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# Damages payable by Facebook for '*Irish Blessings*' privacy breaches reduced on appeal from £3k to £500

*J20 v. Facebook Ireland Limited*
*[2017] NICA 48*

## Article by David Bowden

BAR STANDARDS BOARD
REGULATING BARRISTERS

**Damages payable by Facebook for privacy breaches reduced on appeal from £3k to £500**
*J20 v. Facebook Ireland Limited - [2017] NICA 48*

**Executive speed read summary**
**In September 2013 a posting about J20 was put up on Facebook under an 'Irish Blessings' title. That posting identified his 3 children and their religion. Another posting headed 'Belfast Banter' showed J20 holding a fish with a caption '*That's a tout so it is. Said the fish'*. The word 'tout' is widely recognized in Northern Ireland as slang for a police informant. J20 instructed solicitors. A letter demanding the posting be removed was ignored. J20 applied for and was granted an emergency injunction. It took 2 weeks after all the court papers were served on Facebook for it to remove the postings. J20's claim against Facebook for misusing of private information and harassment were tried before Mr Justice Colton in the High Court who awarded J20 £3000 damages. Facebook appealed to the Court of Appeal on wide ranging grounds principally that it had a '*mere conduit'* defence. Lord Morgan LCJ has dismissed Facebook's appeal. The Court of Appeal ruled there was no misuse of private information about J20's children. However that an allegation that someone is a '*tout'* automatically gives rise to an allegation that there has been a confidential relationship between that person and a state agency that he is assisting and that allegation lays a basis for privacy. As it was 2 weeks after the service of the injunction before Facebook removed the posting, the Court of Appeal ruled that Facebook was a 'publisher' of that information in that period and its mere conduit defence failed. It left open for another day whether Facebook's notice and take down procedure was adequate or not. As the post was only there for a limited period of time, the damages that Facebook had to pay J20 were reduced from £3000 to £500. Other than this, Facebook's appeal on all grounds was dismissed. Facebook will have to pay its costs and J20's costs both in the High Court and the Court of Appeal.**

*J20 v. Facebook Ireland Limited*
*[2017] NICA 48* *7 September 2017*
Her Majesty's Court of Appeal in Northern Ireland (Lord Chief Justice Morgan, Lord Justice Weatherup and Mr Justice Horner)

**What is the corporate structure of Facebook?**
Facebook has a complex structure:

- **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:

- **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

**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 in 200 countries. 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. The postings here 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 postings had been made on Facebook?**
There were 2 sets of postings on Facebook about J20:

- **Irish Blessings** – which contained details of J20's 3 adult children identifying their religion, and
- **Belfast Banter** – which had a photograph of J20 holding a fish with this caption '*That's a tout so it is. Said the fish*'.

**When and how were the complaints made to Facebook?**
The postings were put up on Facebook on 11 September 2013. J20 made these complaints:

- 13 September 2013 – his solicitor's faxed a letter to Facebook about Irish Blessings with its url requesting it be taken down,
- 25 September 2013 – J20 applies for an urgent interim injunction against Facebook in relation to both sets of postings and serves that with the supporting evidence on Facebook, and
- 27 September a judge orders the injunction against Facebook.

They were eventually deleted 1 month later on 9 October 2013 being 2 weeks after Facebook was served with the injunction.

**What claims were made against Facebook?**
These claims were made against Facebook by J20:

- Tort of misuse of private information, and
- Harassment under Article 3 of the Protection from Harassment (Northern Ireland) Order 1997.

The judge below also queried whether the Data Protection Act 1998 was relevant.

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

- acted as a 'mere conduit' and has a statutory defence under Regulation 19 of the Electronic Commerce (EC Directive) Regulations 2002,
- did not have actual or constructive knowledge of the Belfast Banter or Irish Blessings pages,
- had no active monitoring obligation, and
- operated a notice and take down procedure.

**What ruling was made in the High Court?**
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 -**[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 article 3, 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 and breaches of either the DPA or the Communications Act 2003 were not pursued.

**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*'. A website operator is (in certain circumstances) obliged to remove links to web pages that are published by 3rd 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. 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.

