

THE HIGH COURT

[2014 No. 8912 P]

BETWEEN

X. (AN INFANT SUING THROUGH HIS MOTHER AND NEXT FRIEND, Y.)

PLAINTIFF

AND

SUNDAY NEWSPAPERS LIMITED (TRADING AS 'THE SUNDAY WORLD')

DEFENDANT

JUDGMENT of Mr. Justice Gilligan delivered on the 24th day of October, 2014

1. The issue that arises on this application is that of the right to privacy of the infant plaintiff (hereinafter referred to as the "the minor") aged one year, and the right to freedom of expression on the part of the defendant newspaper.

2. In the words of the defendant, in its newspaper publication of 19th October, 2014, a notorious gangland figure has been granted a court order stopping the Sunday World revealing that "he has gotten his girlfriend pregnant twice since he was put behind bars. The violent criminal is suspected of fathering a child more than three months after he was locked up in a high security prison. The feared thug even had his name put on the child's birth cert and the youngster bears his surname. This is despite the fact that conjugal visits are not allowed in Irish jails and sexual contact between prisoners and their visitors is strictly prohibited".

3. The minor's mother, becoming aware that the defendant proposed to publish an article involving her minor child sought *ex parte* relief from this Court on Saturday, 18th October, 2014, which application was based on the affidavit of the plaintiff's solicitor which specifically stated at para. 5 thereof as follows:-

"I say that it has come to the attention of my client by virtue of the newspaper contacting the mother's partner *via* the prison authorities that the Sunday World newspaper intends to publish an article in this jurisdiction to the effect that the mother's partner is named as the father of the minor plaintiff on the birth register and concluding that the implication to be drawn from that is that the conception of the minor occurred in prison and contrary to prison rules. The other implication which readers of the article may draw is that the mother's partner is not the biological father of the minor plaintiff."

4. The plaintiff's solicitor goes on to aver at para. 6 of the affidavit as follows:-

"I say that the minor's mother is extremely concerned at the prospect of publication of the said article and the effect such speculation as to parentage will have upon the future welfare and psychological wellbeing of the minor. I say that the minor is entitled to privacy concerning the circumstances of his conception and/or parentage and is also entitled to protection from unjustified injury to his psychological health."

5. The mother's partner is named on the minor's state registered birth certificate as the father of the minor and the plaintiff's solicitor accepts in her grounding affidavit that the birth certificate is a public document, but she believes that commenting on the circumstances of his conception and parentage is a separate matter and one which engages in an immediate and obvious way with his right to privacy. She avers that she believes that the use of the identity of the minor is no more than a detail of the story and she says and believes that the right to privacy, bodily integrity in the form of psychological/mental health of the minor, far outweighs any possible public interest in the anticipated publication.

6. On the hearing of the application on Saturday, 18th October last, this Court (Moriarty J.) ordered that the publication or broadcast of any matter reporting the within proceedings which would or would be likely to identify the minor, or the minor's mother, the intended plaintiff's next friend herein, is prohibited.

7. It was further ordered that the intended defendant and any person having knowledge of the making of this order:

(1) be restrained from publishing any article identifying the said minor, expressly or impliedly as the subject matter of a controversy concerning his conception and/or parentage pending further order of this Court.

(2) be restrained from any publication of the identity of the minor and the minor's mother herein and each of them in any reports concerning this application for injunctive relief or related proceedings whether such identification be occasioned expressly or impliedly pending further order of this Court.

8. Against this background the Sunday World published on 19th October, 2014, a story which was headed '*Exclusive Bosses Launch Prison Sex Investigation*', and goes on to allege, as previously referred to herein, that a notorious gangland figure fathers two children while he is behind bars despite a high security jail's strict rule of no conjugal rights and the article, *inter alia*, goes on to state that prison chiefs have launched an investigation into the incidents and are believed to have confronted the thug and that the investigation was initiated after his partner recently announced publicly on a social media site that she is pregnant again and was openly congratulated by her caged lover's family.

