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IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND

KING'S BENCH DIVISION

BETWEEN:

Michelle O'Neill

Plaintiff

and

John Carson

Defendant.

Master Bell

Introduction

[1] On 30 April 2021 Mr Carson wrote an offensive and misogynistic post about Ms O'Neill on his Facebook page which stated:

"She will be put back in her kennel."

[2] On 8 February 2022 Ms O'Neill issued a writ against Mr Carson claiming that the words were defamatory. No appearance was filed by Mr Carson to defend the writ and on 13 December 2022 Ms O'Neill obtained default judgment against him. She has now applied for an assessment of damages under Order 37 of the Rules of the Court of Judicature.

[3] The statement of claim, in addition to making allegations of defamation, also alleged breach of Ms O'Neill's personal data rights under the Data Protection Act 2018 and the General Data Protection Regulation (UK). Counsel, however, informed me that potential damages for any breach of the GDPR were not being pursued because it was recognised that any damages under that head would involve substantial double counting.

[4] I am grateful to Mr Girvan, who appeared on behalf of Ms O'Neill and Mr Bready, who appeared on behalf of Mr Carson, for their helpful submissions.

Assessing Damages for Defamation

[5] The purpose of damages in a defamation action was set out by the Master of the Rolls, Sir Thomas Bingham, in *John v MGN Limited* [1997] QB 586, in the following terms:

> "The successful plaintiff in a defamation action is entitled to recover, as general compensatory damages, such sum as will compensate him for the wrong he has suffered. That sum must compensate him for the damage to his reputation; vindicate his good name; and take account of the distress, hurt and humiliation which the defamatory publication has caused. In assessing the appropriate damages for injury to reputation the most important factor is the gravity of the libel; the more closely it touches the plaintiff's personal integrity, professional reputation, honour, courage, loyalty and the core attributes of his personality, the more serious it is likely to be. The extent of publication is also very relevant: a libel published to millions has a greater potential to cause damage than a libel published to a handful of people. A successful plaintiff may properly look to an award of damages to vindicate his reputation: but the significance of this is much greater in a case where the defendant asserts the truth of the libel and refuses any retraction or apology than in a case where the defendant acknowledges the falsity of what was published and publicly expresses regret that the libellous publication took place. It is well established that compensatory damages may and should compensate for additional injury caused to the plaintiff's feelings by the defendant's conduct of the action, as when he persists in an unfounded assertion that the publication was true, or refuses to apologise, or cross-examines the plaintiff in a wounding or insulting way."

[6] This summary of the key principles by the Master of the Rolls was recently expanded upon by Nicklin J in *Riley v Murray* [2021] EWHC 3437 (QB) where he said:

> "[21] I have added the numbering in this passage, which identifies the three distinct functions performed by an award of damages for libel. I have added the lettering also to identify, for ease of reference, the factors listed by Sir Thomas

Bingham. Some additional points may be made which are relevant in this case:

(1) The initial measure of damages is the amount that would restore the claimant to the position he would have enjoyed had he not been defamed: *Steel and Morris -v- United Kingdom* (2004) 41 EHRR [37], [45].

(2) The existence and scale of any harm to reputation may be established by evidence or inferred. Often, the process is one of inference, but evidence that tends to show that as a matter of fact a person was shunned, avoided, or taunted will be relevant. So may evidence that a person was treated as well or better by others after the libel than before it.

(3) The impact of a libel on a person's reputation can be affected by:

a) Their role in society. The libel of Esther Rantzen [*Rantzen -v- Mirror Group Newspapers (1986) Ltd* [1994] QB 670] was more damaging because she was a prominent child protection campaigner.

b) The extent to which the publisher(s) of the defamatory imputation are authoritative and credible. The person making the allegations may be someone apparently well-placed to know the facts, or they may appear to be an unreliable source.

c) The identities of the publishees. Publication of a libel to family, friends or work colleagues may be more harmful and hurtful than if it is circulated amongst strangers. On the other hand, those close to a claimant may have knowledge or viewpoints that make them less likely to believe what is alleged.

d) The propensity of defamatory statements to percolate through underground channels and contaminate hidden springs, a problem made worse by the internet and social networking sites, particularly for claimants in the public

eye: *C -v- MGN Ltd* (reported with *Cairns -v- Modi*at [2013] 1 WLR 1051) [27].

(4) It is often said that damages may be aggravated if the defendant acts maliciously. The harm for which compensation would be due in that event is injury to feelings.

(5) A person who has been libelled is compensated only for injury to the reputation they actually had at the time of publication. If it is shown that the person already had a bad reputation in the relevant sector of their life, that will reduce the harm, and therefore moderate any damages. But it is not permissible to seek, in mitigation of damages, to prove specific acts of misconduct by the claimant, or rumours or reports to the effect that he has done the things alleged in the libel complained of: *Scott -v- Sampson* (1882) QBD 491, on which I will expand a little. Attempts to achieve this may aggravate damages, in line with factor (d) in Sir Thomas Bingham's list.

(6) Factors other than bad reputation that may moderate or mitigate damages, on some of which I will also elaborate below, include the following:

a) "*Directly relevant background context*" within the meaning of *Burstein -v- Times Newspapers Ltd* [2001] 1 WLR 579 and subsequent authorities. This may qualify the rules at (5) above.

b) Publications by others to the same effect as the libel complained of if (but only if) the claimants have sued over these in another defamation claim, or if it is necessary to consider them in order to isolate the damage caused by the publication complained of.

c) An offer of amends pursuant to the Defamation Act 1996.

d) A reasoned judgment, though the impact of this will vary according to the facts and nature of the case.

> (7) In arriving at a figure it is proper to have regard to (a) Jury awards approved by the Court of Appeal: *Rantzen*, 694, *John*, 612; (b) the scale of damages awarded in personal injury actions: *John*, 615; (c) previous awards by a judge sitting without a jury: *John*, 608.
>
> (8) Any award needs to be no more than is justified by the legitimate aim of protecting reputation, necessary in a democratic society in pursuit of that aim, and proportionate to that need: *Rantzen* ... This limit is nowadays statutory, via the Human Rights Act 1998."

