THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 104

Record Number: 2017/72

Peart J.
Whelan J.
Gilligan J.

BETWEEN:

FRED MUWEMA

PLAINTIFF/APPELLANT

- AND -

FACEBOOK IRELAND LIMITED

RESPONDENT

JUDGMENT OF MR. JUSTICE MICHAEL PEART DELIVERED ON THE 19th DAY OF APRIL 2018

1. Facebook is a well-known social media service which provides an internet platform on which its registered users can post messages on their Facebook page. Users may choose to identify themselves on their Facebook page. However, messages may also be posted on a Facebook page where the registered user is not identifiable, thereby enabling messages to be posted pseudonymously, and in effect, anonymously.

2. Being able to post such messages under the cloak of anonymity facilitates those who wish to make false and defamatory statements about others. While a person so defamed can request Facebook to remove the offending material, he/she must, in order to commence proceedings for defamation, seek disclosure from Facebook of the identity and location of the person who is the registered user of the Facebook page on which they claim to have been defamed. In most instances Facebook does not oppose an order being made by a court for the disclosure of the identity of the user in question, and will disclose that identity upon receipt of a valid court order. However, in the present case, they have opposed the making of such an order because they believe that on the evidence available the disclosure of the BSI in respect of the user in question will expose him to arrest and ill-treatment at the hands of the authorities in Uganda whom he opposes, because he has posted material which is critical of the Ugandan government, and the government too is anxious to know the author's identity. I will address that issue in more detail in due course.

3. The Court's equitable jurisdiction to grant an order for disclosure of the identity of an alleged wrongdoer finds its origin in *Norwich Pharmacal Co. and ors v. Commissioner of Customs and Excise* [1974] AC 133 – per Lord Reid, and such an order has become known as a 'Norwich Pharmacal' order. The order may not be granted in every instance where it is sought. Where the Court is satisfied that the applicant's right to disclosure of the information is outweighed by some countervailing right or interest of the person sought to be identified, it may refuse to make the order sought. In such cases the Court must carry out a careful balancing exercise to see where the balance of justice lies. Each case will be considered on its own facts and circumstances.

4. In the present case the Court was required to balance the applicant's right to take proceedings for damages for defamation against the author of the defamatory material, against the right of the author to be protected from ill-treatment and other threats to his bodily integrity at the hands of others who, as a result of his identity being disclosed to the plaintiff, might also seek to harm him. The High Court (Binchy J.) decided that the identity of the author should not be disclosed under a Norwich Pharmacal order in order to protect the user from the risk of harm. The plaintiff now appeals to this Court against that conclusion.

Background

5. The plaintiff is a well-known lawyer in Uganda, and claims to have been defamed in three particular messages posted by a person or persons operating the Tom Voltaire Okwalinga Facebook page ("TVO") on the 17th, 19th and 24th March 2016. There followed thousands of subsequent comments, posts and blogs which the plaintiff says have "condemned, ridiculed and threatened both myself and my firm, as well as endangering my safety, reputation and credit". The identity of the registered user or users of the TVO page and their location are not disclosed, and are not known to the plaintiff. He is seeking that information from Facebook so that he can sue the persons concerned for damages, and have the offending material removed.

6. On the 22nd March 2016 the plaintiff sent an email to Facebook Incorporated, specifying the offending post and requesting that they be removed. He also requested the Internet Protocol address of TVO. After a further exchange of emails he received an email dated the 31st March 2016 from U.S lawyers acting for Facebook Inc. informing him firstly that Facebook Inc. was unable to comply with his request, and that the appropriate entity to which he should make his request was the defendant, Facebook Ireland; secondly, that in any event the details that he had requested could be provided only upon receipt of a court order requiring disclosure of the requested information, and specifying the profile or page at issue by specific Uniform Resource Locator (URL) – in other words a web address; and thirdly as follows:

> "Third, Facebook can and does remove access to content that violates its policies when properly notified of it. Proper notice requires specific and complete detail of the purportedly objectionable content, including proper identification of the specific uniform resource locator ("URL") of the content at issue, and a detailed explanation as to why the subject content violates policies. Your March 22 letter identifies no such URL or detailed explanation. Your March 24 letter identifies the following three URLs :
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> [3 URLs set forth]
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> To the extent you claim that any content on the Facebook service is defamatory in nature, your complaint should be addressed to the user who created and posted the content, not Facebook. Moreover, Facebook is not in a position to evaluate the truth or falsity of such content and will not remove or block it absent proper service of a valid court order

identifying the specific content deemed to be defamatory."

