Neutral Citation Number: [2012] IEHC 95

THE HIGH COURT

2012 254 P

BETWEEN:

EOIN MCKEOGH

PLAINTIFF

V

JOHN DOE 1 (USER NAME DAITHII4U)

AND

JOHN DOE 2

AND

JOHN DOE 3 (TAXI EIRE.LEFORA.COM)

AND

FACEBOOK IRELAND LIMITED

AND

GOOGLE IRELAND LIMITED

AND

GOOGLE US

AND

YOUTUBE

AND

YOUTUBE, LLC

AND

YAHOO! UK LIMITED

AND

CROWDGATHER INC

DEFENDANTS

-AND-

INDEPENDENT NEWSPAPERS (IRELAND) LIMITED TRADING AS THE IRISH INDEPENDENT

-AND-

INDEPENDENT NEWSPAPERS (IRELAND) LIMITED TRADING AS THE EVENING HERALD

-AND-

TIMES NEWSPAPERS LIMITED

-AND-

EXAMINER PUBLICATIONS (CORK) LIMITED

-AND-

INDEPENDENT STAR LIMITED TRADING AS IRISH DAILY STAR

-AND-

THE IRISH TIMES

THIRD PARTIES

Judgment of Mr Justice Michael Peart delivered on the 22nd January 2012:

Who would have thought when in the dark hours of the 13th November 2011 a young man got out of a taxi in Monkstown without paying the fare, that this would result in another young man, the plaintiff, who was thousands of miles away in Japan on that date, would discover on the 29th December 2011 after his return to this country, that not only had video footage of the first man exiting the taxi been posted on YouTube by the taxi driver in an effort to have his identity revealed, but also that thereafter another person, travelling the information superhighway that is the internet under the pseudonym 'Daithii4U', would see that footage and wrongly identify the plaintiff as being the person who had left the taxi without paying the fare, thereby defaming him, and that this zemblanity, the very opposite of serendipity, would see the appearance of a phalanx of at least a dozen lawyers before this Court for seven hours throughout yesterday for a debate of weighty issues, such as the right to privacy, the right to freedom of the press to fairly and accurately report court proceedings, and the right to an effective remedy, the combined costs of which might be sufficient to purchase a decent house in any part of the country? Yet that is what has happened.

By way of background to this unfortunate state of affairs which has undoubtedly led to great upset and distress to the plaintiff himself and his family, I should say that on the 11th January 2012, I heard an *ex parte* application by the plaintiff for a number of interim orders aimed at achieving an immediate removal from YouTube of the video footage which has led to the plaintiff being defamed, as well as from any other sites on which it might be viewed, as well as restraining the named defendants and other parties with notice of the making of the orders from publishing material defamatory of the plaintiff on the internet or otherwise, including the video material in question. In addition, I granted what are known now as Norwich Pharmacal orders requiring certain of the named defendants to provide to the plaintiff the identity of the web users who had defamed the plaintiff via their websites so that the plaintiff would be able to take steps against them in order to protect his good name and prevent further publication of material defamatory of him.

I have been informed by Pauline Walley SC for the plaintiff that following the making of those orders on the 11th January 2012, some success has been achieved as there has subsequently been a 95% take down of the material in question. There has apparently been some information provided also in relation to the identity of parties who have posted defamatory material, but I am unclear as to the extent of that information. But for the moment I am not concerned with the extent to which the parties to whom those orders are directed have complied with same. There is no application before this Court in relation to any alleged non-compliance, such as attachment and committal or sequestration of assets.

What is before the Court is an application directed against parties described in the title hereto as Third Parties, and who comprise a number of newspaper proprietors who have reported upon the court proceedings to date, but who were not named as defendants in the original proceedings. They were not served with the order made on the 11th January 2012, and neither were they in court on that date. Being orders of an interim nature only, the Court directed that a Notice of Motion returnable for the 13th January 2012 be served on the defendants, whereby the plaintiff could apply for interlocutory orders in the same terms pending the determination of the substantive proceedings.