[7] In this jurisdiction the approach to be adopted in the assessment of damages in defamation actions was explained by McAlinden J in *Foster v Jessen* [2021] NIQB 56:

> "[91] Stephens J, as he then was, in a recent judgment dealing with the assessment of damages under section 3(5) of the Defamation Act 1996 (*Elliot v Flanagan* [2017] NI 264) gave very valuable guidance as to the approach to be adopted in the assessment of damages in defamation cases generally. I intend to closely follow the approach indicated by Stephens J. The amount to be paid by way of compensation in defamation proceedings is to be determined by the court on the basis of the following general principles. Firstly, the award of general damages in defamation proceedings is intended to serve the following 3 functions, namely:
>
> (i) To act as a consolation to the plaintiff for the distress the plaintiff suffers from the publication of the statement;
>
> (ii) To repair loss to the plaintiff's reputation; and
>
> (iii) As a vindication for the plaintiff's reputation.
>
> [92] The assessment of damages is not achieved by following some mechanical, arithmetical or objective formula (see *Broome v Cassell & Co Ltd* [1972] AC 1027 at 1071). The court is entitled to take into account a wide range of matters and it is useful to have regard to the checklist adopted by Hirst LJ in *Jones v Pollard* [1996] EWCA Civ 1186 which highlighted the following matters:
>
> > "1. The objective features of the libel itself, such as its gravity, its prominence, the circulation of the medium in which it was published, and any repetition.

2. The subjective effect on the plaintiff's feelings (usually categorised as aggravating features) not only from the publication itself, but also from the defendant's conduct thereafter both up to and including the trial itself.

3. Matters tending to mitigate damages, such as the publication of an apology.

4. Matters tending to reduce damages, *e.g.* evidence of the plaintiff's bad reputation, or evidence given at the trial which the jury are entitled to take into account in accordance with the decision of this court in *Pamplin v Express Newspapers Ltd* [1988] 1 W.L.R. 116.

5. Special damages.

6. Indication of the plaintiff's reputation past and future."

[93] Vindication is an aspect of the award so that if the allegations should re-emerge, the damages must be large enough to proclaim the baselessness of the libel or as put in *Broome v Cassell & Co Ltd* [1972] AC 1027 at 1071 the plaintiff "must be able to point to a sum awarded by a jury sufficient to convince a bystander of the baselessness of the charge." Vindication can also be achieved, either in whole or in part, by an apology or by a categorical statement by the defendant that the statement is unfounded.

[94] When determining the appropriate level of general damages for defamation, the court is entitled to take into account such matters as the plaintiff's status and reputation, the mode and extent of publication, the conduct of the publisher and any injury to the plaintiff's feelings the result of the defamation or a consequence of highhanded, oppressive or insulting behaviour by the publisher. In this case, Mr Ringland QC, in his position paper, does not argue that an award of exemplary damages is warranted and there is nothing to indicate that such an award would be appropriate in the specific circumstances of this case. Any award of damages will be compensatory but that does not mean that such an award is not capable of having some deterrent or exemplary effect as explained by Lord Hoffmann in paragraphs [41] - [42] of *Gleaner Co. Limited and another v Abrahams* [2004] 1 AC 628. "

Submissions on Meaning

[8] As Lord Bridge emphasised in *Charleston v News Group Newspapers* [1995] 2 AC 65, in order to determine the natural and ordinary meaning of the words of which a plaintiff complains, it is necessary to take into account the context in which the words were used and the mode of publication. Therefore, before I summarise the evidence given to the court at the assessment of damages hearing, it is necessary to put the impugned Facebook post in the context in which it was posted. I will also summarise the position that each party has argued for when it comes to the meaning of the words which is being urged on the court.

[9] The context was that on his Facebook page Mr Carson had included what in a pre-digital age might have been a leaflet. This consisted of a photograph of Edwin Poots, together with the slogan "Edwin Poots for party leader" and the DUP logo. This was a reference to the fact that Mrs Foster was stepping down as the leader of the DUP and a leadership election was to be held. Mr Carson was thereby indicating his support for Mr Poots in this contest. Thirteen people had caused emojis to be attached to this leaflet, indicating their support.

[10] Subsequently, another Facebook user posted a comment on Mr Carson's page which read:

> "That doll there has lead the DUP for many a year unchallenged."

[11] Both counsel accept that that post contains a spelling mistake. They agree that the unknown author of the post meant to write the word "led" but made a spelling error and wrote "lead". Counsel for the parties then diverge in their arguments as to what happened next.

[12] Mr Bready submits that it is unlikely that Mr Carson was trying to make a pun on the spelling mistake and jump from word "lead" to a reference to "kennel". Mr Girvan interprets Mr Carson's comment in a different way and submits that, once Mr Carson spotted the spelling error, he jumped to making a deliberate pun by posting the misogynistic and offensive reference to a dog. Mr Girvan attributed no blame for Mr Carson's post to Mr Poots.

[13] The parties then diverge much further in terms of the meaning that should be attributed to the words. The statement of claim alleges that the natural and ordinary meaning of the words is:

> "That the plaintiff is a subservient and incompetent female politician whose abilities are to be equated in all respects with those of a dog and as a consequence is easily dominated by and subservient to male DUP politicians, such as DUP leadership contender Edwin Poots."

[14] It goes on to allege that, by reason of these words, Ms O'Neill's reputation and character has been lowered in the eyes of reasonable members of society and she has been brought into public scandal, odium and contempt. Therefore her reputation has been seriously and irreparably damaged and she

has suffered considerable distress, hurt and embarrassment. Counsel submitted that this misogynistic and defamatory attack on Mss O'Neill:

> "… not only impugned her reputation but also sought to inculcate a culture of hatred, derision and objectification of women in politics and in society generally."

[15] The statement of claim then alleges:

> "The zoomorphism within the posting equating the plaintiff to a dog was particularly offensive to the Plaintiff due to:
>
> (a) The racist and/or sectarian slogans of the past whereby those of Irish nationality and descent were compared to dogs.
>
> (b) Statements in the recent past by members of the DUP comparing Sinn Fein politicians to 'crocodiles.' "

[16] Mr Girvan submitted that the post was trying to promote Mr Poots as a leadership candidate for the DUP leadership contest and denigrate Ms O'Neill's abilities. He suggested that the meaning of the post suggested on behalf of Ms O'Neill was one of a range of possible meanings and that the meaning set forth in the statement of claim had never been challenged. In terms of circulation, Mr Girvan noted that Mr Carson had 1,700 Facebook friends and that the local mainstream media had then picked up the story (albeit with condemnation of Mr Carson).

