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# Facebook ordered to pay damages for misusing private information

*CG v. Facebook Ireland Limited and Joseph McCloskey [2016] NICA 54*

## Article by David Bowden

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**Facebook ordered to pay damages for misusing private information**
*CG v. Facebook Ireland Limited and Joseph McCloskey - [2016] NICA 54*

**Executive speed read summary**
**Joseph McCloskey put up postings on his Facebook page called Predators and Predators 2. The focus of these postings was to raise awareness that persons convicted of sex offences involving children had been released into the community. Predators 1 contained details of XY and an injunction was obtained to secure its removal. Predators 2 contained details about CG which primarily was a republication of details of his conviction including his photograph from the Irish Times. Predators 2 contained a rough indication of where CG lived but not his address. CG received death threats. Although Facebook had an online abuse reporting tool, this was not used by CG's solicitors. The posting was removed. CG brought an action against both Facebook and Joseph McCloskey. After a trial in February 2015 Stephens J ordered Facebook to pay CG £20,000 damages and Joseph McCloskey to pay CG £15,000 damages.**

**Facebook appealed to the Court of Appeal in Northern Ireland. CG cross-appealed a finding that Facebook Ireland Limited was not a 'data controller' under the Data Protection Act 1998. The Court of Appeal allowed CG's cross appeal. It also ruled that Facebook Ireland Limited was entitled to a mere conduit defence under the Electronic Commerce (EC Directive) Regulations 2002. It ordered the interim injunction in CG's favour to remain in place. It held that Facebook was not liable to CG for misuse of private information other than for the period from 26 November 2013 to 4 or 5 December 2013. The Court of Appeal held that Facebook's notification and take down procedure which it publicized on its platform complied with the 2002 Regulations.**

**Facebook sought to argue that the data controller was Facebook Ireland Limited and that the courts of the UK had no jurisdiction because Facebook UK only provided marketing services to Facebook Ireland. The Court of Appeal firmly rejected this submission and applied the earlier CJEU rulings in *Google Spain* and *Weltimmo* ruling that Facebook (UK) Ltd plainly engaged in the effective and real exercise of activity through 'stable arrangements' in the UK. It ruled that Facebook was a 'data controller' for the purposes of section 5 of the DPA 1998 and that having regard to the importance of those activities to Facebook's economic enterprise the processing of data by Facebook was carried out in the context of the activities of that establishment.**

**In another Facebook case from Northern Ireland, Colton J has ordered it to pay J20 £3000 compensation for misuse of private information saying that he had a reasonable expectation of privacy in respect of references to his children and to him being a 'tout' or informer. An amendment has now been tabled to the Digital Economy Bill at Report stage in the House of Lords seeking a binding Code of Practice to protect children and young people from online abuse and bullying.**

*CG v. Facebook Ireland Limited and Joseph McCloskey*
*[2016] NICA 54* *21 December 2016*
Her Majesty's Court of Appeal in Northern Ireland (Lord Chief Justice Morgan, Lord Justices Gillen and Weatherup)

**What offences had CG and XY been convicted of?**
In 2005 XY admitted 6 charges of indecent assault, 6 charges of gross indecency and 1 of inciting a child to commit an act of gross indecency. The offences took place between 1982-89. He had 15 previous convictions. XY was sentenced to 6 years imprisonment. After having spent one half of his sentence in prison, he was released but he was then detained for a further 6 months on account of having breached one of the conditions of his licence.

In 2007 CG was convicted for offences of indecent assault and gross indecency. On 27 March 2007 he was sentenced to 10 years imprisonment. He was granted parole and released on licence on 27 February 2012.

**Were any of these offences spent?**
No. Under section 5(1)(b) of the Rehabilitation of Offenders Act 1974, the sentence of an offender for a jail term of 4 years are more will never become spent.

**What postings had Joseph McCloskey made on Facebook?**
Joseph McCloskey had made a series of 2 postings on Facebook:

- **Predators 1**: 'Keeping our kids safe from Predators', and
- **Predators 2**: 'Keeping our kids safe from Predators 2.'