9. In any event, neither the notorious gangland figure nor the minor plaintiff herein, or his mother, were named or identified in the article, but it is now indicated to the court that it is proposed this coming Sunday to run a follow up article in which the notorious gangland figure will be named and the article will be accompanied by photographs of him. It is specifically indicated to the court that neither the minor, nor his mother, will be named in the article and it is against this background that the plaintiff now seeks interlocutory relief in the terms of the order as granted by this Court (Moriarty J.) on the interim *ex parte* application.

10. The minor's mother and next friend on a private Facebook website has referred extensively to the birth of her son, the minor, and she is pictured with the mother's partner and another child. There is a reference on her site to her being pregnant again but in an affidavit she avers that, in fact, she is not pregnant again and that a relation of hers, as a prank, put certain information on her website which did indicate that she was pregnant and this reference has since been taken down from her site. In any event, it appears that the defendant now accepts that the minor's mother is not pregnant again, and an indication has been given to the court that this aspect will not be referred to in any subsequent article.

11. Mr. Kirwan on the defendant's behalf, submits to the court that these matters pertaining to the mother and mother's Facebook website should all have been brought to the attention of this Court on the making of the *ex parte* application, but it does appear to this Court solely for the purpose of this application that such information is unlikely to have influenced the judge on the interim application, particularly bearing in mind that the mother's partner is named on the minor's birth certificate and registered as his father.

12. In a grounding affidavit on the defendant's behalf, Niall Donald, the journalist who wrote the first article on 19th October and who proposes to write the article for this coming Sunday's edition, queries as to how the plaintiff's solicitor can make an allegation that the minor will suffer from harmful speculation, controversy and prejudice and he says that the question of a child's privacy in the context of an issue of wider context or significance will be a matter of legal submission. In this regard, the court sought a copy of the proposed article for this coming Sunday's newspaper and was advised by counsel that it was not yet written.

13. He also avers that the minor's parents are recorded as a matter of public record due to the fact that his birth certificate is a publicly available document, and that in any event the people most likely to be able to identify him are really those who already know who his parents are.

14. In a supplemental affidavit the plaintiff's solicitor exhibits a medical report as dated 22nd October, 2014, from a Consultant Clinical Psychologist.

15. In his opinion the minor is at risk of developing serious psychological problems as a result of developmental delay, potential parental attachment issues, potential long term absence of his mother's partner and potential bullying if there is continued speculation in the press as to his parentage and/or the circumstances of his conception.

16. In an affidavit for the purpose of this application as sworn by the minor's mother, she avers at para. 7 in replying to the affidavit as filed on behalf of the Sunday World and as deposed to by Niall Donald, that his paper offered to leave her son's name out of the story and went on to say that "his parents are a matter of public record". She goes on to aver "I say that my concern is not that my son would be identified as my son, rather it is that he would be identified with the story which speculates about his paternity and/or the circumstances of his conception. I accept that the newspapers are entitled to run a story about prison regulations, what I do not accept is that the minor herein should be identified and his paternity held up to scrutiny and ridicule in a public arena. I say and believe that at all times the Sunday World have dealt with this complaint as if it was my own or that of the mother's partner and have not addressed the concerns regarding the welfare of the minor".

17. She further goes on to aver that she believes that it is perfectly possible for the defendant to publish the essential details of the story without material which would identify the minor and, indeed, did so in the article it published last Sunday and she says that this represents a fair balance between the rights of the Sunday World and the rights of the infant plaintiff.

18. She further avers that surely the public interest has already been served in the front page article which was carried in the newspaper last Sunday, and that any further publication which would identify her son and bring national attention and notoriety to the circumstances of his parentage and/or conception is gratuitous and unnecessary for the purposes of conveying any matters which may be in the public interest.

19. It is now necessary to return to the article as published on 19th October, 2014, because in addition to the headlines as previously referred to herein, there was published a very large headline underlined in red and written in large black and red print with the following two words "Immaculate CONception" with the letters CON at the commencement of the second word being in large red capitals.

20. I have the benefit of these submissions of Mr. Burns on behalf of the plaintiff and Mr. Kirwan on behalf of the defendant, and I also have the benefit of written submissions on behalf of both parties which I have read and considered.

21. It is quite clear that the minor has a right at law to privacy and that the defendant has a right at law to freedom of expression, not necessarily confined to matters of public interest.

