and determined it did not violate Facebook's terms of service." Equally it is clear that the other web pages were identified by way of online complaint. All of these sites were reviewed by the defendant and held not to violate Facebook's terms of service. It was aware of the Irish Blessings page from 13 September 2013 via the solicitors' letter and indeed was aware of the Irish Blessings photograph by way of online complaint on 12 September.

[72] The defendant further argues that the notices are deficient in that neither the solicitors' letters nor the online complaints identify any grounds of unlawfulness. In short the basis on which the activity or information is said to be unlawful has not been provided.

[73] In considering this issue there are a number of matters which seem to me to be relevant.

[74] Firstly, neither the plaintiff nor his friends can be criticised in relation to the online complaints. They do not provide the opportunity to set out a legal basis for complaint. The automated system involves the complainant clicking onto pre-prepared boxes for the reporting of abuse. Someone such as the plaintiff or his friends cannot be expected to categorise the legal nature of their complaints and indeed the automated system does not facilitate this. Having received the complaints it seems to me that the onus then shifts to the defendant to assess the alleged abusive content. Secondly, the solicitors' letter of 13 September refers to the Irish Blessings website (which the defendant was able to identify) and makes express reference to the plaintiff being described as a "loyalist bigot", "as bitter as the day is long", "sectarian scumbag". The letter also refers to 13 offensive and sectarian comments which had been posted on the site and makes express reference to the fact that the plaintiff is in fear of his life.

[75] I accept that the letter of 13 September could and should have been more specific in identifying the precise legal basis of the plaintiff's complaint. However, in my view the defendant should be expected to know the relevant law in relation to such matters as defamation, harassment and breach of private information when a complaint is drawn to its attention. It cannot simply turn a blind eye to complaints and say that a complainant has failed to properly categorise the legal basis of that complaint. At a minimum the defendant should consider the material in respect of which there has been a complaint and remove any unlawful content. In this case the unlawful content which I have found is apparent on the face of the material. This is not a case where the defendant required further information to come to a conclusion on the lawfulness of the material posted. The unlawfulness is apparent in the words themselves. This is not a case for example in which a plaintiff is relying on some form of innuendo to establish defamation. Equally, this material could be distinguished from the photographs about which the plaintiff complains. On the face of the photographs there is nothing that would alert the defendant to any suggestion that they were "doctored" in any way or taken on a private occasion. The reference to the religion of the plaintiff's children and to him being referred to as a "tout" were unlawful and could not be justified. In the circumstances I have come to the conclusion that the defendant did have actual knowledge of the unlawful nature of the information in question. In short the defendant had sufficient facts and circumstances before it to make it apparent that the publication of the information which I have identified was private.

[76] The material supporting the injunction application (which was not received until 25 September 2013) contains an affidavit from the plaintiff which sets out his complaints in detail. He repeats the assertions about the reference to him being a Loyalist bigot and a sectarian scumbag. He refers to comments to the effect that he is a woman beater and a person who takes the drug Diazepam. He refers to the photograph describing him as a "tout" which he understood to mean that he was some sort of agent or informer. He refers to threats from Dissident Republicans to Loyalist protestors. He describes his distress at the references to his children. He indicates that he is in fear of his life and that these posts are having a detrimental effect on his mental well-being.

[77] It cannot be said that this is a case in which the defendant acted expeditiously in removing the offending information. In the circumstances of this particular case it is significant that the defendant made a decision not to remove the material when the complaint was made. This is not a case where there has been some delay whilst the matter was considered by the defendant. The defendant assessed the material and came to a view that it should not be deleted. Specifically it came to the view that it did not violate its community standards. There was no reply at all to the letter of 13 September 2013. The defendant chose not to seek clarification or to engage with the plaintiff's solicitors in any way. Rather as per Mr Gagne's affidavit in relation to the Irish Blessings page the defendant "determined it did not violate Facebook's terms of service."

[78] I have therefore come to the conclusion that the defendant is liable for the misuse of private information which I have identified in this case.