In so far as the orders made on the 11th January 2012 are binding on what are described therein as "any third party having notice of the making of the orders", the plaintiff is contending that the said newspaper proprietors who have reported on the said proceedings are within the meaning of 'third parties' for that purpose since they are aware of the making of the orders, and that by naming the plaintiff in their reportage of the court proceedings, and have reported upon the nature of the defamatory material, and in some cases have failed to report the denial by the plaintiff that the taxi fare evader is him and have failed to report this Court's conclusion that it was satisfied by the plaintiff's evidence that he was not even in this country on the 13th November 2011 and was not and could not be the man shown exiting the taxi on that date, that they are in breach of the order made by this Court prohibiting the publication or republication, or any other dissemination on the Internet or in hard copy form, of material defamatory of the plaintiff. It has been submitted that the manner in which these parties have reported these proceedings to date has served only to perpetuate the defamation of the plaintiff, and constitutes a breach of the order in that regard.

I should say that the plaintiff at no time sought to institute these proceedings in a way that does not disclose his identity, and did not make any application on the 11th January 2012 that his name should not be disclosed in any reporting of the application or the proceedings. That was not due to any oversight on his part or on the part of his legal team. Indeed, there is something counter-intuitive about the idea that a person who seeks reliefs from the Court aimed at vindicating his good name, by way of damages or otherwise, would seek to do so anonymously.

I should repeat also what I have said on several occasions, both on the 11th January 2012, and on subsequent occasions, that I am completely satisfied from not only the clear evidence of the plaintiff himself, but also from a perusal of his passport, upon which there is stamped incontrovertible evidence of his presence in Japan on the 13th November 2011, that he is not and could not have been the man seen exiting the taxi on that date. Indeed, the taxi driver himself appeared in Court on the 13th January 2012 and confirmed to the Court that the plaintiff was not the man who had failed to pay the fare, and expressed his regret that the placing of the video footage in question had resulted in the plaintiff being wrongly identified as the culprit. I understand that he has also apologised to the plaintiff for what has occurred.

I should add also that the placing of the video on YouTube by the taxi driver did not of itself defame the plaintiff, though it certainly created a risk that a wrong identification might be made by somebody else. It was the wrong naming of the plaintiff by the person travelling under the pseudonym 'Daithii4U' which has done the damage to the plaintiff's reputation.

Nevertheless, this whole unfortunate saga has led to the most appalling stream of vile, nasty, cruel, foul, and vituperative internet chatter and comment on YouTube and on Facebook directed against this entirely innocent plaintiff, and the anonymous authors of which have chosen to believe and assume is the man who did not pay his taxi fare, and who feel free to say what they wish about him, and in language the vulgarity of which offends even the most liberal and broadminded, and which I will not repeat. One can readily understand what motivates the plaintiff to try and put a stop to it. However, this court does not have a magic wand. The damage has already been done, and it is impossible to 'unring' the bell that has sounded so loudly. There is a lot of truth in the phrase already used in this case by Rossa Fanning BL for Facebook, and repeated by me a few days ago, namely that "*the genie is out of the bottle*". Certainly for my part, I would not wish that phrase to diminish or belittle in any way the gross injustice which has been perpetrated on this plaintiff whose life should not have become so blighted through no fault on his part.

On the present application against the newspapers in question, the plaintiff in his further effort to protect his good name has sought the following reliefs against them:

> 1. An Order prohibiting the Third Parties identified below, all and or each of them, their servants and or agents and or any other third parties having notice of the said orders from breaching the terms of the Orders of this Honourable Court dated 11th day of January 2012 directing any third party having notice of the making of the Orders of this Honourable Court to take down, disable and to remove, material defamatory of the Plaintiff to include the publication or dissemination of a

video clip and accompanying text alleging that the Plaintiff was guilty of taxi fare evasion, theft, dishonesty pending the hearing of the substantive action. The Third parties are as follows:

The Evening Herald

The Sunday Times

The Examiner

The Daily Star

The Irish Independent

The Irish Times

2. An Order prohibiting all third parties, including those listed above, having notice of the making of the Orders of this Honourable Court prohibiting publication of the said material from publishing, republishing, broadcasting and/or disseminating, either on the internet, broadcast or in hard copy publication, materials defamatory of the Plaintiff to include publication or dissemination of a video clip and accompanying text alleging that the Plaintiff was guilty of taxi fare evasion, theft, dishonesty pending the hearing of the substantive action.