22. I am inclined to the view that the defendants have drawn into the equation the issue of the minor's parentage by the use of the headline "Immaculate CONception" and "The feared thug even had his name put on the child's birth cert and the youngster bears his surname". If the defendants had simply kept to the general thrust of the main story that the minor was conceived within a prison contrary to prison regulations, then it appears unlikely that the plaintiff could have had any real complaint provided his parentage was not drawn into the equation. In my view, and solely for the purpose of this application, his parentage has been drawn into the equation and will be in the equation if a future associated article to be published this coming Sunday is accompanied by a photograph and/or names of the mother's partner as a result of which, the minor plaintiff will be capable of identification and because of the manner of the wording of the article already published his parentage and his birth certificate details will be drawn into the public domain and his paternity held up to scrutiny and ridicule in the public arena. It is only the minor's right to privacy that is involved and only the concerns as expressed on his behalf that are relevant to this application.

23. Extensive reference has been made to the judgment of this Court (Kearns P.) in *Hickey & Anor v. Sunday Newspapers Limited* [2010] IEHC 349 and, in particular, the reference at para. 42 to the President's view that he was not satisfied that the publication of certain photographs of the subject matter of the claim amounted to breaches of privacy, and that central to this conclusion he referred to a number of considerations which I have taken into account as I have the submissions of both parties in relation to this aspect of the judgment. I also have regard to the judgment of the Court of Human Rights in *Von Hannover v. Germany*, a judgment of 24th June, 2004, wherein the court at para. 69 reiterated the fundamental importance of protecting private life from the point of view of the development of every human being's personality. That protection – as stated above – extends beyond the private family circle and also includes a social dimension. The court considers that anyone, even if they are known to the general public, must be able to enjoy a legitimate expectation of protection.

24. I further take into account the views as expressed by Kearns P. in *Hickey*, particularly from para. 31 onwards wherein he stated:-

"[31] The jurisprudence of this jurisdiction as to where the line is to be drawn between these two competing rights is an evolving process and judges must be careful to note where their powers begin and end in this respect. As stated by Fennelly J. in *Mahon v. Post Publications Ltd.* [2007] IESC 15, [2007] 3 I.R. 338 at pp. 374 and 375:-

'[86] ... The courts do not pass judgment on whether any particular exercise of the right of freedom of expression is in the public interest. The media are not required to justify publication by reference to any public interest other than that of freedom of expression itself. They are free to publish material which is not in the public interest ...

The right of freedom of expression extends the same protection to worthless, prurient and meretricious publication as it does to worthy, serious and socially valuable works. The undoubted fact that news media frequently and implausibly invoke the public interest to cloak worthless and even offensive material does not affect the principle."

[32] Fennelly J. referred to *R. v. Central Independent Television Plc.* [1994] Fam. 192, in which Hoffmann L.J. said at pp. 202 and 203:-

'Newspapers are sometimes irresponsible and their motives in a market economy cannot be expected to be unalloyed by considerations of commercial advantage. Publication may cause needless pain, distress and damage to individuals or harm to other aspects of the public interest. But a freedom which is restricted to what judges think to be responsible or in the public interest is no freedom. Freedom means the right to publish things which government and judges, however well motivated, think should not be published. It means the right to say things which 'right thinking people' regard as dangerous or irresponsible. This freedom is subject only to clearly defined exceptions laid down by common law or statute.'

[33] Similarly, Lord Woolf C.J. said in *A. v. B. plc* [2003] Q.B. 195, at p. 205, that:-

'Any interference with the press has to be justified because it inevitably has some effect on the ability of the press to perform its role in society. This is the position irrespective of whether a particular publication is desirable in the public interest. The existence of a free press is in itself desirable and so any interference with it has to be justified.'

[34] Thus, while it is clear that newspapers are free to publish all sorts of matters regardless of public interest, the right to freedom of expression, like the right to privacy itself, is not an unqualified right. Restricting freedom of expression for privacy considerations requires circumstances which can be very clearly identified. This was emphasised by O'Hanlon J. in *M. v. Drury* [1994] 2 I.R. 8. That was a case in which the court was asked to restrain the publication of allegations by a father that his marriage had broken down by reason of the adulterous relationship of his wife with a priest. Having set out the passage from *R. v. Central Independent Television Plc.* [1994] Fam. 192, O'Hanlon J. continued, at pp. 16 and 17:-

'While we are undoubtedly administering a different legal system in this jurisdiction, underpinned by the constitutional guarantees, I am of the opinion that the general approach supported by the judgment of Hoffman L.J. is to be recommended in cases where the freedom of the press is sought to be circumscribed on the basis that publication may be a source of distress to persons named or even to their children who are totally innocent of blame in matters alleged against one or both of their parents.