**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. They are listed in chronological order:

Byrne v. Dean **[1937] 1 KB 818** (Court of Appeal – Greer and Slesser LJJ, Greer LJ dissenting)
*A notice was put up on golf club wall. This suggested that someone had reported the unlicensed gambling machines to the police. The club owners failed to take the notice down. The golf club proprietor and secretary by allowing the defamatory statement to remain on the gold club wall were taking part in the publication of it.*

Godfrey v. Demon Internet Limited **[2001] QB 201** (High Court, QBD – Morland J)
*A posting originating from an unknown person in the USA was retrieved and stored on Demon's news server, from where it was available for downloading by subscribers. Godfrey told Demon that the posting was defamatory and Demon later removed it. Although at common law the transmission was 'publishing' in a similar way to a bookseller selling a defamatory book, Demon was not a commercial publisher for the purposes of section 1(2) of the Defamation Act 1996 so that it satisfied the requirement for the section 1(1)(a) defence. Following the publishing at common law and the notification of defamatory content, Demon had failed to take reasonable care and was unable to utilise the statutory defence contained in either section 1(1)(b) or (c).*

*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.

*Callaghan v. Independent News and Media Limited* **[2009] NIQB 1** (High Court NI, QBD, Stephens J)
*The question of whether there was a reasonable expectation of privacy was an objective question and a question of fact. If a reasonable expectation existed, the court had to weigh the competing Convention rights. In carrying out the balancing exercise, the justifications for interfering or restricting rights under articles 8 and 10 of the ECHR had to be taken into account. Callaghan did not have an expectation of privacy so far as the police, the prison service and the probation service were concerned. The tone and content of the newspaper's articles were calculated to engender considerable public hostility towards Callaghan. The publication of an un-pixelated photograph of Callaghan would cause disruption to his home, his private life and his family connections through acts of violence if his precise whereabouts were made known. Callaghan was entitled to an injunction under the terms of the Protection from Harassment (Northern Ireland) Order 1997.*

*McGaughey v. Sunday Newspapers Limited* **[2011] NICA 51** (Court of Appeal in Northern Ireland - Morgan LCJ, Higgins LJ and Sir John Sheil) **[2010] NI Ch 7** (High Court, Chancery, McCloskey J)
*An appeal court will not interfere with the assessment of damages by a lower court unless it is demonstrated that that there has been some error of principle, misapprehension of the facts or the award was wholly erroneous. Publication of photographs of Naomi Campbell connecting her to drug rehabilitation resulted in damages of £2,500 for breach of confidentiality and the Data Protection Act 1998 and £1,000 by way of aggravated damages. These figures were left undisturbed in the House of Lords. In Douglas v Hello! Damages for invasion of privacy for £3,500 and mental distress were left undisturbed on appeal. In Applause Store Productions Limited and Firsht v Raphael* ***[2008] EWHC 1781*** *the defendant set up a Facebook account and created a link to a group entitled 'Has Mathew Firsht lied to you?' and suggested that he had not paid money owed by him. The profile for the site purported to disclose Firsht's personal details. The judge awarded Firsht £15,000 general damages for*

*libel but noted that damages for misuse of private information were modest and awarded only £2,000. There is a distinction between the level of general damages in libel and that in misuse of private information cases. Decisions on misuse of private information demonstrate that modest damages are appropriate unless there are particular circumstances not associated with reputation which are properly to be taken into account.*

*King v. Sunday Newspapers Limited* **[2011] NICA 8** (Court of Appeal in Northern Ireland – Higgins, Girvan and Coghlin LJJ)
*The judge below was right to conclude that the publication of details of a person's family members could engage his article 8 ECHR rights. An individual normally had a reasonable expectation of privacy in respect of information concerning his private, intimate and family relationships. In an intimate or parent/child relationship, what happened in respect of one of the parties had clear repercussions for the relationship generally. The publication of King's partner's identity could not be justified but the publication of her religion could. Where a wrongful publication of private information was alleged, the questions were whether article 8 was engaged and whether it had been infringed. The 1st question involved a* 'reasonable expectation of privacy' *test. That was a question of fact which took account of all the circumstances, including the attributes of the claimant, the nature and purpose of the intrusion, the absence of consent, and whether the effect on the claimant was known or could have been inferred. The 2nd question involved balancing the parties' article 8 and 10 ECHR rights. The test was one of proportionality, the question being whether, on the facts, a fetter on the right of freedom of expression was necessary in a democratic society. Of significant weight was the importance of upholding duties of confidence created between individuals. The identification of her religion was justified as demonstrating King's religious hypocrisy. King had not made out a case of harassment. He had not challenged the truth of the allegations, and the mere fact that the articles had caused him distress did not establish harassment. He had not shown that the newspaper knew, or ought to have known, that it was harassing him. While the articles contained some factual errors and misused some private information that did not show that the newspaper had set out to harass King as opposed to printing a story intended to expose aspects of his life in the public interest and in the exercise of its right of free expression.*