7. Following receipt of this correspondence the plaintiff instructed Messrs. Lavelle, solicitors, Dublin to write to Facebook Ireland on his behalf. They did so by letter dated the 19th April 2016 in which the nature of the defamatory statements was explained, and a request was made that the material be removed. Details of the 3 particular URLs were provided, and the letter indicated that should the content not be removed within seven days, their client reserved his position in relation to court proceedings. It concluded with a request that Facebook Ireland provide the plaintiff with the "basic subscriber information" ("BSI") of TVO in circumstances where the plaintiff intended to take legal action against the user of the TVO account.

8. By 4th May 2016 no reply had been received to that letter and a reminder was sent. A brief email in reply from Facebook Ireland dated the 9th May 2016 (at 20.18hrs) was in the following terms:

> "Hi – Thank you for bringing this matter to our attention. The content you have reported is no longer accessible in Uganda. We understand this to resolve the issue. However, if you continue to believe your rights are being violated or infringed, please provide us with additional explanation and we would be happy to look into this matter further. Thanks for contacting Facebook."

9. A minute later at 20.19hrs, Facebook sent another email indicating that the previous email should be disregarded, and stating that they were looking into the matter with their legal department and would respond "shortly". Messrs. Lavelle wrote on the 11th May 2016 stating that the content was still accessible in Uganda and worldwide, and protesting that it was completely unacceptable that the content had not been removed given that their client had first requested removal by his letter dated the 22nd of March 2016, and they referred to their own correspondence on the 19th of April 2016 and the 4th May 2016. A response was requested within seven days. An email was received dated the 11th May 2016 allocating a particular reference number to the complaint received, but otherwise containing no substantive response to the correspondence received from Messrs. Lavelle . Proceedings then issued on the 25th May 2016 and served naming Facebook Ireland as defendant.

10. A number of reliefs were sought in these proceedings in addition to a claim for damages for defamation. Orders were sought pursuant to section 33 of the Defamation Act 2009 prohibiting further publication of the Facebook page of TVO hosted by the defendant, and in particular the offending articles, or alternatively pursuant to the same section, an order prohibiting the publication or further publication of the posts set out in the schedule to the plenary summons. In addition, an order was sought that the defendant or any person having notice of the order cease and desist from any further publication of certain articles which were on the relevant dates in March 2016 on the TVO Facebook page, and to take all effectual steps to remove the defamatory Facebook page and/or the posts identified in the schedule from any cached pages or online search results. In addition, the relief relevant to the present appeal was sought in the following terms:

> "An order directing the defendant to provide the plaintiff with any details which it holds relating to the identities and location of the person or persons who operate the Tom Voltaire Okwalinga Facebook page or the individual posters thereon."

11. When issuing these proceedings, the plaintiff also issued a notice of motion seeking various interlocutory orders in the same terms as set forth in the plenary summons, including an order directing the defendant to provide the identity of the persons operating the TVO Facebook page. Upon such disclosure it is the plaintiff's intention to add the identified author of the posts as a defendant to the proceedings, and claim damages against him also.

12. That notice of motion was heard by Mr Justice Binchy on 1st July 2016. A written judgment was delivered on the 23rd August 2016 in which he expressed his conclusions as follows:

> "64. In conclusion, the jurisdiction of the Court to make the orders sought by this application (save for the "Norwich Pharmacal" orders) is now subject to the limitations prescribed by the Oireachtas in s. 33 of the Act of 2009. This section makes it clear that such orders may only be granted in circumstances where it is clear that the defendant has no defence that is reasonably likely to succeed. In my view this applies equally to a "take down" order as much as it does to a prior restraint order. At this remove, it is difficult to see how it could be said that the defendant is not reasonably likely to succeed with the defence to the proceedings provided for in s. 27 of the Act of 2009. Moreover, I am of the view that in this case the application should also be refused because it would serve no useful purpose, having regard to the availability of publications containing the same and other damaging allegations about the plaintiff elsewhere on the internet. For these reasons, I consider that the application for takedown and prior restraint orders must be refused. *I will however make a "Norwich Pharmacal" order in the terms that I understand the parties have agreed.*" [Emphasis provided]