[17] Mr Bready submitted that the consequences for Mr Carson had been significant. Firstly, he had been suspended by the Local Government Commissioner for Standards who had imposed a three month suspension. Subsequently Mr Carson had been advised to withdraw his nomination as a candidate at the last local elections. He indicated that, if Mr Carson had not voluntarily withdrawn his name, he would have been forced out by his party. In addition, he was now no longer a member of the party he had belonged to for over 40 years. In the expression used by his counsel, Mr Carson "had read the room". Mr Bready agreed that Mr Carson had dealt with the matter in a clumsy and inadequate manner.

[18] Counsel for Mr Carson has submitted that I should interpret the words as meaning simply that Ms O'Neill was "a bitch". He made no submission that the post was not defamatory.

[19] When it comes to deciding on the meaning of the words, Mr Girvan submitted that, I should accept the meaning asserted in Ms O'Neill's statement of claim unless I find those words "wildly extravagant or impossible" or that the words were clearly not defamatory in their tendency. To support his submission Mr Girvan relied upon the decision in *Hills v Tabe* [2022] EWHC 316 (QB) where Richard Spearman QC, sitting as a deputy High Court Judge said:

"11. In *New Century v Makhlay* [2013] EWHC 3556 (QB), Carr J held at [30]: "A default judgment on liability under CPR Part 12 is a final judgment that is conclusive on liability. The Particulars of Claim are, in effect, a proxy for the judgment, setting out the basis of liability. Once judgment is entered, it is not open to a defendant to go behind it. Damages of course still have to be proved, and a defendant can raise any issue which is not inconsistent with the judgment – see the White Book 2013 notes to CPR 12.4.4."

12. Warby J identified the approach the Court should adopt in relation to a default judgment in *Brett Wilson LLP v Persons Unknown* [2016] 4 WLR 69 at [18]-[19]:

> '18 The claimant's entitlement on such an application is to 'such judgment as it appears to the court that the claimant is entitled to on his statement of case': CPR 23.11(1). I accept Mr Wilson's submission that I should interpret and apply those words in the same way as I did in Sloutsker v Romanova [2015] EWHC 2053 (QB) [84]: "This rule enables the court to proceed on the basis of the claimant's unchallenged particulars of claim. There is no need to adduce evidence or for findings of fact to be made in cases where the defendant has not disputed the claimant's allegations. That in my judgment will normally be the right approach for the court to take. Examination of the merits will usually involve unnecessary expenditure of time and resources and hence [be] contrary to the overriding objective. It also runs the risk of needlessly complicating matters if an application is later made to set aside the default judgment: see QRS v Beach [2014] EWHC 4189 (QB), [2015] 1 WLR 2701 esp at [53]-[56]."
>
> 19 As I said in the same judgment at [86]: "the general approach outlined above could need modification in an appropriate case, for instance if the court concluded that the claimant's interpretation of the words complained of was wildly extravagant and impossible, or that the words were clearly not defamatory in their tendency.'
>
> Those instances of circumstances which might require departure from the general rule are not

> exhaustive, but only examples. I have considered whether there is any feature of the present case that might require me to consider evidence, rather than the claimant's pleaded case, verified by a statement of truth and uncontradicted by the defendants. I do not think there is any such feature. I have therefore proceeded on the basis of the pleaded case, both in my introductory description of the facts above, and in reaching the conclusion that the claimant has established its right to recover damages for libel, and to appropriate injunctions to ensure that the libel is not further published by the defendants."

[20] I am unconvinced, however, that this decision represents the position in Northern Ireland law. The reference in the quotation to Civil Procedure Rule ("CPR") Part 12 should not be skimmed over by the reader. CPR 12.12 provides an important Rule in England and Wales for which there is no Northern Ireland equivalent, namely:

> "(1) Where the claimant makes an application for a default judgment, the court shall give such judgment as the claimant is entitled to *on the statement of case*."

This would appear to be the basis from which the rest of the approach flows and which allowed Carr J in the *New Century* decision to state:

> "The Particulars of Claim are, in effect, a proxy for the judgment, setting out the basis for liability."

[21] Orders 13, 37 and 82 of the Rules of the Court of Judicature in this jurisdiction contain no provision comparable to CPR 12.12 in England and Wales which have the effect of requiring me to accept whatever meaning of the controversial words that the plaintiff has asserted in their statement of claim. The court is therefore obliged to determine the meaning of the words complained of before determining the level of damages that should be awarded.

ORAL EVIDENCE

[22] The only oral evidence received by the court was from Ms O'Neill. Although Mr Carson attended the hearing, his counsel handed in a letter from Mr Carson's doctor which stated that Mr Carson was struggling with anxiety and was at present medically unfit to give oral evidence.

[23] Ms O'Neill gave evidence that she was elected to Dungannon and South Tyrone Borough Council in 2005 and was a councillor there for six years, serving during that time as deputy mayor and then as the first ever female mayor on that Council. In 2011 she was elected to the Northern Ireland Assembly. Since her election to the Assembly she has served as Minister of

Agriculture and Rural Development, Minister of Health, Deputy First Minister, and is now the First Minister Designate.

[24] She stated that during that time she has been an advocate for more women in public life. She takes her role as a political leader very seriously in terms of promoting the role of women. She does not consider that there is a level playing field for women in public life and believes that there is a lot to do in challenging some of those issues. Throughout all of her time in politics she has been an advocate for equality. She considers that women in public life are constantly judged and demeaned and that quite frequently they are subjected to misogynistic commentary and abuse, both in real life and in the online world. Ms O'Neill stated that Mr Carson's post was an attack on her core beliefs.

[25] Ms O'Neill said that, once Mr Carson posted his comment, it was widely shared and was sent to her by others. It was then brought into the mainstream media by local journalists. She thought it was malicious and absolutely misogynistic. She considered it was an attack on her as a professional and as a woman. She thought it had connotations on her competence and portrayed her as subservient, given the reference to a dog. She considered that animal metaphors are frequently part of gender-targeted abuse. She believed we have a huge societal problem in terms of violence against women and girls. She believed that misogynistic comments were a part of that wider spectrum and of the violence against women and girls and that these attitudes required to be dismantled.