Predators 1 was first published on Facebook by Joseph McCloskey in August 2012. It contained the name, photograph and conviction details of XY. On 30 November 2012 Mr Justice McCloskey (whose surname is a coincidence) granted an interim injunction requiring Facebook to remove Predators 1 and the posting was promptly removed.

Predators 2 was first published in December 2012 which was '*dedicated to the identification of sex offenders*'. On 22 April 2013, Joseph McCloskey added CG's details to his Predators 2 page. This contained CG's name, his photograph sourced from the '*Irish News'* which reported his conviction and details of his convictions. It also contained a broad description of the area where CG lived but did not state his address. Predators 2 was removed from Facebook by 22 May 2013.

**What is the corporate structure of Facebook?**
Facebook has a complex structure with the judgment recording this:

- **Facebook Ireland Limited** is a private limited company incorporated in the Republic of Ireland,
- **Facebook Ireland Limited** is wholly owned by **Facebook Ireland Holdings** which is an unlimited company and does not file accounts,
- **Facebook Ireland Holdings** is 99% owned by **Facebook International Holdings II** which is registered in Ireland and by 1% owned by **Facebook Cayman Holdings Limited III** which is registered in the Cayman Islands,
- **Facebook UK Limited** is a private limited company incorporated in England. It is wholly owned by **Facebook Global Holdings II LLC**.

**How do the Facebook companies operate in practice?**
As to how this structure operates in practice, the judgment says this:

- **Facebook UK Limited** derives all of its income from providing marketing support services to **Facebook Ireland Limited**,
- **Facebook UK Limited** does not operate, host or control the Facebook service. It has offices in the United Kingdom,
- In 2012 **Facebook Ireland Limited** paid €770.6m to **Facebook Ireland Holdings** for the right and licence to utilise the Facebook platform,
- **Facebook Ireland Limited** is the data controller with respect to the personal data of users outside the US and Canada, and
- a data processing agreement is in place between **Facebook Ireland Limited** and **Facebook UK Limited** under which **Facebook UK Limited** as '*data processor'* processes certain personal data on behalf of **Facebook Ireland Limited** as '*data controller'* in order to generate advertising revenue in the United Kingdom

**What claims were made against Facebook?**
These claims were made against Facebook by CG:

- Tort of misuse of private information,
- Breach of privacy,
- Breach of the Data Protection Act 1998 ('DPA').

**What additional claims were made against Joseph McCloskey?**
In addition, CG claimed against Joseph McCloskey for:

- Harassment, and
- Unauthorised use of his photograph.

**What defences did Facebook seek to run?**
Facebook defended CG's claim on a number of bases, the most important of which were that Facebook:

- acted as a 'mere conduit',
- did not have actual or constructive knowledge of Joseph McCloskey's Predators 2 page,

- had no active monitoring obligation, and
- operated a notice and take down procedure.

**What for Facebook was the relevance of the Data Protection Act 1998?**
Broadly, Facebook submitted that it was not the data controller but rather was only a data processor. Facebook submitted that the data controller was the individual account holder who posted up information to their personal Facebook page. Facebook also sought to deny that courts within the United Kingdom had any jurisdiction over it. This submission was based on its corporate structure with Facebook UK providing marketing support whilst Facebook Ireland is Facebook's real foothold into the European market place.

**How successful has Facebook been?**
Since its launch in February 2004, Facebook now has a turnover of over $1billion a year. It has a $350 billion market valuation. By the 4th quarter of 2016, Facebook had 1.86 billion monthly active users. Facebook UK's accounts show a turnover of £210 million and a taxable profit of £20 million. Facebook UK Limited paid £4.16 million in UK corporation tax in 2015 and a mere £4,327 in 2014.