13. However, on the 2nd August 2016, prior to the perfection of any order, the matter came back before Mr Justice Binchy, for mention, when Facebook sought leave of the Court to introduce new evidence with a view to opposing the making of the Norwich Pharmacal order. That new evidence is contained in an affidavit of Mr Jack Gilbert who is described as "Lead Litigation Counsel" of Facebook Ireland. The contents of that affidavit are set out extensively in a second written judgment delivered by the trial judge on 8th February 2017 in which he gave reasons for not making a Norwich Pharmacal order.

14. Mr Gilbert's affidavit goes into considerable detail in relation to the political activities in Uganda by the person referred to as TVO. He goes on to say that while TVO is the author of the posts referred to in the plaintiff's notice of motion, the position is complicated by the fact that the URLs provided by the plaintiff related to an entirely different Facebook page which also goes by the name of "Tom Voltaire Okwalinga, i.e. a "fake TVO page", and that the plaintiff has intermingled the more established TVO profile with the fake TVO page. The trial judge stated in para 9 of his second judgment:

> "The report [US Department of State Human Rights Report on Uganda] confirms the existence of "credible" reports that security forces tortured and beat suspects and that the use of excessive force and torture during arrests and other law enforcement operations resulted in casualties. In short, Mr Gilbert expresses concern that if the defendant is directed to furnish the plaintiff with the BSI of TVO, whether that of the genuine TVO profile or the fake TVO page, this may lead to the identification of the authors of the TVO profile and/or the fake TVO profile (if they are in fact different) and that if their identities are revealed, the life, bodily integrity and liberty of those persons would be placed in jeopardy. Mr Gilbert acknowledges that it is difficult to evaluate the extent of this threat but says that he now has what he believes to be a well-founded fear that the threat is real." [Emphasis provided]

15. The trial judge was satisfied that this new evidence could have an important influence on the outcome of the application for the Norwich Pharmacal order. In circumstances where his order had by this time not yet been perfected, he permitted it to be received by

the Court even though it was accepted by Facebook that the new evidence had been available and could have been adduced when the interlocutory application was heard. There is no appeal against the trial judge's conclusion in this respect.

16. The trial judge permitted the plaintiff to file a further affidavit in reply to Mr Gilbert's affidavit which in turn led to the defendant obtaining and filing an affidavit sworn by a Ugandan lawyer named Nicholas Opiyo who took issue with the plaintiff's said replying affidavit. The trial judge appears to have attached significant weight to this affidavit, being from an independent lawyer in Uganda. I will come to that affidavit shortly.

17. In his affidavit the plaintiff had stated that Mr Gilbert's concerns for the safety of TVO should his identity be disclosed were unnecessarily alarmist, and had not been confirmed by TVO himself, and should not be admissible in evidence. The plaintiff had also stated that TVO was not the only political activist in Uganda who was critical of the Ugandan government, and that if he is prosecuted he will have his human rights respected, as has occurred in the case of others of whom the plaintiff gives as one example, one Robert Shaka. Indeed, he goes so far as to state that in fact Robert Shaka is widely suspected of being the real TVO. He stated that Robert Shaka had been arrested and charged with offences under the Computer Misuse Act but having been charged had been released on bail and was a free man. He gives other examples of persons who have been similarly arrested but released on bail and unharmed.

18. The plaintiff's affidavit had gone on to state that while he accepts that there are challenges to the observance of human rights in Uganda, and that the government there have been involved in human rights violations, it is nevertheless presumptuous and alarmist to "paint a picture of unmitigated violation of human rights and lawlessness in Uganda …". He states at para 12:

> "As an active legal practitioner, I can confirm that despite facing constraints of underfunding and other performance challenges, the justice system in Uganda is generally fully functional and it serves justice to everyone including Government critics and in that regard compares favourably to other leading countries in Africa".

19. Facebook in Mr Gilbert's affidavit had exhibited a number of human rights reports in relation to Uganda which contained many allegations of human rights violations. The plaintiff stated in his affidavit in response that those reports had not contained the Ugandan government's responses, and he suggested that those reports "are full of unsubstantiated generalisations and are one-sided".