[26] Ms O'Neill was quite clear that remarks such as that made by Mr Carson were not part of the cut and thrust of political debate. His comment was misogynistic. Ms O'Neill said that she had not made any comment on the DUP leadership contest and she found the reference made on Mr Carson's Facebook page (by another Facebook user) to Mrs Foster as "that doll" was denigrating of Mrs Foster.

[27] As regards Mr Carson's apology, Ms O'Neill noted that when he initially apologised, he did not remove the post. She did not know the date on which the post was later removed. She noted that the Acting Local Government Commissioner for Standards referred to the apology as "half baked". She regarded Mr Carson's second apology as "too little, too late" given that it came some two years after the original post. In cross-examination, she told the court that she would always accept an apology if it was made. She stated that the emojis in response to Mr Carson's post by four other Facebook users made her feel attacked and angry.

[28] I note that no evidence was given, either by Ms O'Neill or from any other witness, in relation to any extrinsic facts to support the allegations in the statement of claim that the post should be understood as having a particular meaning because in the past racist and/or sectarian slogans have been used whereby those of Irish nationality and descent were compared to

dogs or that there had been statements made by members of the DUP comparing Sinn Fein politicians to 'crocodiles.'

[29] Ms O'Neill told the court that there were no invitations that she did not receive as a result of Mr Carson's post. Nor was she subject to a leadership challenge within her own party.

Ruling on Meaning

[30] As I indicated previously, I do not consider that the decision of *Hills v Tabe* represents the legal position in Northern Ireland. It is a matter for the court to determine the meaning of the words used by the defendant. If I am incorrect about the effect of *Hills v Tabe*, then I take the view that the meaning argued for in the statement of claim was wildly extravagant and impossible.

[31] In his submissions that the words posted by Mr Carson were defamatory, Mr Girvan referred me to the Australian authority of *Piscioneri v Brisciani* [2015] ACTSC 106, where Burns J rejected a defence submission that the word "bitch" was mere vulgar abuse, ruled that the word was defamatory, and awarded the plaintiff damages for defamation. Subsequent to the hearing Mr Girvan also referred me to *Elzahed v Commonwealth of Australia* [2015] NSWDC 271 where the view was taken that the word "bitch" was not defamatory. Indeed, there are further Australian cases such as *Wood v Branson* (1952) 3 SALR 369 where the court also considered that the word was not defamatory and simply amounted to mere vulgar abuse. Notably Garibaldi J in *Ward v Zelikovsky* (1994) 136 NJ 516, 643 A 2d 972 at 982 – 983 went so far as to say this:

> "The term 'bitch' is undoubtedly disparaging. But to hold that calling someone a 'bitch' is actionable would require us to imbue the term with a meaning it does not have. Such a holding would, in effect, say that some objective facts exist to justify characterising someone as a bitch. If calling someone a bitch is actionable, defendants must be able to raise the defence of truth. 'Bitch' in its common everyday use is vulgar but non-actionable name-calling that is incapable of objective truth or falsity. A reasonable listener hearing the word 'bitch' would interpret the term to indicate merely that the speaker disliked Mrs Ward [the plaintiff] and is otherwise inarticulate. Although Zelikovsky's [the defendant] manner of expression was very offensive, our slander laws do not redress offensive ideas."

[32] Returning to case law nearer home, Sir Anthony Clarke MR explained in *Jeynes v News Magazine Limited* [2008] EWCA 130 how the meaning of words ought to be approached in defamation actions:

> "The legal principles relevant to meaning have been summarised many times and are not in dispute. …

They are derived from a number of cases including, notably, *Skuse v Granada Television Limited* [1996] EMLR 278, per Sir Thomas Bingham MR at 285-7. They may be summarised in this way:

> (1) The governing principle is reasonableness.
>
> (2) The hypothetical reasonable reader is not naïve but he is not unduly suspicious. He can read between the lines. He can read in an implication more readily than a lawyer and may indulge in a certain amount of loose thinking but he must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available.
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> (3) Over-elaborate analysis is best avoided.
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> (4) The intention of the publisher is irrelevant.
>
> (5) The article must be read as a whole, and any 'bane and antidote' taken together.
>
> (6) The hypothetical reader is taken to be representative of those who would read the publication in question.
>
> (7) In delimiting the range of permissible defamatory meanings, the court should rule out any meaning which, 'can only emerge as the product of some strained, or forced, or utterly unreasonable interpretation…' (see Eady J in *Gillick v Brook Advisory Centres* approved by this court [2001] EWCA Civ 1263 at paragraph 7 and Gatley on Libel and Slander (10th Edition), paragraph 30.6).
>
> (8) It follows that 'it is not enough to say that by some person or another the words *might* be understood in a defamatory sense.' *Neville v Fine Arts Company* [1897] AC 68 per Lord Halsbury LC at 73."

[33] The danger of straining the meaning of the words used was pointed out in *Stubbs Ltd. v Russell* [1913] A.C. 386 by Lord Shaw of Dunfermline where he said:

> "For I think the test in these cases is this: Is the meaning sought to be attributed to the language alleged to be libellous one which is a reasonable, natural, or necessary interpretation of its terms? It is productive, in my humble judgment, of much error and mischief to make the test simply whether some people would put such and such a meaning upon the words, however strained or unlikely that construction may be. The interpretation to be put on language varies infinitely. It varies with the knowledge, the mental equipment, even the prejudices, of the reader or hearer; it varies - and very often greatly varies - with his temperament or his disposition, in which the elements, on the one hand, of generosity or justice, or, on the other, of mistrust, jealousy, or suspicion, may play their part. To permit, in the latter case, a strained and sinister interpretation, which is thus essentially unjust, to form a ground for reparation, would be, in truth, to grant reparation for a wrong which had never been committed."

[34] When it comes to deciding what the reasonable meaning of the words used was, courts need to bear in mind the lament of Sedley LJ in *Halford v Chief Constable of Hampshire Constabulary* [2003] EWCA] Civ 102:

> "As May LJ remarked in *Alexander v Arts Council of Wales* [2001] 1 WLR 1953 at [41] libel pleaders never seem content to say that the words in issue mean what they say; a pyramid of insulting paraphrases has to be erected on them."