**What reporting tools does Facebook offer to its users?**
A Facebook user has the option of using the settings so that any postings are available to anyone to see or are only visible to a closed user group of that person's existing or future Facebook contacts. Joseph McCloskey's Predators' postings were visible to anyone.

Facebook operates an online-only reporting system by which an individual can ask for postings to be removed but Facebook will not process any such request unless a complainant provides Facebook with the URL (unique resource locator) for every posting complained about. Facebook says that it disables content that violates its terms of service when properly advised of violations through this tool.

**What criticisms were made of these tools by CG and his lawyers?**
CG's solicitors said CG had received death threats and there was no other system that Facebook had so that complaints of this seriousness could be accelerated in any way. There was no commitment to dealing with any complaints in any particular time frame. Facebook said it would not look through a page 'containing thousands of comments' and would only act where the specific URL was provided. Even then Facebook required a complainant to specify exactly which words and/or pictures breached its terms of use and why.

**What did the judge in the High Court rule?**
On 27 February 2015 Mr Justice Stephens sitting in the Queen's Bench Division of the High Court ruled in CG's favour - **[2015] NIQB 11**. He ordered Facebook to pay CG £20,000 damages. He ordered Joseph McCloskey to pay CG £15,000 damages. By further order dated 4 March 2015 - **[2015] NIQB 28** – he ordered Facebook to pay CG's costs on the standard basis. Both CG and Joseph McCloskey were legally aided.

**What did the CJEU rule on the obligations of websites to remove data in *Google Spain*?**
The Grand Chamber of the CJEU handed down its judgment in *Google Spain SL v. Agencia Espanola de Proteccion de Datos* (**C-131/12**) on 13 May 2014. It ruled on the right to be forgotten as it applied to internet search engines. By searching automatically, constantly and systematically for information published on the internet, an operator of a search engine '*collects*' data within the meaning of article 2(b) of the Data Protection Directive **EC/95/46** ('DPD'). Where an operator within the framework of its indexing programmes, '*retrieves*', *'records'* or '*organises*' the data in question, which it then '*stores*' on its servers and '*make available'* to its users in the form of lists of results. Those operations have to be classified as '*processing*'.

An operator of a search engine is a '*data controller'* in respect of that processing. The operator of a search engine must ensure that its activity complies with the requirements of the DPD. As to territorial scope, Google Spain was a subsidiary of Google Inc. on Spanish territory and an '*establishment*' under the DPD. Where personal data is processed by a business which, although it has its seat outside the EU, it has an establishment within the EU, the processing is carried out '*in the context of the activities*' of that business where the business is intended to promote and sell advertising space in order to make its service offered profitable.

A website operator is (in certain circumstances) obliged to remove links to web pages that are published by third parties and contain information relating to a person from the list of results displayed following a search made on the basis of that person's name. The effect of the interference with an individual's rights is heightened on account of the important role played by the internet and search engines in modern society.

A data subject may address an erasing request directly to the website operator which must then duly examine its merits. Where the data controller does not grant the request, the data subject may bring the matter before a supervisory authority or court so that it carries out these checks and orders the data controller to take appropriate measures.

**What did the CJEU rule on '*establishment*' under the DPD in *Weltimmo*?**
In *Weltimmo sro v. Nemzeti Adatvedelmi es Informacioszabadsag Hatosag* (**C-230/14**) the 3rd chamber of the CJEU handed down its ruling on 1 October 2015 on the meaning of '*establishment*' under the DPD. Each Member State must apply the DPD's provisions it has adopted where the data processing is carried out in the context of activities conducted on its territory by an establishment of the data controller. The presence of only one representative could suffice to constitute an '*establishment*' if that representative acted with a sufficient degree of stability for the provision of the services concerned in that member state.

The concept of '*establishment*' extends to any real and effective activity - even a minimal one - exercised through stable arrangements. Weltimmo pursued a real and effective activity in Hungary and also had a representative in Hungary. That representative served as a point of contact between Weltimmo and the advertisers. It represented the company in administrative or judicial proceedings. Weltimmo had opened a bank account in Hungary (intended for the recovery of its debts) and used a letter box in Hungary for the management of its everyday business affairs. That information is capable of establishing the existence of an '*establishment'* under the DPD. If this is indeed the case, Weltimmo's activity is subject to the Hungarian data protection laws.