3. Further or in the alternative an Order prohibiting the Third parties, all and or each of them, their servants and or agents including those listed above from publishing or republishing or in any way broadcasting or disseminating either on the internet, broadcast or in hard copy publication, material which would identify or tend to identify the Plaintiff as the subject matter of the defamatory allegation that he was guilty of taxi fare evasion, theft or dishonesty pending the hearing of the substantive action.

Those are the reliefs sought in the Notice of Motion served upon the Third Parties. The fact that reliefs are sought in these terms suggests that the plaintiff does not consider that the Notice Parties are already bound by the orders made. I mentioned this to Ms. Walley at the commencement of the hearing of this application. She has responded by suggesting that this Court should in addition, or perhaps as an alternative, declare that the newspapers in question are captured by the order once they have notice of the making of the order and that they are in breach of it, and thereafter make specific orders against them so that specifically they are restrained from reporting the proceedings in any way which identifies the plaintiff and defames him by repeating the material in question.

Ms. Walley has submitted that the plaintiff is entitled both under the Constitution and the European Convention on Human Rights to have his right to privacy and to his good name protected and vindicated by the Court, and that in order to so do, this Court must in order to provide him which an effective remedy, being another right, it is submitted, to which he is entitled under those instruments, dig deep into its inherent jurisdiction in order to fashion a remedy. She has referred to a number of judgments in support of this submission, which is designed to counter the arguments made on behalf of the newspapers in question that not only has the plaintiff no right under law to anonymity in his court proceedings, but that they are entitled under law to report those court proceedings fairly and accurately, including by naming him, and that not only are they not the intended targets of the injunctions made by this court, but even if they are deemed to be, they have not in any way breached them by the manner in which they have reported them.

Time does not permit me at this stage to set forth in detail the passages to which she has referred in support for her submission that the plaintiff must be able to achieve an effective remedy in respect of the serious injustice which he has suffered, but I will refer to the latest authority referred to, namely the judgment of Hogan J. in *S (a minor) and others v. Minister for Justice, Equality and Law Reform and others*, unreported, High Court, 21st January 2011. That case of course bears no relationship to the facts or subject matter of the present case. It was in the context of a challenge to a deportation order, where an issue arose as to whether the applicant's right to an effective remedy under Article 13 of the European Convention on Human Rights was infringed by reason of the fact that the common law substantive judicial review rules did not allow or at least did not sufficiently allow the High Court when exercising its supervisory jurisdiction to engage in a merits based review of impugned decisions. In so far as the Court is not permitted by statute to grant a declaration of incompatibility unless it is clear that an applicant has exhausted such domestic remedies as are available, the learned judge addressed the question of whether an effective remedy under domestic law existed by stating, inter alia, the following:

> *"Do these Applicants have another legal remedy which is adequate and available?*
>
> *10. As these applicants contend that the existing common law judicial review rules are inadequate to protect their constitutional and ECHR rights, the question arises for the purposes of s. 5(1) of the 2003 Act as to whether Irish law provides another legal remedy for this purpose which is adequate and available. There is, of course, such a remedy available to the applicants, namely, to contend that these common law rules are themselves unconstitutional.*
>
> *11. Article 34.3.1 of the Constitution provides that the High Court is "invested with full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal."*
>
> *12. The fact that this Court is given an express constitutional jurisdiction to determine "all matters and questions whether of law or fact" in and of itself ensures that litigants are guaranteed an effective remedy in respect of all justiciable questions. But, of course, the matter does not rest there, since Article 40.3.1 also provides that:*
>
> *"The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen."*
>
> 13. Article 40.3.2 further provides that:
>
> "The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name and property rights of every citizen."
>
> *14. These inter-locking provisions ensure - among many other things - that the State guarantees all litigants that*