20. Mr Opiyo is a well-known and reputable human rights lawyer in Uganda. As already stated he swore an affidavit on behalf of Facebook in order to address matters averred to by the plaintiff. Apart from handling many high profile cases in Uganda he has been the recipient of an award for his work, and is a visiting professor at Stanford University, California. He swore his affidavit at the request of Facebook in order to respond to averments made by the plaintiff in his affidavit sworn on the 16th January 2017. Mr Opiyo responded in his affidavit to what was averred to by the plaintiff. Mr Opiyo had in fact acted for Mr Robert Shaka in the matter of Mr Shaka's arrest to which the plaintiff had referred, and still acts for him in that matter.

21. In his affidavit Mr Opiyo set out his credentials as an award-winning human rights expert in Uganda, and stated that he was therefore qualified and had the necessary experience and knowledge of relevant facts to speak about how people who were critical of the government in Uganda were treated in Uganda. He had read the plaintiff's affidavit, and did not agree with its contents. I t will be recalled that the plaintiff had referred to the fact that one Robert Shaka had been the subject of arrest for offences under the Computer Misuse Act, and was suspected of being the person referred to as TVO, yet he had been released on bail following arrest. Mr Opiyo, who acted for Mr Shaka, gives more information in this regard as follows as set forth in paras 7-13 of the affidavit:

> "7. I have defended and continue to defend Shaka Robert, a Uganda online activist registered on Facebook as Meverick Blutaski, and a former employee of the US Embassy in Uganda, who was on June 8, 2015 accused, arrested and charged on suspicion of being Tom Okwalinga Voltaire (TVO). I say that Shaka Robert was waylaid in the early hours of the morning and under cover of darkness abducted by non-uniformed security officials. Mr Robert was driven to the Special Investigations Unit (SIU) of the Ugandan Police Force in Kireka, west of Kampala city. I further say that the SIU is a detention facility which is notorious for torture and the cruel and inhumane treatment of suspects. A detailed report of the use of torture in the facility is contained in the Human Rights Watch World Report (available at: https://www.hrw.org/world-report/2013/country-chapters/uganda).
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> 8. I say that the arresting officers did not identify themselves, refused to disclose the reason for the arrest in violation of the provision of the constitution of the Republic of Uganda which requires them to do so. They also denied Mr Robert access to his family and friends in violation of the provisions of the Constitution of the Republic of Uganda. Upon his arrest, Mr Robert was stripped of his cell phones and detained incommunicado for more than the constitutionally allowable 48 hours.
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> 9. I was compelled to challenge the incommunicado detention of Mr Robert before the Nakawa Magistrates Court for being in violation of his rights and the law, and the court issued an order for his unconditional release. I further say that the orders of the court were served upon all relevant authorities but they refused to comply with the order. They violated the orders of the court and instead charged Mr Robert before another court in central Kampala (the Buganda Chief Magistrates Court) of "disguising himself as Tom Voltaire Okwalinga(TVO), between 2011 and 2015, wilfully and repeatedly using a computer, with no purpose of legitimate communication, disturbed the right of privacy of President Museveni by posting statements as regards to his health condition on social media, to wit, Facebook.
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> 10. Mr Robert applied for bail but was remanded to the Central Prison for a week and afterwards released on a court bail. When he attempted to travel for holidays in December 2015, he was violently arrested at the Entebbe International Airport and accused of theft, a charge he had never been informed about or summoned over. He was later released in the deep of the night.
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> 11. Mr Robert continued to live under fear and received several anonymous threats to his life by phone and has lived in hiding since then. He has issued proceedings challenging his trial, entitled […….] before the Constitutional Court of Uganda and it is yet to be heard.
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> 12. I know that the Ugandan Police have been looking for TVO for a very long time and, as demonstrated by the case of Mr Robert, when they arrest anyone on suspicion of being TVO, the arrested persons are subjected to extreme abuse of their rights by the police, often in violation of the orders of court.
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> 13. I have also observed the use of trumped up charges to intimidate those critical of the person of the President of