**Are there any other prior authorities of relevance?**
These authorities are relevant in this case and are referred to by Lord Chief Justice Morgan in his judgment:

*OBG v. Allan; Douglas v Hello!* **[2007] UKHL 21; [2008] 1 AC 1** (House of Lords - Lords Hoffmann, Nicholls, Walker & Brown and Lady Hale)
Special considerations attach to photographs in the field of privacy. As a means of invading privacy a photograph is particularly intrusive. Privacy can be invaded by further publication of information or photographs already disclosed to the public

*Murray v. Express Newspapers* **[2008] EWCA Civ 446** (Court of Appeal – Clarke MR, Laws & Thomas LJJ)
The question whether there is a reasonable expectation of privacy is a broad one, which takes account of all the circumstances of the case including the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at 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.

*Regina (T) v. Chief Constable of Greater Manchester Police* **[2014] UKSC 35** (Supreme Court - Lords Neuberger, Clarke, Wilson, Reed and Lady Hale JJSC)
The point at which a conviction recedes into the past and becomes part of a person's private life will usually be the point at which it becomes spent under the Rehabilitation of Offenders Act 1974.

*Regina (C) v. Secretary of State for Justice* **[2016] UKSC 2** (Supreme Court - Lady Hale, Lords Clarke, Wilson, Carnwath and Hughes JJSC)
In favour of anonymity are all the general considerations about harm to a patient's health and well-being, the 'chilling effect' of a risk of disclosure, both on his willingness to be open with his doctors and other carers, and on his willingness to avail himself of the remedies available to challenge his continued deprivation of liberty, long after the period deemed appropriate punishment for his crimes has expired. He is much more likely to be able to lead a successful life in the community if his identity is not generally known. The risk of 'jigsaw' identification, of people putting two and two together, will remain despite the change of name.

**What were the issues the Court of Appeal had to decide?**
Facebook appealed to the Court of Appeal in Northern Ireland. As well as appealing the amount of damages it was ordered to pay, it also appealed Stephens J ruling that it had any liability at all to CG. Although there was some overlap in the grounds of appeal, Facebook took these 4 main points:

- CG had failed to discharge the burden of proof,
- Facebook had an adequate notice and take down procedure,
- There had been no breach of DPA in relation to any '*sensitive personal data'*, and
- Facebook had a mere conduit defence based on Regulation 19 of the Electronic Commerce (EC Directive) Regulations 2002 ('the 2002 Regulations').

CG also cross-appealed against the finding made below by Stephens J that Facebook Ireland Limited was not a '*data controller'* under the DPA 1998.

**What order did the Court of Appeal make?**
The Court of Appeal allowed CG's cross appeal and ruled that Facebook Ireland Limited was the data controller. It ruled that Facebook was entitled to a mere conduit defence under the 2002 Regulations. It ordered the interim injunction in CG's favour to remain in place. Finally it held that Facebook was not liable to CG for misuse of private information other than for the period from 26 November 2013 to 4 or 5 December 2013.

**What did the Court of Appeal rule on burden of proof?**
Facebook submitted that the burden of proof that it did not have actual knowledge or sufficient knowledge of facts or circumstances laid on it. Morgan LCJ ruled that the '*answer in our view lies in the structure of the 2002 Regulations which not alone provide the test in Regulation 19 but also provide a mechanism for the transmission of information through Regulations 6 and 22*'. He ruled that it was for *'the claimant to adduce prima facie evidence that the ISS provider has actual knowledge of relevant facts or information before the provider is fixed with the obligation to prove that it did not'* On this he noted that the '*correspondence on behalf of the respondent in respect of the second appellant's page relied on misconceived causes of action and declined to advance any detailed analysis of the materials to support a claim of unlawful disclosure of private information*'. Because of this Morgan LCJ said that he did not '*consider that in the case of the second appellant's profile page and postings such prima facie evidence was established'*