*Davison v. Habeeb, Google UK, Google Inc. and Others* **[2011] EWHC 3031 (QB)** (High Court, QBD, HHJ Parkes QC)
*The publication of defamatory words to 5 individuals, none of whom knew or was known to Davison, would have caused her very modest damage and it was difficult to see what vindication she would obtain. Consequently, Davison had failed to disclose a real and substantial tort within the jurisdiction and the order granting her permission to serve her claim on Google outside the jurisdiction would be set aside. Davison would not be denied access to justice because she had remedies against other alleged authors of the material complained of if she could establish the necessary elements of a claim against them. There was an arguable case that Google was a publisher of the material complained of and following notification, it allegedly became liable for continued publication. There was no realistic prospect of Davison establishing that the notification of her complaint fixed Google with actual knowledge of unlawful activity or information or made it aware of facts or circumstances from which it would have been apparent to it that the activity or information was unlawful. There was no good arguable case, having regard to regulation 19 of the Electronic Commerce (EC Directive) Regulations 2002* **SI 2002/2013** *that Google was liable in damages or for any other financial remedy in respect of the publication of the words complained of on Blogger.com whether before or after notification by Davison of her complaint.*

*Tamiz v. Google Inc* **[2013] EWCA Civ 68** (Court of Appeal – Lord Dyson MR, Richards and Sullivan LJJ)
The judge below had been wrong to regard Google's role as purely passive and to attach the significance he did to the absence of any positive steps by Google in relation to continued publication of the comments. Google facilitated publication of the blogs but its involvement was not such as to make it a primary publisher. It was doubtful that (prior to notification of the complaint) Google could be considered to be a secondary publisher, facilitating publication in a manner analogous to a distributor. This is because it could not be said to have reasonably known of the comments. After notification additional considerations arose. The provision of a platform for the blogs was equivalent to the provision of a notice board. Google provided tools to enable the blogger to design the layout of his part of the notice board, made the notice board available on terms of its own choice and could readily remove or block access to any notice that did not comply with those terms. Accordingly if Google allowed defamatory material to remain after it had been notified, it might be inferred to have associated itself with, or to have made itself responsible for, the continued presence of the material and thereby to have become a publisher of the material. Such an inference could not properly be drawn until Google had had a reasonable time within which to remove the comments.

*AB v. Sunday Newspapers* **[2014] NICA 58** (Court of Appeal in Northern Ireland – Lord Morgan LCJ and Higgins LJ)

*The conclusions of the judge below had been correct in relation to harassment, libel, malicious falsehood and breaches of the ECHR. The only issue in the appeal was the allegation that re-publication of the allegations that AB provided information to the state authorities about criminal activities would constitute a breach of confidence and misuse of private information. A person acting as a covert human intelligence source or informer had a reasonable expectation that his confidential relationship would not be disclosed. Many informers had criminal backgrounds and their motives for giving information to the police might be ambiguous. However, that did not diminish the reasons for protecting the confidentiality of the relationship, namely to secure the welfare of the informer and to encourage the supply of information to the police. Here investigative journalism should be free to publicise allegations of criminal conduct on the part of AB but the allegation that he was a state agent raised different issues. There was a considerable public interest in the deterrence of publication of any allegation that AB was a state agent. The duty of confidence only arose where the material had not entered the public domain and, while the information at issue had been published online and was likely to be broadly known to those involved in dissident circles that still left a wide circle of the public who would be oblivious to the allegations. The fact that the information remained available on the internet did not mean that the public had accessed it.*

**What were the issues the Court of Appeal had to decide?**
Facebook appealed to the Court of Appeal in Northern Ireland on wide grounds. As well as appealing the amount of damages it was ordered to pay, it also appealed Colton J's ruling that it had any liability at all to JR20. Although there was some overlap in the grounds of appeal, leaving no stone unturned Facebook took these 10 points:

