

**Neutral Citation No. [2010] NICH 7**

Ref: **McCL7841**

*Judgment: approved by the Court for handing down  
(subject to editorial corrections)\**

Delivered: **14/05/10**

**FINAL**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

—————  
**CHANCERY DIVISION**  
—————

**BETWEEN:**

**CHRISTOPHER McGAUGHEY**

**Plaintiff:**

**-and-**

**SUNDAY NEWSPAPERS LIMITED**

**Defendant:**

—————  
**McCLOSKEY J**

**I INTRODUCTION**

[1] This is an appeal against the order of Master Ellison, whereby he dismissed the Defendant's Application to remit the Plaintiff's action to the County Court.

**II THE PLAINTIFF'S CASE**

[2] According to the most recently amended Statement of Claim (authorised by this court, upon the hearing of the appeal), the Plaintiff is aged thirty-six years and lives in the area of Portrush, County Antrim. It is alleged that on 22<sup>nd</sup> August 2008, representatives of the Defendant newspaper organisation called at the Plaintiff's home twice and questioned him about whether the well known loyalist, Johnnie Adair, was residing there. Both the Plaintiff and his house were photographed, without his consent. The following day, page 7 of "The Sunday World" displayed

photographs of Mr. Adair, the Plaintiff and the Plaintiff's home, arranged under the title "Adair's Lair?", followed by an article which contained, as its central theme, a claim that Mr. Adair had been residing at the Plaintiff's home during some unspecified period belonging to the recent past. Within the text, the Plaintiff is identified as the occupier of the house and a denial of the central claim is attributed to him. The text continues:

*"UDA sources ... confirmed that the North Antrim Brigade had heard reports of [Adair] being in [that] area. Sources are now speculating that Adair was indeed in that area, but heard that he may be 'getting a visit', as one loyalist source put it ... and jumped out again ahead of the posse".*

The photographs, headline and article occupied virtually an entire tabloid page.

[3] The main cause of action invoked by the Plaintiff, in pursuing his resulting claim against the Defendant, is described as *"misuse of private information"*. The Plaintiff also asserts a breach of his right to respect for private life under Article 8 of the European Convention on Human Rights and Fundamental Freedoms (*"ECHR"*). Thirdly, and finally, he contends that the Defendant is a data controller and has acted in breach of its statutory duty under Section 4(4) of the Data Protection Act 1998 in that it *"... processed the said personal data unfairly and unlawfully in contravention of the Plaintiff's rights, freedoms and legitimate interests and the First Data Protection Principle"*.

[4] In support of the first and second of the Plaintiff's causes of action, as summarised above, the amended Statement of Claim contains the following key pleading:

*"... At all material times the Plaintiff had a reasonable expectation of privacy and a right to respect for his private and family life and his home ...*

*The Defendant knew, or ought to have known, that the Plaintiff had a reasonable expectation that the subject matter of the photographs was private and that the photographs were taken in a private place"*.

The amended Statement of Claim also relies on paragraph 3 of the Press Complaints Commission Code, which states:

*"(i) Everyone is entitled to respect for his or her private and family life, home, health and correspondence, including digital communications. Editors will be expected to justify intrusions into any individual's private life without consent.*

- (ii) *It is unacceptable to photograph individuals in a private place without their consent.*

*Note - private places are public or private property where there is a reasonable expectation of privacy".*

[5] The amended Statement of Claim further asserts that the Plaintiff has subsequently been the victim of a series of unwelcome and unpleasant acts and incidents. It is alleged that he has been the victim of spitting and verbal abuse; acts of vandalism; threatening graffiti; an intimidating letter; an attack on his home; and adverse and negative attention. It is further alleged that he has been obliged to leave his Portrush home and reside elsewhere. The Plaintiff's claim for damages is formulated as a claim for general damages for distress, hurt feelings and loss of dignity. There is, further, a claim for aggravated damages based mainly on the formulation of the Defence. The pleading continues:

*"The Plaintiff claims general and aggravated damages for the aggravating conduct of the Defendant in and about the negative, adverse and sensational content of the publication. The court will be asked to infer that the particulars of the publication by the Defendant were not supported by information in the possession of the Defendant and that the Defendant in the knowledge of this nevertheless proceeded to make publication".*

### **The Defence**

[6] The Defence, while admitting the offending publication, denies any breach of any of the rights asserted by the Plaintiff. Further, it specifically invokes the defences of public interest and qualified privilege, claiming that the Defendant was acting under a moral and/or social duty and had a legitimate interest in communicating the offending information to its readers, who had a reciprocal interest in receiving it. It is further asserted that the Defendant acted responsibly. Finally, the Defendant's rights under Article 10 ECHR are invoked.