> Uganda. For instance, Rtd. Col. Dr. Kizza Besigye, the main rival to the President has been arrested and charged in court over one hundred (100) times of trumped up charges. He has been charged with rape, treason and subjected to public humiliate and beating by the security agents. He spends most of his time traversing the country to answer a litany of charges. He has not been convicted of any of the charges. In describing charges of rape against him, a High Court Judge noted in the case of Uganda v. Kizza Besigye that "the evidence before this court is inadequate even to prove a debt, impotence to deprive of a civil right, ridiculous for convicting of the pettiest offence scandalous if brought forward to support a charge of any grave character, monstrous if to ruin the honour of a man who offered him as a candidate for the highest office of this country". A transcribed copy of the judgement is available at [website address]. I beg to refer to a copy of the said report, upon which, marked with the letters "NO2" I have sworn my name prior to the swearing hereof."

22. Mr Opiyo went on to state in his affidavit that he believes that if the identity of TVO is disclosed he or she will be subjected to similar or worse abuse by the security agents in Uganda, and is likely to suffer torture, cruel and inhumane treatment at the hands of the security agents in a manner or worse than the said Mr Robert has suffered.

23. Having considered the affidavits filed, and the parties' extensive submissions the trial judge concluded that if he was to grant the order sought "it is probable that TVO, whether the real TVO or the fake TVO, will suffer human rights abuses at the hands of the Ugandan authorities, ranging from unlawful detention and mistreatment in custody to torture. This application must be considered in light of that conclusion".

24. Having balanced that consideration against others, such as the fact that TVO placed himself/herself at risk of identification in posting comments about the plaintiff on Facebook, and also that he had already concluded that the postings concerning the plaintiff are defamatory of him, and that without the identity of TVO being revealed, the plaintiff is left without a remedy, the trial judge stated that what was at issue therefore was the balancing of the right of the plaintiff to vindicate his good name on the one hand, and the right to life and bodily integrity of TVO on the other. The trial judge decided he must refuse the application, stating as follows:

> "In [*Foley v. Independent Newspapers* [2005] 1 I.R. 88], Kelly J. clearly recognised that the right to freedom of expression would have to give way to the right to life in the event of a conflict. I think it must be correct to say that a person's right to his good name must take second place to the right to life and bodily integrity of another where the threat to bodily integrity is sufficiently serious, as I believe it to be here. I think the comment of Lord Kerr of the Supreme Court of the United Kingdom in [*Rugby Football Union (respondent) v. Consolidated Information Services Ltd (formerly via Go Go Limited) (in liquidation)* [2012] 1 W.L.R. 3333], which I have cited in the concluding part of para. 31 above is apposite. That passage clearly envisages circumstances where a person seeking a Norwich Pharmacal order may be denied such an order even though it may have the effect of denying the applicant a relief to which he would otherwise be entitled."

25. The trial judge, however, indicated that in the event that the offensive postings complained of by the plaintiff were not taken down by the defendant within fourteen days from the date of his order the plaintiff was entitled to renew his application for Norwich Pharmacal relief.

26. In his notice of appeal, the plaintiff states that the trial judge placed too much weight to the hearsay affidavit evidence of Mr Gilbert and of Mr Opiyo, and on a report of Amnesty International which was referred to on affidavit but not itself adduced in evidence by way of exhibit. He states also that the trial judge placed too little reliance on his own evidence contained in his affidavit replying to that of Mr Gilbert, and in particular the evidence regarding media activists and/or government opponents in Uganda, as well as what he said in respect of the lack of independence of Ugandan courts, as well as his evidence relating to the treatment of a person "surmised to in fact be TVO, namely Robert Shaka". Other grounds are relied upon such as that the trial judge placed too little reliance and weight to the plaintiff's evidence relating to certain criminal legislation in Uganda and in particular the Computer Misuse Act, and powers of arrest thereunder. In that regard, he stated in his third affidavit that there is nothing particularly offensive or unlawful about TVO being marked for arrest by the Ugandan authorities as it is an offence to post offensive material on the internet, and any person who does so is liable to be arrested for such an offence. He urged also that the trial judge placed too much reliance on the judgment of Kelly J. in *Foley*, and that his conclusion as to the extent of the danger posed to TVO was disproportionate in circumstances where it is the actions of TVO himself that have exposed him to defamation proceedings and/or the threat of arrest in Uganda if his identity is disclosed.