- 2 postings related to the religion of J20's children but the action was brought by J20 alone and not by J20 as their litigation friend,
- The trial judge made no evidential finding that any of the children referred to in the 2 postings were minors,
- For 2 postings were in response to a photograph of J20 with a caption in which the trial judge ruled he had not reasonable expectation of privacy,
- The judge wrongly relied on *King* and read across from *King* to find a reasonable expectation of privacy although there were clear distinctions between *J20* and *King*,
- For the photograph of J20 with the caption '*That's a tout so it is. Said the fish'*, the judge below erred in law in concluding J20 had a reasonable expectation of privacy,
- The judge's reliance on *AB* in concluding that referring to J20 was a '*tout'* constituted misuse of private information was wrong in law as the 2 cases were very different,
- The Statement of Claim made no reference to J20 being alleged to be a tout (it being only in the Reply and the affidavit evidence in support of the interim injunction) and the judge below should have rejected it because it was not correctly pleaded,
- The judge below was wrong to conclude that the postings did not give rise to a reasonable expectation of privacy for J20 or if so this was not manifest or self-evident. The judge's finding imposed an unrealistically strict standard on an internet service provider (ISP) and was inconsistent with Article 14 of the E-Commerce Directive,
- The content was removed within 2 weeks of the 1st valid notification to Facebook. The judge below did not consider whether the offending material was actually 'published' by Facebook (rather than Facebook acting as a mere conduit to enable others to publish it), and
- The award of £3k general damages was excessive and the judge below erred in law as he should have only awarded a modest sum instead.

**What order did the Court of Appeal make?**
The Court of Appeal allowed Facebook's appeal but only in a very limited way. It reduced the damages Facebook had to pay. Despite the prolixity of Facebook's submissions, the Court of Appeal ruled that the appeal boiled down to only 2 issues – had Facebook misused J20's private information and had Facebook been responsible for publication?

**What did the Court of Appeal rule on misuse of private information?**
Facebook's appeal on this was dismissed with the Court of Appeal agreeing with the judge below that the reference to J20 being a '*tout*' was a misuse of private information.

Lord Morgan starts by observing that the '*issue of whether or not information is private is highly dependent upon the factual circumstances surrounding that information'*. He says that whether or not to disclose one's religious persuasion is a '*matter for the person holding that opinion'* and is '*an aspect of personal autonomy*'. Morgan LCJ ruled that it was for J20 '*to set out the information and the*

*facts and circumstances upon which he or she relies in order to establish that this is information in respect of which he or she has a reasonable expectation of privacy'*. Morgan LCJ however noted that the '*nature of the relationship*' between J20 and his 3 children had not been '*explored in the pleadings, the evidence or the judgement'* and so was an issue that was not before the judge and '*cannot now be raised on appeal*'.

Morgan LCJ rejected Facebook's attempt to say the '*tout*' allegation were not in J20's Statement of Claim. He refused to dismiss the claim on that basis ruling that he '*did not accept the submission'*. Concluding on this issue Morgan LCJ said the judge below '*was entitled to come'* to the conclusion that the reference to J20 as a '*tout'* had '*constituted misuse of private information'*. He ruled that an '*allegation that a person is a tout or informer* ***automatically*** *gives rise to the allegation that there has been a confidential relationship between the person and some agency that he is assisting*' and for this reason the '*very allegation, therefore, lays a basis for the required level of privacy*'.

**What did the Court of Appeal rule on publication?**
Lord Morgan started by noting that J20's initial solicitor's letter made no reference to Belfast Banter and the '*tout'* allegations this appearing for the first time in the affidavit evidence in support of the injunction application. Facebook submitted that it '*should not be criticised for failing to take the material down until 9 October 2013*' but Morgan LCJ rejected that submission observing that '*once the material was supplied on 25 September 2013 and the Order served on 27 September 2013*', that Facebook was '*required to act expeditiously'* and agreeing with the judge below who '*was correct to conclude that it failed to do so*'. For this reason, Morgan LCJ ruled that Facebook was '*liable for the publication of the tout allegation from a date around the end of September until 9 October 2013'*. Offering Facebook only a limited crumb of comfort, Lord Morgan ruled that Facebook '*obviously has no liability in relation to any viewing of the allegation between 14 September 2013 and the end of the month'*.

**What order did the Court of Appeal make on damages?**
Lord Morgan LCJ assesses the damages relating to the 'tout' publication at £500 '*having regard to the limited period of time during which the post was available to be viewed*'.

**What issues did the Court of Appeal leave open?**
Lord Morgan LCJ said that the matter of the effectiveness of Facebook's online reporting system was not before the Court of Appeal. However he noted that this was the 2nd case (after *CG v. Facebook Ireland Limited and Joseph McCloskey* **[2016] NICA 54**) in '*which there has been judicial criticism of the effectiveness of the system*' and that in another case the Court of Appeal might '*have to review the effectiveness of the online reporting system and the consequences of any inadequacies found'*.

**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'*.

**9 October 2017**

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.