[7] In the solicitor's affidavit grounding the remittal application, it is highlighted that there is no supporting medical evidence and it is suggested, by implication, that the damage and distress allegedly suffered by the Plaintiff are couched in vague and diffuse terms. The affidavit also directs the attention of the court to a series of modest awards in cases of this *genre*, mainly of the order of £2,500/£3,750, in a number of reported cases, mostly involving high profile or "celebrity" members of society - *Campbell -v- MGN Limited* [2002] EWHC (QB) 499; *Archer -v- Williams* [2003] EWHC (QB) 1670; and *Douglas -v- Hello Limited, No. 3* [2005] EWCA. Civ 595 [all considered, *infra* ]. While the affidavit also acknowledges the award of £60,000 in *Mosley -v- News Group Newspapers Limited* [2008] EWHC 1777, it is averred that the present case is wholly different.

### III DISCUSSION

[8] The main cause of action promoted by the Plaintiff, characterised as “misuse of private information”, may be described as a developing tort of comparatively recent emergence. It has a clear affinity with the longer established duty of confidentiality and Article 8 ECHR. In *Attorney General -v- Guardian Newspapers (No. 2)* [1990] 1 AC 109, Lord Keith stated, at pp. 255/256:

*“The law has long recognised that an obligation of confidence can arise out of particular relationships. Examples are the relationships of doctor and patient, priest and penitent, solicitor and client, banker and customer. The obligation may be imposed by an express or implied term in a contract but it may also exist independently of any contract on the basis of an independent equitable principle of confidence ...*

*Most of the cases have arisen in circumstances where there has been a threatened or actual breach of confidence by an employee or ex-employee of the Plaintiff, or where information about the Plaintiff’s business affairs has been given in confidence to someone who has proceeded to exploit it for his own benefit ...*

*In such cases the detriment to the confider is clear. In other cases there may be no financial detriment to the confider, since the breach of confidence involves no more than an invasion of personal privacy ...*

***The right to personal privacy is clearly one which the law should in this field seek to protect.** If a profit has been made through the revelation in breach of confidence of details of a person’s private life it is appropriate that the profit should be accounted for to that person. Further, as a general rule, **it is in the public interest that confidences should be respected ...***

*So I would think it a sufficient detriment to the confider that information given in confidence is to be disclosed to persons whom he would prefer not to know of it, even though the disclosure would not be harmful to him in any positive way”.*

[Emphasis added]

This passage, while helpfully sketching the contours of the tort founded on an obligation of confidentiality, also provides some useful indications of what might be compensatable in the event of a breach.

[9] A breach of the duty of confidentiality occurred in *Cornelius -v- Taranto* [2000] EWHC 561 (QB), where the Defendant wrongfully transmitted a medico-legal report concerning the Plaintiff to her general medical practitioner and a consultant psychiatrist, without her permission. The report contained defamatory and confidential material hurtful to the Plaintiff, who sued in consequence. Morland J stated:

*“[72] The detriment to the Claimant occurred because the Defendant transmitted the medico-legal report ... in breach of contract and breach of confidence. It matters not that no use detrimental to the Claimant was made of this report ...*

*[78] In my assessment of damages I must be careful to ensure that the Claimant is only compensated for the injury to her feelings caused by the Defendant’s unauthorised disclosure of the medico-legal report ...*

*[80] The damages that I award for the unauthorised transmission of the medico-legal report causing injury to the Claimant’s feelings will be strictly limited to injury to feelings caused by the breach of confidence ...*

*[81] In the assessment of damages in this case the nature and detail of the confidential materials disclosed, the character of the recipients of the disclosure and the extent of disclosure are material factors in weighing up the true degree of injury to the Claimant’s feelings”.*

The court awarded £3,000 for injury to feelings, augmented by £750 to compensate for “... the expense incurred by her efforts to retrieve copies of the medico-legal reports retained in Health Service records”: See paragraph [86].