There are extreme cases where the right to privacy (which is recognised as one of the personal rights, though unspecified, guaranteed protection by the Constitution...) may demand the intervention of the courts. An example might be the circumstances illustrated in *Argyll v. Argyll* [1967] Ch. 302 where confidential communications between husband and wife during their married life together, were protected against disclosure. Generally speaking, however, it seems desirable that it should be left to the legislature, and not to the courts to 'stake out the exceptions to freedom of speech' (in the words of Lord Denning).

In the present case the court is asked to intervene to restrain the publication of material, the truth of which has not as yet been disputed, in order to save from the distress that such publication is sure to cause, the children of the marriage who are all minors. This would represent a new departure in our law, for which, in my opinion, no precedent has been shown, and for which I can find no basis in the Irish Constitution, having regard, in particular, to the strongly-expressed guarantees in favour of freedom of expression in that document."

[35] In *Herrity v. Associated Newspapers (Ireland) Ltd.* [2008] IEHC 349, [2009] 1 I.R. 316, Dunne J. carefully examined the circumstances in which a claim based on privacy will overcome a claim based on freedom of expression. She also considered the nature of matters which might warrant the description of being "private". Having found in that case that the right to privacy outweighed freedom of expression, essentially because the case concerned the publication of telephone messages which had been obtained in breach of the express prohibition imposed by s. 98 of the Postal and Telecommunications Services Act 1983, she noted at p. 340 that:-

'[61] ... One must bear in mind that the provisions of s. 98 of the Act of 1983 are there to protect the privacy of an individual's telephone conversations. No one expects to see their private telephone conversations printed in a newspaper to excite the prurient curiosity or to provide amusement for the paper's readers.

[62] There may be other circumstances where the right to privacy prevails. For example, could a newspaper be entitled to publish details of a diagnosis of serious illness in respect of an individual bearing in mind the nature of the confidential doctor patient relationship? What if the individual was a well known public figure? Would it make a difference if the individual was a celebrity or, say, a senior politician? I would have thought that the circumstances which could justify a publication of such private information would seldom arise and only if there was some clear, demonstrable public interest."

[36] It is thus far from easy to determine where the parameters to the right of privacy may lie when placed in balance with the right of freedom of expression. One intuitively feels that a right of privacy is less easily established in public places where a person, in the words of T.S. Eliot, has had time "to prepare a face to meet the faces that you meet". That is particularly the case when one is performing a function of a public nature which I am satisfied the first plaintiff

and Mr. Agnew were performing on this occasion. This was not a private celebration or event in the first plaintiff's own home or at some other location to which a legitimate expectancy of privacy attached. That is not to say, however, that there will never be occasions where a person photographed in a public place can successfully invoke privacy rights."

25. I note in particular the view as expressed by this Court (Dunne J.) in *Herrity v. Associated Newspapers Ireland Limited* [2009] 1 I.R. 316 wherein she stated at p. 340:-

"There is a hierarchy of constitutional rights and as a general proposition, I think, that cases in which the right to privacy will prevail over the right to freedom of expression may well be far and few between. However, this may not always be the case and there are circumstances where it seems to me the right to privacy could be such that it would prevail over the right to freedom of expression."

26. Mr. Kirwan, on the defendant's behalf, refers to the view of Kearns P. in *Hickey* wherein he stated that:-

"A radical ratcheting up of the right to privacy at the expense of the right of freedom of expression to a degree which in my view should more properly be the subject matter of legislation."