The medical evidence

[79] In this action the plaintiff claimed that as a result of the postings on Facebook he suffered a psychiatric injury. The plaintiff's solicitors instructed Dr Brian Mangan, Consultant Psychiatrist to examine the plaintiff and provide medico legal reports for the court. Dr Mangan provided two reports based on examinations of the plaintiff on 15 January 2014 and 17 September 2015. Dr Gerry Loughrey Consultant Psychiatrist reported on behalf of the defendant having examined the plaintiff on 17 February 2016.

[80] Dr Mangan provided a subsequent addendum dated 10 March 2016 in response to the report from Dr Loughrey.

[81] It is clear from both medical reports that prior to September 2013 the plaintiff had a long history of anxiety, depression and stress. He had frequent visits to his General Practitioner whose notes reveal a history of depression, alcohol dependence, use of illegal drugs including Ecstasy, Cannabis and Speed. There was a history of various references to community addiction teams. He had multiple prescriptions over the years with a particular history of being prescribed Diazepam which he has been taking for 25 years.

[82] When the plaintiff saw Dr Mangan on 15 January 2014 he indicated that he had received "threats" on Facebook and that he found these stressful and difficult to deal with. His focus was on fear of being attacked by paramilitaries and he describes leaving his home and living for periods at a different location.

[83] Records subsequent to the postings on Facebook reveal an attendance on 24 September 2013 re a report of chronic anxiety. There is no specific reference to the Facebook postings.

[84] The next record is a telephone contact with his GP on 25 September where he refers to chronic anxiety and issues relating to threats to life on Facebook. There is a reference to:

> "In court today re injunctions to get removed. Feels related to him being in mixed relationship. He was prescribed Diazepam.
>
> A subsequent telephone contact of 10 October 2013 reports chronic anxiety wanting Diazepam increased. In court taking Facebook to court for posting death threats. It is documented he was attending a counsellor.

> Requested sleeping tablets and Diazepam. His request was denied. It is documented he was very angry."

The next relevant attendance is 11 October 2013. According to Dr Mangan:

> "It is documented he had a long history of anxiety and depression and stress. Dependant on Benzodiazepines. Has been through a lot over the years during the Troubles and has a forensic history. It is documented he had on-going worries regarding death threats. Previously he would have taken a lot of alcohol, rarely now. Does not admit to misuse of drugs. With present court case he is taking extra Diazepam etc. He did attempt a slow reduction two years ago and he became very agitated and slightly psychotic. P has now recovered although he did return to previous dose. Well looking calm good eye contact. Dwells a lot on past experiences that still distress him. Psychiatric referral Woodstock Lodge. Our in-house counsellor saw him on a weekly basis for over a year. No apparent improvement. Went to FASA today but not happy with the people he saw in there. Is requesting to see a psychiatrist."

[85] The next relevant entry is dated 18 December 2013 where the applicant "reports in court yesterday" – this relates to his prosecution for an assault on police. Appointment for Malone Place Day Treatment Unit organised through Woodstock Lodge.

[86] Finally, on 14 March 2014 there is a note that he made telephone contact with his General Practitioner. It is documented he had a stress related problem. He was discharged from prison with no medication.

[87] Dr Mangan's diagnosis was that the plaintiff suffered from an exacerbation of pre-existing mixed anxiety and depressive disorder. He came to this conclusion based on an assertion that the plaintiff was subject to "death threats" on Facebook. Dr Mangan acknowledged that the plaintiff had a long history of mental health problems and he expected that his psychological injuries arising from the threats against him would resolve gradually over the next 12 months. He attributed 50% of his current mental health problems to the threats that were made against him. When Dr Mangan re-examined the plaintiff on 17 September 2015 the plaintiff informed him that there had been "further threats" made against him on Facebook and social media. This had resulted in an increase in his stress levels. The focus wedded to his pre-occupation with his personal safety. The only subsequent entry referred to by Dr Mangan since his previous examination was an entry of 19 March 2015 indicating the plaintiff was depressed, lots of complex issues, "Re things in past