[10] In *Campbell -v- MGN Limited* [2002] EWCA. Civ 1373, the English Court of Appeal provided an erudite judgment on a series of issues bearing on the Plaintiff’s causes of action and the Defendant’s liability, which do not arise in the present context. The main significance of the decision, for present purposes, is the award made at first instance to the Plaintiff - £2,500 for breach of confidentiality and under Section 13 of the Data Protection Act, to compensate the injury to the Plaintiff’s feelings, enhanced by £1,000 aggravated damages, based on a finding that certain of the offending publications concerning the Plaintiff had “trashed her as a person” in a highly offensive and hurtful manner: see paragraph [139].

[11] In *Archer -v- Williams* [2003] EWHC 1670 (QB), the court found that the Defendant was liable in damages for the wrongful disclosure of confidential information relating to the Plaintiff. The claim for compensatory damages was focussed specifically on one aspect of the offending publication, relating to a cosmetic operation which the Plaintiff had undergone, being information not previously in the public domain. After referring to *Cornelius* and *Campbell*, Jackson J stated:

*“[76] On the basis of these two authorities I accept that where a breach of confidence causes injury to feelings, this court has power to award general damages. General damages for injury to feeling should be kept to a modest level and should be proportionate to the injury suffered. Such awards should be well below the level of general damages for serious physical or psychiatric injury”.*

[Emphasis added].

The learned judge, observing that the Plaintiff would continue to be the focus of much publicity, both favourable and unfavourable, assessed general damages at £2,500.

[12] In *Douglas and Jones -v- Hello Limited and Another* [2005] EWCA. Civ 595, the English Court of Appeal, having traced extensively the evolution of the law of confidence, concluded that the Plaintiffs’ claim for invasion of their privacy belonged to this framework:

*“[102] ... That law, as extended to cover private and personal information, protected information about the Douglas’s wedding”.*

For present purposes, it is notable that each of the Plaintiffs was awarded £3,750 as general damages for mental distress and these awards were undisturbed on appeal, albeit the extent to which these discrete awards were actively appealed is somewhat obscure: see paragraphs [243] – [250].

[13] Most recently, there is the well publicised decision in *Mosley -v- News Group Newspapers* [2008] EWHC 1777 (QB). There, Eady J recorded the Plaintiff’s cause of action in the following terms:

*“[3] The cause of action is breach of confidence and/or the unauthorised disclosure of personal information, said to infringe the Claimant’s rights of privacy as protected by Article 8 of the European Convention on Human Rights and Fundamental Freedoms (“the Convention”). There is*

*no claim in defamation and I am thus not directly concerned with any injury to reputation."*

His Lordship then reflected on the recent developments in this sphere:

*"[7] Although the law of "old-fashioned breach of confidence" has been well established for many years, and derives historically from equitable principles, these have been extended in recent years under the stimulus of the Human Rights Act 1998 and the content of the Convention itself. 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. That is because the law is concerned to prevent the violation of a citizen's autonomy, dignity and self-esteem. It is not simply a matter of "unaccountable" judges running amok. Parliament enacted the 1998 statute which requires these values to be acknowledged and enforced by the courts. In any event, the courts had been increasingly taking them into account because of the need to interpret domestic law consistently with the United Kingdom's international obligations. It will be recalled that the United Kingdom government signed up to the Convention more than 50 years ago."*

It was noted that the Plaintiff's case centred on the recording on private property of sexual activity, thus belonging to *"the extreme of intimate intrusion"*: see paragraph [23].

[14] The judgment contains some notable pronouncements on the issue of damages. Firstly, the judge considered that it would be wrong to conclude, at first instance, that exemplary damages *could not* be awarded, the contrary conclusion being one which only the House of Lords could properly make: see paragraph [203]. However, his evident inclination was against this species of damages being recoverable and he was satisfied that, on the particular facts, exemplary damages were not appropriate: paragraph [210]. His Lordship then considered the nature of compensatory damages in privacy cases, contrasting the approach in the law of defamation:

*"[214] Because both libel and breach of privacy are concerned with compensating for infringements of Article 8, there is clearly some scope for analogy. On the other hand, it is important to remember that this case is not directly concerned with compensating for, or vindicating, injury to reputation. The claim was not brought in libel. The distinctive functions of a defamation claim do not arise."*