[35] In my view this is what has happened in the statement of claim with its references to zoomorphism, racist slogans and crocodiles. I consider that the reasonable meaning of the words used by Mr Carson were effectively that Ms O'Neill was "a bitch" and that the impact of her political views and policies would be contained and restrained. So instead of disagreeing with her politics, and engaging in an intellectual debate, he insulted her gender. I consider that counsel's submission that her political competence was being challenged and defamed amounts to an exaggeration of what was posted. On balance, in my view the natural and reasonable meaning of Mr Carson's words is:

> "She is a bitch and we will get her under control."

[36] I take the view that this is classic misogynistic abuse and is also combined with that bravado and bombast often seen amongst football supporters, asserting that their team will beat the opponent. The context of Mr Carson's post is therefore somewhat related to the impending leadership contest in the DUP. The implication is that Mr Carson's preferred candidate would triumph over Ms O'Neill. But I do not consider it reasonable to draw from that context that the statement is defamatory of Ms O'Neill's competence as a politician. The winning of elections depends on far more than the competence of a party leader.

[37] Although, therefore, I have not accepted the meaning of the words as suggested in the statement of claim, this should not be thought of as implying criticism of the drafting of the statement of claim. As Ackner LJ said in *Lucas-Box v News Group Newspapers Ltd* [1986] 1 WLR 146:

> "… it has become the settled practice for a plaintiff, where the meaning of the words complained of is not clear and explicit, to plead the meanings which he says the words bear. This enables the defendant to know what case he has to meet and to prepare his defence accordingly. Such a practice is, further, of considerable assistance to the court since it thus clearly provides to the trial judge the meanings upon which he must rule in deciding whether the words published are capable of being so understood."

Free Speech

[38] Defamation actions where a politician alleges defamation by another politician need to be carefully considered in case they are being used to attack legitimate free speech. As Mrs Justice Steyn said in *Riley v Sivier* {2022] EWHC 2891 (KB):

> "The special importance of expression in the political sphere, a freedom which is at the very core of the concept of a democratic society, is well recognised; and the concept of political expression is a broad one. The limits of acceptable criticism are wider in respect of political expression concerning politicians."

[39] As Lord Steyn observed in *Reynolds v Times Newspapers and Others* [2001] 2 AC 127, the correct approach to the line between permissible and impermissible political speech was indicated by the European Court of Human Rights in *Lingens v. Austria* (1986) 8 E.H.R. 407, as follows (at 419, para. 42):

> "The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every

> word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance. No doubt article 10(2) enables the reputation of others--that is to say, of all individuals--to be protected, and this protection extends to politicians too, even when they are not acting in their private capacity; but in such cases the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues."

[40] However in this case Mr Carson did not raise any argument that this was genuine political discourse and hence free speech. Furthermore, even if the issue had been raised by his counsel, I would have rejected the argument on the basis that what Mr Carson posted went beyond genuine political debate.

The Threshold of Seriousness

[41] Before I turn to the question of the assessment of damages, I must first deal with the issue of whether these proceedings pass the threshold of seriousness. This test was introduced with a view to excluding trivial claims. In *Lachaux v Independent Print Ltd and another* [2019] UKSC 27 Lord Sumption observed that caselaw in the last two decades has determined that the damage to reputation in an apparently actionable case must pass a minimum threshold of seriousness. The first of two notable cases was *Jameel (Yousef) v Dow Jones & Co Inc* [2005] QB 946. The plaintiff had sued the publishers of the Wall Street Journal for a statement published online in Brussels to the effect that he had been funding terrorism. The statement was shown to have reached just five people in England and Wales. The Court of Appeal rejected a submission that the conclusive presumption of general damage was incompatible with article 10 of the Human Rights Convention. Lord Phillips of Worth Matravers MR, delivering the leading judgment, observed (para 37) that:

> "English law has been well served by a principle under which liability turns on the objective question of whether the publication is one which tends to injure the claimant's reputation."

[42] But he held that the presumption could not be applied consistently with the Convention in those cases, said to be rare, where damage was shown to be so trivial that the interference with freedom of expression could not be said to be necessary for the protection of the claimant's reputation. The appropriate course in such a case was to strike out the claim, not on the ground that it failed to disclose a cause of action, but as an abuse of process. The Court of Appeal held that it was an abuse of process for the action before them to proceed "where so little is now seen to be at stake", and duly struck it out.

[43] The effect of this decision was to introduce a procedural threshold of seriousness to be applied to the damage to the claimant's reputation. Two things are clear from the language of Lord Phillips' judgment. One is that the threshold was low. The damage must be more than minimal. That is all. Secondly, the Court of Appeal must have thought that the operation of the threshold might depend, as it did in the case before them, on the evidence of actual damage and not just on the inherently injurious character of the statement in question.

[44] The second notable case on this issue was *Thornton v Telegraph Media Group Ltd* [2011] 1 WLR 1985. It arose out of an application by the Defendant newspaper to strike out part of the particulars of claim in a libel action on the ground that the statement complained of was incapable of being defamatory. Allowing the application, Tugendhat J held that in addition to the procedural threshold recognised in *Jameel*, there was a substantive threshold of seriousness to be surmounted before a statement could be regarded as meeting the legal definition of "defamatory". The judge's definition (para 96) was that a statement "may be defamatory of him because it substantially affects in an adverse manner the attitude of other people towards him, or has a tendency so to do". He derived this formula from dicta of Lord Atkin in *Sim v Stretch* [1936] 2 All ER 1237. At para 94, he dealt with the relationship between the definition thus arrived at and the presumption of general damage, in terms which suggested that (unlike the *Jameel* test) the application of the threshold depended on the inherent propensity of the words to injure the claimant's reputation:

> "If the likelihood of adverse consequences for a claimant is part of the definition of what is defamatory, then the presumption of damage is the logical corollary of what is already included in the definition. And conversely, the fact that in law damage is presumed is itself an argument why an imputation should not be held to be defamatory unless it has a tendency to have adverse effects upon the claimant. It is difficult to justify why there should be a presumption of damage if words can be defamatory while having no likely adverse consequence for the claimant. The Court of Appeal in Jameel (Yousef)'s case [2005] QB 946 declined to find that the presumption of damage was itself in conflict with article 10 (see para 37), but recognised that if in fact there was no or minimal actual damage an action for defamation could constitute an interference with freedom of expression which was not necessary for the protection of the claimant's reputation: see para 40."