and ongoing." At that stage it was Dr Mangan's view that there had been a deterioration in the plaintiff's mixed anxiety and depressive disorder since the time of his last examination. Dr Mangan specifically relates that to further threats on Facebook. He was also distressed and angry when he discovered that his solicitor had represented some of the individuals who had made threats against him and believes there was a conflict of interest. Dr Loughrey who examined the plaintiff on 17 February 2016 took a different view from Dr Mangan. Having examined the medical notes and records he came to the view that the matter of the Facebook postings had "a marginal effect upon his severe mental health problems and that this effect has passed". It was his view that "if the postings in question had not been made, this man's psychiatric disturbance and level of disability would have been essentially the same". Like Dr Mangan he too examined the plaintiff's medical notes and records. He too noted the symptoms of anxiety and depression through the years, the anxiety in part arising from chronic hypervigilance and PTSD, and a history of co-morbid alcohol and drug dependence which was most recently manifest as Benzodiazepine dependent.

[88] What did emerge from Dr Loughrey's report was that the plaintiff links the postings on Facebook to the family of his previous partner with whom he had three children. His previous partner was related to a dissident Republican who deceased circa 2005. Prior to that date he had received what he considered credible threats that he would be shot. In his evidence to the court the plaintiff indicated that these postings brought all of this back.

[89] The predominant complaint from the plaintiff to Dr Loughrey was focused on his fear of this particular family.

[90] Overall Dr Loughrey said "It was difficult to get him to describe any more psychiatric symptoms". I too found this a feature of the plaintiff's evidence. In general terms he resorted to the fact that he was "disgusted" with the posts, something which he repeated. The main issue emerging from the plaintiff's evidence was of concern for his safety.

[91] In my view the entries immediately prior to the postings in September 2013 are significant. Thus, throughout 2010 there is reference to chronic anxiety and being seen by the community psychiatric nurse. On 31 January 2011 he attends his general practitioner with chronic anxiety and again there is repeated reference throughout 2011 with regard to mental health issues. 2012 was no different with again repeated attendances for chronic anxiety. On 8 May 2013 he attends with his general practitioner complaining again of chronic anxiety. The first attendance immediately after the postings which are the subject matter of his action also refer to chronic anxiety – 24 September 2013.

[92] It was Dr Loughrey's view that the referral to Malone Place indicates that treatment for addiction was being sought. If one looks at the medical evidence as a

whole it is difficult to identify any increase in the plaintiff's level of disability or complaints. In Dr Loughrey's words they are "essentially the same".

[93] Having considered the entirety of the medical evidence and importantly having listened to the plaintiff's evidence I prefer Dr Loughrey's opinion. However, of much more significance in relation to this particular issue is the fact that it is clear from the plaintiff's evidence that the psychiatric injury about which he complains is related to death threats. Throughout the course of the evidence he was keen to tell me about other threats posted on Facebook which are not the subject matter of this action. Indeed, Dr Mangan's second report which suggested a deterioration in the symptoms is expressly related to subsequent death threats. Equally, his first report refers to death threats and to an alleged posting which said of the plaintiff he was "going to be shot, cut up". It may well be that there are other postings which had given the plaintiff a genuine concern for his safety but none of these are part of his action.

[94] In short I have come to the conclusion that the plaintiff has not established that he has suffered a psychiatric injury as a result of the postings which are the subject matter of this action.

Conclusion

[95] The defendant is liable to the plaintiff for the tort of misuse of private information.

[96] The plaintiff is entitled to damages for the breaches I have determined. In assessing the level of damages I have regard to the limited nature, extent and duration of the breaches. The damages should vindicate his rights and reflect the undoubted injury to his feelings. As I have indicated in the judgment I do not attribute any actual personal or psychiatric injury to any of the breaches I have found. It seems to me that this is the type of case considered by the Court of Appeal in *McGaughey v Sunday Newspaper Ltd* [2011] NICA 51 where the court stated at paragraph [19]:

> "We consider, however, that the thrust of the decisions on misuse of private information demonstrates that modest damages are appropriate unless there are particular circumstances not associated with reputation which are properly to be taken into account."

I do not consider this is such a case and that therefore an award for modest damages is appropriate.

[97] In all the circumstances I consider an appropriate award is one of £3,000 damages.

[98] I wish to conclude by thanking counsel, Mr Ronan Lavery QC and Mr Paul Bacon for the applicant and Mr Anthony White QC and Mr Peter Hopkins for the respondent, for their excellent written and oral submissions which I found extremely helpful.