*The purpose of damages, therefore, must be to address the specific public policy factors in play when there has been "an old fashioned breach of confidence" and/or an unauthorised revelation of personal information. It would seem that the law is concerned to protect such matters as personal dignity, autonomy and integrity."*

He continued:

*"[216] Thus it is reasonable to suppose that damages for such an infringement may include distress, hurt feelings and loss of dignity. The scale of the distress and indignity in this case is difficult to comprehend. It is probably unprecedented. Apart from distress, there is another factor which probably has to be taken into account of a less tangible nature. It is accepted in recent jurisprudence that a legitimate consideration is that of vindication to mark the infringement of a right: see e.g. *Ashley v Chief Constable of Sussex* [2008] 2 WLR 975 at [21]-[22] and *Chester v Afshar* [2005] 1 AC 134 at [87]. Again, it should be stressed that this is different from vindication of reputation (long recognised as a proper factor in the award of libel damages). It is simply to mark the fact that either the state or a relevant individual has taken away or undermined the right of another – in this case taken away a person's dignity and struck at the core of his personality. It is a relevant factor, but the underlying policy is to ensure that an infringed right is met with "an adequate remedy". If other factors mean that significant damages are to be awarded, in any event, the element of vindication does not need to be reflected in an even higher award. As Lord Scott observed in *Ashley*, *ibid*, " ... there is no reason why an award of compensatory damages should not also fulfil a vindicatory purpose"."*

Noting that any award of damages must be proportionate and immune from the stigma of arbitrariness, his Lordship considered it appropriate to pay some attention to the current levels of personal injury awards: see paragraphs [218] – [221]. Simultaneously, he noted "*the limits of useful comparison*" in conducting such an exercise. As regards the analogy with defamation cases, he observed:

*"[230] I am conscious naturally that the analogy with defamation can only be pressed so far. I have already emphasised that injury to reputation is not a directly relevant factor, but it is also to be remembered that libel damages can achieve one objective that is impossible in privacy cases. Whereas reputation can be vindicated by an*



*award of damages, in the sense that the claimant can be restored to the esteem in which he was previously held, that is not possible where embarrassing personal information has been released for general publication. As the media are well aware, once privacy has been infringed, the damage is done and the embarrassment is only augmented by pursuing a court action. Claimants with the degree of resolve (and financial resources) of Mr Max Mosley are likely to be few and far between."*

The judge's overall conclusion is expressed thus:

*"[231] Notwithstanding all this, it has to be accepted that an infringement of privacy cannot ever be effectively compensated by a monetary award. Judges cannot achieve what is, in the nature of things, impossible. That unpalatable fact cannot be mitigated by simply adding a few noughts to the number first thought of. Accordingly, it seems to me that the only realistic course is to select a figure which marks the fact that an unlawful intrusion has taken place while affording some degree of solatium to the injured party. That is all that can be done in circumstances where the traditional object of restitutio is not available. At the same time, the figure selected should not be such that it could be interpreted as minimising the scale of the wrong done or the damage it has caused."*

Noting that his conclusion on liability entailed "*simply the application to rather unusual facts of recently developed but established principles*", and expressly eschewing any element of deterrence or punishment, he assessed damages at £60,000.

#### **IV CONCLUSION**

[15] I remind myself that, in moving this application, the onus rests on the Defendant and the court's determination is to be made within the framework of Section 31 of the Judicature (NI) Act 1978, which provides, in material part:

*"(1) The High Court may in accordance with Rules of Court at any stage remit to a County Court the whole or any part of any civil proceedings to which this subsection applies if ...*

*(b) the court is satisfied upon the application of any party to proceedings involving an unliquidated claim that the full amount of that claim is likely to be within the monetary limit of the jurisdiction of the County Court ...*

*and in any such case the court is of the opinion that in all the circumstances the proceedings may properly be heard and determined in the County Court”.*

Furthermore, as stated by Carswell LCJ in *Clinton -v- Chief Constable of the Royal Ulster Constabulary* [1999] NI 215, at p. 221:

*“1. On an application for remittal the onus rests on a Defendant to establish to the satisfaction of the court that the full amount of the Plaintiff’s claim is likely to be within the monetary jurisdiction of the County Court.*

*2. The court should accept such version of the facts advanced on behalf of the Plaintiff as is entitled to reasonable credence”.*

On the discrete issue of aggravated damages, the Lord Chief Justice stated, at p. 222:

*“The Law Commission ... laid down two basic preconditions for an award of aggravated damages:*

*(1) Exceptional or contumelious conduct or motive on the part of a Defendant in committing the wrong or, in certain circumstances, subsequent to the wrong; and*

*(2) Mental distress sustained by the Plaintiff as a result.*

*We consider that this formulation is an accurate statement of the law.”*

The Lord Chief Justice noted that this formulation accords with established legal principle.