[45] It should be clearly noted that the threshold test was required because, as was observed in *Thornton v Telegraph Media Group*, Lord Atkin made it clear in *Sim v Stretch* that exhibitions of bad manners or discourtesy were not to be placed on the same level as attacks on character.

[46] I specifically asked counsel whether a *Jameel* threshold of seriousness point was to be made on behalf of Mr Carson and was informed that it would not be. I thought long and hard about whether or not to strike out Ms O'Neill's action in the light of this jurisprudence and came close to doing so. Nevertheless, I concluded that it would be inappropriate to grant an order striking out the action on that basis without having heard argument from counsel on the issue. Although the point was not argued before me, there was a significant possibility that a robustly argued application might have been successful.

Was the Post Defamatory?

[47] All citizens, including politicians, have the right not to have their reputations unjustly damaged. In *Reynolds v Times Newspapers* [2001] 2 AC 127 Lord Nicholls observed:

> "Reputation is an integral and important part of the dignity of the individual. It also forms the basis of many decisions in a democratic society which are fundamental to its well-being: whom to employ or work for, whom to promote, whom to do business with or to vote for. Once besmirched by an unfounded allegation in a national newspaper, a reputation can be damaged for ever, especially if there is no opportunity to vindicate one's reputation. When this happens, society as well as the individual is the loser. … Protection of reputation is conducive to the public good. It is in the public interest that reputation of public figures should not be debased falsely."

[48] *Gately on Libel and Slander* (12th edition, para 2.28) gives examples of words that have been held to be defamatory:

> "It has been held defamatory to publish of a person that he is a rogue and a rascal, a swindler or a sharper, a greedy sinecurist, a crook, a shyster, dishonest, a coward, a liar, someone who 'rats' on promises, a paedophile, a hypocrite, a fanatic, a villain, a racist, a blackguard, a libeller, a slanderer and a scandalmonger, or a habitual drunkard or a drug addict (and *a fortiori* a drug dealer), or indiscreet, or arrogant, or wanting in gratitude, or mistreats his children. It has been held defamatory to write of someone that he has been guilty of oppressive, intolerant, insulting, reprehensible, threating or unbrotherly conduct, or of a breach of duty, or that his actions are motivated by revenge when he asserts other motives, or that he is a 'heartless, rude bastard'; or to impute 'any dishonourable conduct to another not involving a breach of positive law' or to impute that a person is motivated by vanity or self-delusion."

[49] In *Lachaux v Independent Print Ltd and another* [2019] UKSC 27 Lord Sumption giving the judgment of the court said:

> "For present purposes a working definition of what makes a statement defamatory, derived from the speech of Lord Atkin in *Sim v Stretch* [1936] 2 All ER 1237, 1240, is that "the words tend to lower the plaintiff in the estimation of right-thinking members of society generally." Like other formulations in the authorities, this turns on the supposed impact of the statement on those to whom it is communicated. But that impact falls to be ascertained in accordance with a number of more or less artificial rules. First, the meaning is not that which other people may actually have attached to it, but that which is derived from an objective assessment of the defamatory meaning that the notional ordinary reasonable reader would attach to it. Secondly, in an action for defamation actionable per se, damage to the claimant's reputation is presumed rather than proved. It depends on the inherently injurious character (or "tendency", in the time-honoured phrase) of a statement bearing that meaning. Thirdly, the presumption is one of law, and irrebuttable.

[50] Ms O'Neill is a politician of considerable stature. She represents Northern Ireland on the national and international political stage. She meets, and is probably on first name terms with, presidents and prime ministers. For many girls and young women in Northern Ireland she undoubtedly demonstrates that women can reach the top of the political mountain and that a political career of substance is open to all, regardless of gender.

[51] By comparison with her, Mr Carson is a political Lilliputian. Without denigrating local councillors, who play a significant role on a local stage, Mr Carson is probably unknown except to friends and family outside Mid-Antrim. If his name was mentioned to them, national and international politicians would probably ask, "Who's he?" Without being unkind to him, he is a political non-entity on the national stage, never mind the international stage.

[53] In their respective careers therefore, Ms O'Neill is a star in the political firmament at which Mr Carson can only gaze upon from his earthbound location.

[54] So was there damage caused to Ms O'Neill's reputation by Mr Carson's post? In her oral evidence Ms O'Neill clearly struggled to mention any objective measure of how, or in whose eyes, her reputation was damaged. The newspaper reports introduced by her legal team in my view proved the opposite of what counsel sought to prove. Was Ms O'Neill's reputation damaged in the mind of the Belfast Telegraph? No. Its headline was:

> "DUP councillor John Carson slammed after 'misogynistic' Michelle O'Neill comment."

Was her reputation damaged in the mind of the Irish News? No. Its headline was:

> "DUP urged to take action against councillor who suggested Michelle O'Neill 'will be put back in her kennel' by new party leader."

Was her reputation damaged in the mind of the News Letter? No. Its headline was:

> "DUP leadership race – DUP Alderman John Carson causes outrage by suggesting Michelle O'Neill 'will be put back in her kennel' by new party leader."

[55] The reactions contained in the media reports shown to me by the plaintiff was unanimously condemnatory of Mr Carson. None of the media reports wondered whether what Mr Carson had written might be true. None suggested that Ms O'Neill's reputation had been damaged in any way.

[56] The man or woman in the street was not said to think less of her because of the post. Granted, as counsel pointed out, there were four emojis placed in support beside Mr Carson's post. In my view this is not an objective measure of damage to her reputation, merely an indication that, as the person on the Clapham omnibus might say, there were four more idiots out there on Facebook.

[57] In *Smith v ADVFN Plc and others* [2008] EWHC 1797 (QB) Eady J differentiated between defamatory remarks and "mere vulgar abuse" in the context of a remark made on a bulletin board. Eady J observed;

> "It is this analogy with slander which led me in my ruling of 12 May to refer to 'mere vulgar abuse', which used to be discussed quite often in the heyday of slander actions. It is not so much a defence that is unique to slander as an aspect of interpreting the meaning of words. From the context of casual conversations, one can often tell that a remark is not to be taken literally or seriously and is rather to be construed merely as abuse. That is less common in the case of more permanent written communication, although it is by no means unknown. But in the case of a bulletin board thread it is often obvious to casual observers that people are just saying the first thing that comes into their heads and reacting in the heat of the moment. The remarks are often not intended, or to be taken, as serious."