**What did the Court of Appeal rule on Facebook's notice and take down procedure?**
Morgan LCJ ruled that he was '*satisfied that the notice and take down procedure contemplated by the Directive and 2002 Regulations is intended to be a relatively informal and speedy process by which those entitled to protection can get a remedy'*. He said that the '*the omission of the correct form of legal characterisation of the claim ought not to be determinative of the knowledge of facts and circumstances which fix social networking sites such as Facebook with liability'*. Morgan LCJ said that what was necessary was '*the identification of a substantive complaint in respect of which the relevant unlawful activity is apparent'*.

However Morgan LCJ noted that CG's solicitor's pre-action correspondence did not '*express any concern about the publication of the area in which the respondent was allegedly residing'*. For this reason Morgan ruled that he did not '*consider that the correspondence raised any question of privacy in respect of the material published*'.

**What did the Court of Appeal rule on the Data Protection Act 1998?**
Morgan LCJ was guided on this by the CJEU decisions in *Google Spain* and *Weltimmo with* him noting that the *Weltimmo* decision was handed down after Stephens J had given his judgement under appeal. Facebook submitted that the mere fact that the Facebook service was accessible in the UK did not mean that it was established here – and Morgan LCJ agreed with this noting that '*recital 19 of the e-Commerce Directive reinforces that point'*. He ruled that Warby J's ruling in *Richardson v. Facebook and Google (UK) Ltd* **[2015] EWHC 3154 (QB)** was *'of no assistance'* in determining whether **'***the data processing activities of Facebook undertaken in England and Wales were carried out in the context of advertising and other activities by Facebook (UK) Ltd so that they were subject to English data protection law'*.

Morgan LCJ ruled that the '*nationality or place of residence of the data subject, the place where the data processing took place and the place of which the service was accessible were not relevant to the*

*location of the establishment'*. He rejected a submission that the CJEU in *Google Spain* had '*adopted an expansive approach*' and the ruling should be narrowly confined or interpreted. Morgan LCJ ruled that the '*evidence indicates that Facebook (UK) Ltd was established for the sole purpose of promoting the sale of advertising space offered by Facebook the effect of which is to make the service offered more profitable. It conducts its activities within the United Kingdom and is responsible for engaging with those within this jurisdiction who seek to use the Facebook service for advertising*'. He went on to say that it held '*relevant data which it processes on behalf of Facebook in respect of advertising customers*' and that whilst there was '*no direct evidence of its connection with Facebook'* there was however an '*irresistible inference'* that Facebook UK Limited was '*established to service Facebook and is part of the wider Facebook group of companies*'.

Going on, Morgan LCJ ruled that he was satisfied that:

> '*Facebook (UK) Ltd plainly engages in the effective and real exercise of activity through stable arrangements in the United Kingdom and having regard to the importance of those activities to Facebook's economic enterprise the processing of data by Facebook was carried out in the context of the activities of that establishment. Facebook is, therefore, a data controller for the purposes of section 5 of the 1998 Act*.'

**What was the ruling on the Electronic Commerce (EC Directive) Regulations 2002 (SI 2002 No. 2013)?**

Morgan LCJ upheld Facebook's submission that it did not have liability to CG where it was acting as a 'mere conduit'. Morgan LCJ ruled that:

> '*The provisions do, however, provide a tailored solution for the liability of information society services in the particular circumstances outlined in the e-Commerce Directive. We do not consider that this is a question relating to information society services covered by the earlier Data Protection Directives and accordingly do not accept that the scope of the exemption from damages is affected by those Directives. Regulation 3 of the 2002 regulations must be read accordingly*.'