> *they will have an effective legal remedy so far as it is practicable to do so. Indeed, it would be difficult to conceive of a more extensive guarantee of an effective remedy than the one actually provided by these provisions, given that the State is thereby committed "as far as practicable…..to vindicate" the rights in question.*
>
> *15. These basic and elementary principles are attested by a wealth of case-law. As early as 1942 this Court held that a provision of the Land Law (Ireland) Act 1881, which sought to ensure that decisions of the Land Commission were immune from judicial review by the High Court was unconstitutional as inconsistent with Article 34.3.1: see Re Loftus Bryan's Estate [1942] I.R. 185. In Macauley v. Minister for Posts and Telegraphs [1966] I.R. 345, Kenny J. held that a provision of the Courts of Justice Act 1924 which stipulated that actions against Minister required to be authorized by the fiat of the Attorney General was unconstitutional. In Byrne v. Ireland [1972] I.R. 241 the Supreme Court went even further and held that the common law rule whereby the State was immune from suit was inconsistent with Article 40.3.1. Hard on the heels of Byrne v. Ireland came the decision in Meskell v. CIE [1973] I.R. 121, which established that, where necessary, the courts would modify or extend the parameters of existing tort law to enable a litigant to recover damages for a breach of constitutional rights where that existing law did not sufficiently or adequately protect the right in question. The Meskell doctrine has itself spawned significant subsequent case-law, of which important decisions such as Grant v. Roche Products [2008] IESC 35, [2008] 4 I.R. 679 and Herrity v. Independent Newspapers Ltd. [2008] IEHC 249 are just some contemporary examples. Indeed, while the judgment of Hardiman J. in Grant discusses in considerable detail the importance of the concept of the vindication of rights in Article 40.3.2 in the context of actions in tort, these principles are certainly applicable by analogy to other areas of the law so far as issue of the effectiveness of the remedy is concerned."*

Hogan J. went on to instance a number of occasions on which the Courts have concluded that certain statutory provisions and other rules were unconstitutional on the basis that a party was deprived of an effective remedy, and went on to state that those examples "*all share one common theme, namely that the courts will ensure the remedies available to a litigant are effective to protect the rights at issue and that our procedural law (including all legislation restricting or regulating access to the courts) respects basic fairness of procedures and is neither arbitrary or unfair …".*

In reliance upon this statement, it is submitted that an effective remedy for the plaintiff herein can be provided only by the Court requiring of the newspapers in question that in any reporting of these proceedings they report same only in a manner which does not name or otherwise identify the plaintiff, or does not repeat or republish the material complained of in a way which defames the plaintiff.

Ms. Walley is at pains to emphasise that she accepts the entitlement of the newspapers in the public interest to report the proceedings in court in a fair and accurate manner, but submits that while the proceedings themselves are a matter of public interest, and under the Constitution, must as being the conduct of the administration of justice be conducted and heard in public, there is no public interest served by the naming of the plaintiff, who is a private citizen leading a private life, and who is entitled to have his right to privacy under the Constitution protected, particularly in the circumstances of the present case where he has not in any way been responsible for the events which have led to his public identification.

I have heard submissions from Gareth Compton BL for the Sunday Times, Shane English BL for the Irish Daily Star and Irish Examiner, Simon McAleese, solicitor for the Irish Independent and Evening Herald, and Andrew O'Rourke, solicitor for the Irish Times. Rossa Fanning BL for Facebook also made a submission, although, while served with the present motion, no relief is sought therein against his client, and Ms. Walley submitted that he had no standing to make submissions on this motion. I will not treat each of their submissions separately given the time constraints upon me, and I hope I will be forgiven for not setting out these submissions in their entirety for today's purposes.

Essentially, these parties submit that they were not intended by this court to be covered by the injunctions which were granted, given that their only role has been to report in a fair and accurate manner the proceedings in court, which were held in public and where no reporting restrictions were either applied for or granted. They submit that it is clear that they were not intended to be covered by the injunction, and that the intended targets were ordinary users of the internet and/or service providers who either had published, or facilitated the publication of, the defamatory material, and who might repeat that material or post fresh defamatory material, or facilitate same, but that appropriate, fair and accurate reporting of the proceedings in a newspaper, either in hard copy or electronically could never have been intended to be prohibited in the absence of any reporting restrictions being imposed.

Submissions were also made that in any such reporting they are not obliged because of the injunction, or otherwise, to exercise a discretion not to name or identify the plaintiff, given that the plaintiff named himself as the plaintiff in his proceedings and that proceedings are required under the Constitution to be held in public, unless otherwise provided for by statute. It is submitted that a person such as the plaintiff, no matter how innocent he is in relation to the matters complained of in the proceedings, must be taken as knowing that once he goes to court to protect and vindicate his good name he does so in a way which leads not only to him being identified publicly, including perhaps, as has happened, being photographed and filmed on his way to court, as well as the very things about which he complains being aired publicly, and becoming more widely known than if he had chosen to do nothing about them. They have given other examples of such situations, including in a criminal context where a person is charged with a criminal offence, is remanded on bail pending trial, enjoys a presumption of innocence, yet is photographed on his/her way to the criminal courts to attend trial, and who may well be found not guilty. Such persons do not enjoy any right to anonymity such as that claimed for by this plaintiff.