27. The plaintiff argues that the evidence adduced by Facebook does not go so far as to indicate that any threats of harm or breach of his/her right to life and/or bodily integrity of TVO have been made. It is pointed out that TVO has known for some time that he is being sought for arrest and prosecution, yet it is clear that nevertheless he continues to post anti-government material on the internet. It is suggested that in such circumstances he should not be protected by the court from having his identity revealed in preference to enabling the plaintiff to know his/her identity so that proceedings for damages can be commenced. In so far as he may be a wanted man, the plaintiff urges that he is only wanted in the sense that it is considered that he has committed offences against Ugandan law, and there can be nothing improper about that if he was identified and arrested for that purpose. It is urged that the evidence to support a real risk of ill-treatment does not go far enough to meet the relevant threshold.

28. Ultimately, the question which this Court must decide is whether the trial judge was entitled to consider the evidence adduced by Facebook in the form of the affidavits of Mr Gilbert and Mr Opiyo to be cogent evidence of a real risk to the safety, bodily integrity and other fundamental rights of TVO in the event that his identity is disclosed on foot of a *Norwich Pharmacal* order, and to prefer that evidence to the evidence adduced by the plaintiff himself in his affidavits, and in the exercise of his discretion to consider that the rights of TVO outweighed the right of the plaintiff to sue him/her for damages, and that the justice of the case therefore required that the application for such an order be refused.

29. The plaintiff has urged that the trial judge attached too much weight to the affidavit evidence of Mr Opiyo, and to the hearsay evidence of Mr Gilbert, and, conversely, too little to the evidence of the plaintiff. He submits that the evidence adduced by Facebook lacks the required level of cogency to meet the threshold required in order to entitle the trial judge to refuse to make the order sought.

30. That a jurisdiction exists to make the type of order sought is not in doubt. But it is a discretionary jurisdiction to be exercised in the light of the facts and circumstances of any particular case . It is not an order made as of right, even where there is prima facie evidence of wrongdoing shown to exist on the part of the person whose identity is sought to be disclosed. There may in any particular case be countervailing facts and circumstances which would warrant a refusal of an order. This is clear from the judgment of Lord Reid in *Norwich Pharmacal Co. and ors v. Commissioner of Customs and Excise* [supra] itself where at p. 478, having explained the principle behind the court's jurisdiction to make such an order in any particular case, he stated also that he "would

therefore hold that the respondents must disclose the information now sought unless there is some consideration of public policy which prevents that".

31. As with the exercise of any discretion by a court, that exercise involves a balancing exercise. The rights of one party must be balanced against the rights of the other party when considering where the correct balance of justice lies. The courts are familiar with this exercise, most frequently perhaps when considering the balance of convenience/justice in granting or refusing an interlocutory injunction.

32. An example to which the parties have referred in the present case is the judgment of Kelly J. (as he then was) in *Foley v. Sunday Newspapers Ltd* [2005] 1 I.R. 88. There an injunction was sought by the plaintiff to prevent the publication by the defendant of an article which, if published, the plaintiff considered would place at real and serious risk his right to life and/or right to bodily integrity. The interlocutory injunction was refused. It was a case where clearly the right to freedom of expression enjoyed by the defendant newspaper was pitted against the undoubted right to life and bodily integrity enjoyed under the Constitution by the plaintiff. One would expect that the former would have to yield to the latter. As stated by Kelly J. at p.101:

> "In this country we have a free press. The right to freedom of expression is provided for in Article 40 of the Constitution and Article 10 of the European Convention on Human Rights. It is an important right and one which the courts must be extremely circumspect about curtailing particularly at the interlocutory stage of a proceeding. Important as it is, however, it cannot equal or be more important than the right to life. *If, therefore, the evidence established a real likelihood that repetition of the material in question would infringe the plaintiff's right to life, the court would have to give effect to such a right*. That appears to be the gist of what was said by Finlay C. J. in *S. P. U. C. v. Grogan* [1989] I.R.743 at p. 765, where, in the context of the facts of that case, he said: –
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> > "With regard to the issue of the balance of convenience, I am satisfied that where an injunction is sought to protect a constitutional right, the only matter which could properly be capable of being weighed in the balance against the granting of such a protection would be another competing constitutional." [Emphasis provided]

33. It is clear from the passage which is underlined above that, as stated later by Kelly J. in *Foley*, evidence must be adduced to support the assertion of the real risk of a breach of the constitutional right relied upon, and that "a formulaic assertion of a claim" is not sufficient. Kelly J. went on to state at p. 102:

> "… I am quite satisfied that, before an injunction of this type should be granted, the plaintiff would have to demonstrate, by proper evidence, a convincing case to bring about a curtailment of the freedom of expression of the press."