**What status does this Northern Ireland ruling have in England and Wales?**

This is a ruling from Her Majesty's Court of Appeal in Northern Ireland, so judges in Northern Ireland in the High Court or in the County Courts must follow it. However, the Court of Appeal in London is not strictly bound to follow this ruling. Judges sitting in England and Wales in either the High Court or County Court must follow decisions of the Court of Appeal and Supreme Court. They are not bound by a Northern Irish decision even one from the Court of Appeal in Northern Ireland. In *Marshalls Clay Products v. Caulfield* **[2004] EWCA Civ 422, [2004] ICR 1502**, Laws LJ said that:

> '*it would be a constitutional solecism of some magnitude to suggest that by force of the common law of precedent any court of England and Wales is in the strict sense bound by decisions of any court whose jurisdiction runs in Scotland only or, most assuredly, vice versa*.'

Laws LJ said (in relation to Employment Tribunals) that '*as a matter of pragmatic good sense'* that lower courts in '*either jurisdiction will ordinarily expect to follow decisions of the higher appeal court in the other jurisdiction (whether the Court of Session or the Court of Appeal) where the point confronting them is indistinguishable from what was there decided'*.

It should be noted that both sides were represented in the Court of Appeal by leading counsel from Matrix Chambers in London who led the juniors admitted in Northern Ireland.

**What happened in the High Court in *J20 v. Facebook Ireland Limited*?**

The liability judgment in this case was handed down by Mr Justice Colton in the High Court of Justice in Northern Ireland, Queen's Bench Division the day before the Court of Appeal ruling - **[2016] NIQB 98** with his ruling on costs on 13 January 2017 - **[2017] NIQB 3.**

Colton J held that although social media postings relating to a claimant did not constitute harassment under the Protection from Harassment (Northern Ireland) Order 1997 article3, he had a reasonable expectation of privacy in respect of references to his children and to him being a 'tout' or informer. Facebook was accordingly liable for misuse of that private information. Colton J awarded £3000 compensation primarily for misuse of private information. Claims in relation to defamation, breaches of either the DPA or the Communications Act 2003 were not pursued.

**Could the Digital Economy Bill 2017 make any changes?**
The Digital Economy Bill 2017 has passed all its stages in the House of Commons. It is a substantial Bill and the House of Lords in particular have made many amendments and additions to it during its lengthy Committee stage. The Report stage of this Bill is now listed to resume on 20 March 2017. Once it passes its Lords stages it will return to the House of Commons who will have to decide whether to accept the Lords' amendments.

**What amendments have been moved to the Digital Economy Bill 2017 for its Report stage in the House of Lords?**
An amendment has been tabled for Report state by Baroness Jones of Whitchurch and Lord Stevenson of Balmacara. This seeks to add in a new clause after clause 26 to the existing Bill dealing with '*Code of practice for commercial social media platform providers on online abuse'*. If enacted it would mean that the Secretary of State for Culture, Media & Sport would have to publish a code of practice about the responsibilities of social media platform providers to 'protect children and young people from online abuse and bullying'. The proposed Code would be given force by virtue of statutory instrument. The Code would cover as a minimum these 5 things:

- an overarching duty of care of internet service providers and social media platform providers to ensure the safety of a child or young person involved in any activity or interaction for which that service provider is responsible,
- an obligation to inform the police with immediate effect if notified that posts on social media sites contravene existing legislation,
- an obligation to remove posts with immediate effect if notified that posts on social media sites contravene existing legislation,
- an obligation to have specific terms of use that prohibit cyber-bullying and provide a mechanism for complaints of cyber bullying to be received and for the offending material to be removed, and
- a responsibility to work with education professionals, parents and charities to give young people the skills to use social media safely.

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David Bowden is a solicitor-advocate and runs David Bowden Law which is authorised and regulated by the Bar Standards Board to provide legal services and conduct litigation. He is the cases editor for the Encyclopedia of Consumer Credit Law. If you need advice or assistance in relation to consumer credit, financial services or litigation he can be contacted at info@DavidBowdenLaw.com or by telephone on (01462) 431444.