He later observed:

> "One would not wish to encourage "vulgar abuse"; on the other hand, it is not necessarily appropriate for it to be taking up the scarce resources of the civil courts."

On the particular facts of the case before him Eady J concluded that there was no realistic prospect of any of the plaintiff's defamation claims achieving the only legitimate goal of vindicating reputation.

[58] The distinction between defamatory statements and "mere vulgar abuse" was also recognised by the Court of Appeal for England and Wales in *Fox v Blake and Another* [2023] EWCA Civ 1000 where Warby LJ in giving the judgment of the court observed:

> "A fourth relevant aspect of defamation law is the principle that "mere vulgar abuse" is not actionable. The law is summarised in Gatley on Libel and Slander 13th ed at para 3-037:
>
> > "Insults or abuse which convey no defamatory imputation are not actionable as defamation. Even if the words, taken literally and out of context, might be defamatory, the circumstances in which they are uttered may make it plain to the hearers that they cannot regard it as reflecting on the claimant's character so as to affect his reputation because they are spoken in the 'heat of passion, or accompanied by a number of non-actionable, but scurrilous epithets, e.g. a blackguard, rascal, scoundrel, villain, etc.' for the 'manner in which the words were pronounced may explain the meaning of the words.'"
>
> This can be seen as a logical consequence of the law's concentration on the impact a statement would have on the ordinary reasonable reader and the way they would treat the claimant, and a reflection of the importance attributed to context and medium."

[59] It is notable that the paragraph in Gatley referred to by Warby LJ in *Fox v Blake and Another* cites the South African decision of *Wood v Branson* [1952] 3 SA 369 where the word "bitch" was held to be abusive but not defamatory.

[60] In reaching a conclusion as to whether Mr Carson's post was defamatory of Ms O'Neill I have taken account of the various definitions of the term considered by Neill LJ in *Berkoff v Burchill* [1996] 4 All ER 1008. Given the allegations made in the statement of claim and the submissions by Mr Girvan I have also taken account of whether the words posted amount to

"business defamation", namely that the plaintiff's fitness or competence fell short of what is generally necessary for the business or profession that they are involved in. This concept was considered at length by Tugendhat J in *Thornton v Telegraph Media Group Ltd* [2010] EWHC 1414 (QB).

[61] In the light of these authorities I consider that, on any reasonable interpretation of the meaning of the words used, Mr Carson's post falls short of being defamatory. It has had no adverse impact on Ms O'Neill's reputation, either in the local community or internationally. In my view no president or prime minister, nor any member of the public, will think of her reputation in reduced terms as a result of it. To return to the words of Sir Thomas Bingham in *John v MGN Limited* which I referred to earlier, the impugned post did not touch on Ms O'Neill's personal integrity, professional reputation, honour, courage, loyalty or the core attributes of her personality. Hence it was abusive and misogynistic but not defamatory and therefore falls into the category of "mere vulgar abuse". In the light of this conclusion I am obliged to rule that no award of damages is payable to Ms O'Neill in respect of it.

Damage to Feelings

[62] When she went into the witness box and gave oral evidence, Ms O'Neill did not present as someone who had been hurt. She came across as a woman who was supremely confident in who she was and in what she had achieved.

[63] Nor was there evidence offered that Ms O'Neill had been hurt by the post. In the witness box she presented herself as a self-assured woman who knew the place of importance she has held, and currently holds, in political life in Northern Ireland. This was not a witness whose feelings had been devastated by the post. Rather she was a woman who was angry that someone had dared to be misogynistic and she wanted him punished for it.

[64] Nevertheless, even if Ms O'Neill's feelings had been hurt by Mr Carson's Facebook post, I do not have jurisdiction to award her damages for hurt feelings alone in the absence of a finding that her reputation has been damaged. The authorities on defamation are clear that words which merely injure the feelings or cause annoyance but which in no way reflect on the character or reputation of the plaintiff or tend to cause one to be shunned or avoided or expose one to ridicule are not actionable as defamation. As Lord Atkin said in *Sim v Stretch* (1937) 52 TLR 669 at 672:

> "That juries should be free to award damages for injuries to reputation is one of the safeguards of liberty. But the protection is undermined when exhibitions of bad manners or discourtesy are placed on the same level as attacks on character and are treated as actionable wrongs."

[65] *Gatley* (12th edition para 2.18) therefore summarises the law on this issue in the following way:

> It is quite proper, where words are in themselves defamatory, for the jury to take into consideration as a specific element of damages the injury to the claimant's feelings, but one cannot submit such injury as a basis for recovery independent of loss of reputation."

In the light of this, the court may make no award of damages to Ms O'Neill for injury to feelings.

Circulation, Apologies and Mitigation

[66] Having concluded that Ms O'Neill suffered no damage to her reputation as a result of Mr Carson's pathetic and abusive comment, there is therefore no need for me to consider such issues as the degree of the circulation of Mr Carson's comment, the nature of any apology he made, or whether there are any factors to be taken into account in mitigation. Such matters only require consideration in circumstances where a plaintiff's reputation has been damaged.

Costs

[67] I now must decide what to order in respect of the costs of these proceedings. As I stated earlier, Ms O'Neill's legal costs amount to £12,999 and Mr Carson's legal costs amount to £12,697.

[68] Order 63 Rule 3(3) of the Rules of the Court of Judicature sets out the general rule in respect of costs in High Court litigation:

> "If the court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, the Court shall order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs."

[69] One issue which requires clarification is that of what event it is which costs must follow. Undoubtedly the plaintiff might wish to argue that the relevant event is the default judgment entered against the defendant for his failure to enter an appearance. On the other hand, the defendant might wish to argue that the relevant event is the non-award of damages at the assessment of damages hearing. In my view it is the latter view which is correct. The entering of a default judgment is an administrative action carried out by court staff and not a judicial decision. Valentine's Annotated Rules of the Court of Judicature points out:

> 'The event' is not necessarily the judgment for one party. For instance, if the plaintiff recovers a judgment but does not exceed the amount lodged in court under Order 22, the event is, in respect of costs after the date of lodgement, in favour of the defendant."