[16] I proceed on the basis that the Plaintiff will, ultimately, prove on the balance of probabilities all of the key allegations made on his behalf, including those relating to unsavoury events and experiences postdating the offending publication and the nexus linking the former with the latter. In the particular circumstances of this case, I find the absence of medical evidence unsurprising. I note that there is no claim for financial loss. Further, the Plaintiff is not to be compensated for any alleged damage to his reputation. Rather, the object of any award of damages is to provide him with fair and reasonable compensation for any proven injury to his feelings and mental distress. I shall assume, at this stage, that this encompasses any distress generated by the later incidents. I also accept that the Plaintiff may be able to recover an element of aggravated damages, with the proviso that, as the claim is presently constituted and having regard to the governing principles (see *Clinton, supra*), any such award is unlikely to significantly increase the award of compensatory damages. I further take into account that I have not heard the Plaintiff give evidence

and that the nature and extent of the asserted injury to the Plaintiff's feelings and mental distress may be difficult to adequately grasp and assess in consequence, at this stage. Furthermore, while I have been urged by the Defendant to treat the Plaintiff's affidavit and the latest amended Statement of Claim with circumspection, given the timing of their advent, it seems to me that this is counterbalanced by the "reasonable credence" principle.

[17] I consider that detailed comparisons between the facts of the instant case and those of other cases are of limited value. Further, recourse to the levels of awards of general damages in personal injury cases seems to me unhelpful, given the markedly different contexts. Comparative exercises are arid in many spheres of the law and the present is no exception, in this respect. In my view, the most important feature of the decisions considered above is that they disclose a general orientation in favour of comparatively modest awards, tending to confirm as correct the exhortation of Jackson J in *Archer*, paragraph [76]. As noted also by the learned deputy judge in *Applause Store Publications -v- Firsh and Raphael* [2008] EWHC 1781 (QB), awards of damages in cases of misuse of private information have, typically, been modest: see paragraph [81]. I consider that the acutely fact sensitive and unique nature of the *Mosley* case requires no elaboration. Bearing in mind the influence of Article 8 ECHR in this sphere and the Plaintiff's express reliance thereon in the present case, this general trend is also consistent with the far from exorbitant monetary awards routinely found in the Strasbourg jurisprudence.

[18] In determining this appeal, I accept that prior to the offending publication, the Plaintiff was unknown to the public at large. However, it seems likely that the main element of private information relating to the Plaintiff allegedly misused, through the medium of the offending publication, is where he lived. One must bear in mind that 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/or relatively ascertainable by the public at large. The present case seems no exception, in this respect. I remind myself that injury to feelings and mental distress are the relevant touchstones, in the present context. Furthermore, I consider it highly unlikely that any substantial aggravation will be occasioned by the terms of the Defence. A pleading of this kind will be viewed objectively and dispassionately by the trial judge and litigation is intrinsically adversarial in nature, albeit to a progressively diminishing degree. From the perspective of compensation, the Plaintiff's case is of narrow compass and the judge will be astute to identify those elements, such as any alleged damage to reputation, which are *not* compensatable. Giving effect to the clearly identifiable trend previously noted, I consider it reasonable to expect that the Plaintiff's damages, if recoverable, and assuming an element of aggravation, are unlikely to differ markedly from those awarded in most of the cases considered above. Finally, bearing in mind the final clause in Section 31(1) of the Judicature Act, I am satisfied that the Plaintiff's action is appropriate to be heard and determined in the County Court. It is a freestanding, fact sensitive claim brought by a single individual and devoid of any substantial complexity, factual or legal.

## Order

[19] I conclude, accordingly, that the Defendant has discharged its burden. Thus I reverse the order of the Master and hereby remit the Plaintiff's action to the County Court. The parties will be at liberty to address the court on the issue of costs, above and below.