In support of the submission that a litigant does not have any right to anonymity in relation to court proceedings since justice must be administered in public under the Constitution, these parties have referred to a number of authorities which have stated this in very clear terms even in cases where, like the plaintiff, a party has genuinely believed that his/her right to privacy and good name would be breached if his/her involvement as a party to the proceedings became public knowledge. Again, time does not permit me to set forth all the authorities to which I have been referred, but I will refer to the judgment of McCracken J. in *Re: Ansbacher (Cayman) Ltd and others* [2002] 2 IR. 517. In that case, the learned judge considered in great detail the right to privacy in litigation, noting *inter alia* that the right to privacy under the Constitution is not an absolute right and stated at p. 529:

> *"No case has been cited to me in which a right to a good name or a right to privacy can justify anonymity in court proceedings".*

He noted also that a request for such anonymity was expressly refused by Laffoy J. in *Roe v. The Blood Transfusion Service Board* [1996] 3 IR. 67, and he sets forth her rationale for that refusal including by her statement that *"… the public disclosure of the true identities of parties to civil litigation is essential if justice is to be administered in public. In a situation in which the true identity of a*

plaintiff in a civil action is known to the parties and to the court but is concealed from the public, members of the general public cannot see for themselves that justice is done".

Having referred to other authorities, McCracken J. concluded as follows:

> *"The fact that Article 34.1 requires courts to administer justice in public by its very nature requires the attendant publicity, including the identification of parties seeking justice. It is a small price to be paid to ensure the integrity and openness of one of the three organs of the State, namely the judicial process, in which openness is a vital element. It is often said that justice must not be done, but must also be seen to be done, and if this involves innocent parties being brought before the courts in either civil or criminal proceedings, and wrongly accused, that is unfortunate, but is essential for the protection of the entire judicial system. I do not believe I am called upon to consider any hierarchy of rights in the present case, but if I had to do so, I have no hesitation whatever in saying that the right to have justice administered in public far exceeds any right to privacy, confidentiality or a good name."*

I respectfully agree with these statements, and they are supported by Supreme Court judgments to which reference has been made, and which bind this Court.

I note also that when the Oireachtas enacted the Defamation Act, 2009 it did not include any provision conferring a discretion on the courts to hear such proceedings other than in public. It clearly could have done so.

It is a matter of profound regret to me that this entirely innocent plaintiff finds himself in his present predicament whereby his good name has been sullied in the manner in which it has, and where he seeks to remedy that by restraining any reporting of his proceedings which identifies him as the plaintiff, and where this Court must refuse his application for the reliefs sought on the present motion. But I cannot conclude that the facts of this case are so exceptional as to entitle this Court not to follow the law as it has been pronounced at the highest level in this country.

The parties to whom this motion is directed are firstly not parties to whom the order in question was directed for the reason already stated. Their reporting of the proceedings as such is not in any event a breach of the order in question. That is not to say that any newspaper is immune from suit if they publish material which is defamatory of the plaintiff, but the mere reporting of proceedings in which the plaintiff claims against others that he has been defamed does not of itself constitute a repetition of that defamation, provided that it is fair and accurate, and in the event that a newspaper was to infringe that requirement, the plaintiff would have a cause of action in which he could again seek redress in the ordinary way. I am completely satisfied that they were and are entitled to name the plaintiff in their reporting of the proceedings, and that there is no basis on which the plaintiff is entitled to either the reliefs sought in the Notice of Motion as issued, or the alternative declaratory relief urged for through his Counsel's submission that the newspapers in question have breached the terms of the injunction granted against other named defendants. I am not satisfied by so concluding that the plaintiff is deprived of an effective remedy as guaranteed under the Constitution or under Article 13 of the European Convention on Human Rights.

For these reasons, I refuse the reliefs sought.