34. In a different context – that of surrender of a person to Poland under a European arrest warrant – the same need for cogent evidence to support a real risk of ill treatment upon surrender, as opposed to a mere assertion or possibility of ill treatment, can be found in the judgment of Denham J. (as she then was) in *Minister for Justice v. Rettinger* [2010] 3 I.R. 783. she stated, *inter alia*, that the court should examine "whether there is a real risk, in a rigorous examination" and that "the burden rests upon a respondent … to adduce evidence capable of proving that there are substantial grounds for believing that if he (or she) were returned to the requesting country he or she would be exposed to a real risk of being subjected to treatment contrary to article 3 of the Convention".

35. In my view there is no reason why the court should not require the same standard of proof in relation to an assertion by the plaintiff seeking a *Norwich Pharmacal* order where the court is required to carry out a balancing exercise between competing constitutional rights. Mere assertion of a real risk to life and/or bodily integrity should not without more trump the other party's right, as in this case, of access to justice in order to bring a claim for damages.

36. Clearly, the plaintiff herein has done more than merely assert his own right to claim damages for defamation from the author of the offending posts by TVO. At least a *prima facie* case is made out in that regard. Under normal circumstances, that would be sufficient to entitle the court to make an order Facebook Ireland to disclose to him the identity of the author. Indeed, as normally occurs, Facebook Ireland would not oppose such an order being made. But in the present case, albeit after the order had initially been made, evidence was brought forward as to why in this particular case the order should not be made. That evidence was in the form of Mr Gilbert's affidavit as well as the supporting affidavit of Mr Opiyo, the latter being sworn in reply to the plaintiff's replying affidavit to that of Mr Gilbert.

37. The trial judge was required in these circumstances to consider all the evidence adduced. Where there was a conflict of evidence or a divergence between the evidence adduced by the plaintiff and that adduced by Facebook Ireland, he had to form a view. He was entitled to prefer some of the evidence over other evidence . Where he favoured the evidence adduced by Facebook he nevertheless had to consider whether that evidence met the required threshold of proof, whether it was sufficiently cogent to substantiate on the balance of probabilities a real risk to the life and bodily integrity of TVO should his identity be revealed through proceedings that the plaintiff clearly intends to bring against him.

38. In my view the trial judge has clearly applied the right test to the evidence. He carefully analysed the respective evidence adduced on affidavit. Complaint is made by the plaintiff that the trial judge gave too much weight to the evidence of Mr Opiyo, and too little to that of the plaintiff. But this was a matter for the trial judge. He was entitled to attach significant weight to Mr Opiyo's evidence. The trial judge considered him to be independent. That conclusion was open to him. Mr Opiyo was in a position to respond to what the plaintiff had stated about Mr Robert Shaka, given that he actually acted for him in the matter that the plaintiff had referred to. Equally the trial judge was entitled, if he so chose, to have regard to the reports that were exhibited from reputable bodies such as Human Rights Watch which the courts here frequently have regard to, for instance in asylum cases. It was a matter for the trial judge to be satisfied that the evidence established to the necessary level of cogency and on the balance of probabilities that there was a real risk posed to the life and/or bodily integrity of TVO if his identity was disclosed under a *Norwich Pharmacal* order. He was so satisfied. I am satisfied that there was no error of law in that conclusion.

39. I would not interfere with the trial judge's conclusions. Being so satisfied, it was inevitable that the risk established by the evidence should be considered to outweigh the plaintiff's right to bring proceedings for damages for defamation against TVO. He already has commenced such a claim against Facebook Ireland. If successful against Facebook Ireland, he will be compensated in damages in any event, though I am of course conscious that Facebook Ireland will be defending the claim fully, including on the basis that it is not a publisher of the defamatory material in question.

40. Nevertheless, and for all these reasons I would dismiss the appeal.