27. Mr. Kirwan, on the defendant's behalf in an extensive submission to the court in respect of the consideration applicable on an interlocutory application such as this, referred to the decision of this Court (Irvine J.) in *Murray v. Newsgroup Newspapers Limited* [2011] 2 I.R. 156 at p. 181 wherein she stated:-

"Finally, under this heading, it is important to reiterate that what is sought by the plaintiffs amounts to a form of prior restraint. The defendant, in reliance on the jurisprudence of the European Court of Human Rights, submits that any such restriction calls for the most careful scrutiny. In *The Observer and the Guardian v. United Kingdom* (1992) 14 E.H.R.R. 153 the court held:-

'Article 10 of the Convention does not in terms prohibit the imposition of prior restraints on publication, as such. ... On the other hand, the dangers inherent in prior restraints are such that they call for the most careful scrutiny by the Court. This is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest.'"

28. Further reference was placed on the approach as taken by this Court in (Kelly J.) in *Foley v. Sunday Newspapers* [2005] 1 I.R. 88 to the effect that where a plaintiff seeks to restrict freedom of expression by means of an interlocutory order, the plaintiff must demonstrate by proper evidence a convincing case to bring about a curtailment of the freedom of expression of the press. Irvine J. in *Murray* took the view that what was necessary was that:-

"...the plaintiff must demonstrate at an interlocutory application that he is likely to establish at the trial of the action that the publication complained of should not be allowed."

29. Counsel submits that this is a much higher test than the *Campus Oil (Fair case)* test and that it is even again higher than the requirement to demonstrate a strong case on an application for a mandatory interlocutory injunction.

30. Mr. Kirwan submits that following the views of this Court as set forth by Irvine J. and Kelly J., the plaintiff needs at a minimum to adduce proper evidence to support his claim that the publication complained of should be prohibited at the trial of the action and in that regard, Irvine J. was of the view that:-

"In order to demonstrate a convincing case or that such prohibition is likely to be ordered, the applicant must show that the interference with freedom of expression sought is justified by one of the recognised exceptions to that right and that the proposed restriction will be proportionate to the aim to be achieved. Furthermore, as Fennelly J. said in *Mahon v. Post Publications Limited* [2007] 3 I.R. at p. 338, the court must scrutinise an application for an injunction that seeks prior restraint of a publication with particular care."

31. There has been much interest in recent times in the public domain as regards the rights of the child. In this case the minor is aged one, and is represented by his mother. It has to be borne in mind that this Court is only concerned with the minor's right to privacy. It is quite clear as a matter of law that in accordance with the defendant's right to freedom of expression, so particularly important in a journalistic context, that a story involving conjugal rights taking place in an Irish prison is a matter which they are entitled to publish. It appears to be reasonably clear that the story could have been run on a straightforward basis and that as the plaintiff's mother has stated in her affidavit, she could not have had any legitimate complaint. By the introduction of the terminology utilised in the first article, I am satisfied, having given the matter careful consideration, that the defendant draws into the equation the minor's parentage and the details as set forth on his state registered birth certificate.

32. I also have given careful consideration to the content of the medical report of the Consultant Clinical Psychologist, as dated 22nd October, 2014, and to his opinion that the minor is at risk of developing serious psychological problems if his parentage is to be the subject matter of speculation in a national newspaper. I accept in this regard that there are other factors referred to in the medical report, but nevertheless the overall thrust of the report satisfies this Court at this point in time without any contrary evidence of the seriousness of the situation. I also have to bear in mind that once written and published, any speculation as to the minor's parentage is in a permanent form.

33. The right to freedom of expression is not an unqualified right as is the minor's right of privacy, and any discussion which calls into question his parentage in a national newspaper, in my view, interferes with and is a breach of his right to privacy. In measuring this right against that of freedom of expression of the defendant newspaper, I take the view that the minor demonstrates a convincing case to bring about a curtailment of the freedom of expression of the press and thus, the undoubted interference with freedom of expression sought is justified by this recognised exception and, in the view of this Court, the proposed restriction will be proportionate to the aim to be achieved which is to protect the minor plaintiff, not only now but in the future by reason of any threatened permanent publication as regards his parentage, and I come to this conclusion with particular care bearing in mind that, in effect, the injunction sought is seeking prior restraint of a publication.

34. I take the view accordingly that it is appropriate for this Court to grant interlocutory relief in the same form as the interim order of this Court as made on 18th October, 2014.

35. I will hear the submissions of counsel as to the form of the order to be drawn up.