[70] That this view is correct is supported by two Court of Appeal decisions from England and Wales. Firstly, there is the decision in *Alltrans Express Ltd. v CVA Holdings Ltd*. [1984] 1 WLR 394. Master Lubbock had made an order giving the plaintiffs leave to enter judgment for damages to be assessed and the action to be transferred to official referees' business for assessment of damages. Judge Hayman then assessed the plaintiffs' damages at £2 and ordered judgment to be entered in that amount. He further ordered that the defendants should pay the plaintiffs their costs of the assessment. He gave the defendants leave to appeal against the order for costs. In the Court of Appeal Stephenson LJ held that the event of an award of £2 was not the event at which the plaintiffs were aiming. They were aiming at £82,500, and the mere fact that they ultimately got something — token or nominal damages — did not enable him to regard them as remaining successful plaintiffs. Secondly, a similar approach to costs was adopted more recently by the Court of Appeal in *Medway Primary Care Trust and another v Marcus* [2011] EWCA Civ 750.

[71] The issue therefore in the consideration of costs is whether Mr Carson deserves to have a costs order made against him for Ms O'Neill's costs in respect of a Facebook post which I have concluded is not defamatory and merits no award of damages against him.

[72] The general rule that costs follow the event has an important function to encourage parties in a sensible approach to increasingly expensive litigation. This general rule promotes discipline within the litigation system, compelling the parties to assess carefully for themselves the strength of any claim, and ensures that the assets of the successful party are not depleted by reason of having to go to court. This is as desirable in public law cases as it is in private law cases. *R* v *Lord Chancellor ex p CPAG* [1999] 1 WLR 347 (Dyson J); *Re Moore [Costs]* [2007] NIQB 23 [2007] 4 BNIL 130 (Gillen J).

[73] In reaching a decision as to the appropriate decision on costs in these proceedings, I have taken into account a number of factors which include the following:

(i) The basic principle provided in the Rules of the Court of Judicature is that costs should follow the event.

(ii) The litigation came about because Mr Carson made an abusive, misogynistic post on social media.

(iii) In respect of the assessment of damages, I have concluded that the Facebook post did not damage Ms

O'Neill's reputation and that there should be no award of damages in her favour.

(iv) Those who initiate litigation take a risk that they will be unsuccessful and be subject to an order of costs.

(v) In my view what was posted on social media by Mr Carson was verbal abuse of a misogynistic nature which, though highly offensive and which should never have been said, was not actionable and in respect of which defamation proceedings in the High Court ought never have been brought.

[74] In the light of these factors I therefore consider that it is appropriate to depart from the normal rule and make no order as to costs. Each party will therefore bear their own costs.

Conclusion

[75] This was a minor case, albeit that Ms O'Neill is Northern Ireland's most prominent politician. There are litigants before the High Court who are suing over serious birth injuries which they allege were caused by medical negligence, road accidents which have led to catastrophic injuries, high value commercial conflicts which often threaten the employment of many employees, and disputes over children who have been removed from the jurisdiction or alleged to have been seriously sexually abused. When the court's time is taken up with cases involving disputes between politicians involving insults which one imagines are sometimes heard in school playgrounds or outside pubs on Saturday nights, then serious cases of the type I have mentioned inevitably suffer delay. This is undesirable and not in the public interest. These kind of minor cases should not be the subject of High Court proceedings.

[76] I must also emphasise that the purpose of defamation proceedings is not to provide a mechanism to achieve societal change over such faults as misogyny, which has been described as the world's oldest prejudice. Female politicians complain regularly about what they have to put up with because the spirit of misogyny is still active in our age and they are right to do so. The culture has to change. However, I do not consider that defamation proceedings are an appropriate mechanism for attempting to bring about that cultural change.

[77] Nor is the role of defamation to punish an offender for misogynistic speech. If punishment is what is sought, then there are criminal offences specified in the public order legislation in relation to speech which, if committed, can be reported to the police, and then the Public Prosecution Service may institute criminal proceedings in the criminal courts.

[78] I realise that the plaintiff, and perhaps many other women in Northern Ireland, will be disappointed with this decision because they want Mr Carson

punished for his petty, misogynistic comment. But the inconvenient legal truth is this: this court does not have the function of punishing him. All it has jurisdiction to do is to award Ms O'Neill compensation for any damage done to her reputation and, if such damage is found to have occurred, to provide further compensation for the hurt to her feelings. There was no evidence offered to me that her reputation was damaged and indeed I do not believe that there was any such damage. (Had Mr Carson by his Facebook post attacked either Ms O'Neill's honesty (as in *Turley v Unite the Union* [2019] EWHC 3547 (QB)**)** or her faithfulness in marriage (as in *Foster v Jessen*) then the award of damages to Ms O'Neill would have been considerable.) The only person whose reputation was damaged by the Facebook post at issue was Mr Carson. Likewise, there was no evidence offered to the court that Ms O'Neill's feelings were hurt. She demonstrated in the witness box that, as a standard bearer for women's rights and gender equality, she was angry on behalf of all women that such a comment was made in this day and age. This was a perfectly reasonable feeling, but not one which the law on defamation allows the court to compensate Ms O'Neill for.

[79] The fact that I have concluded that Ms O'Neill's reputation has not been damaged and that no award of damages should be made should not be interpreted to mean that Mr Carson has achieved a victory. He paid a very real price for his stupid and offensive remark. I calculate the cost as follows: Firstly, he will pay the legal costs he has incurred and which his solicitor has informed me will be £12,697. According to the information provided to the court, this more than exceeds all the savings he has and, if his solicitor and counsel pursue him for those costs, he is likely to lose his house. Secondly, the remark has cost him the respect of many, if not all, of the women in Northern Ireland. Thirdly, it has also cost him his political career and reputation. The Acting Local Government Commissioner for Standards decided that Mr Carson had breached the Councillors' Code of Conduct by making an abusive comment and suspended him for three months. Subsequently he was forced to withdraw from the 2023 council elections and has now left the political party that he has belonged to for many years. In the words of his own counsel, Mr Carson "committed political suicide".

[80] Finally, the lesson to the public from this incident is manifestly clear. By all means use social media to post pictures of your children, grandchildren, holidays and pets. Share the wonderful or sorrowful experiences of your life with your friends. But if you start to comment on other people in an abusive and possibly defamatory way and they decide to take legal proceedings against you, you may end up losing your job, losing your house, and being made bankrupt. Everything you worked for can be lost because of a reckless comment made in a moment of anger.