

Ref: MOR8291

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered:

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:

CHRISTOPHER McGAUGHEY

Plaintiff/Appellant;

-and-

SUNDAY NEWSPAPERS LIMITED

Defendant/Respondent.

Before: Morgan LCJ, Higgins LJ and Sir John Sheil

MORGAN LCJ

[1] This is an appeal with the leave of McCloskey J from an order made by him remitting the appellant's action to the County Court and thereby reversing the order of Master Ellison who had dismissed the respondent's application to remit the appellant's action.

Background

[2] On 22 August 2008 representatives of the respondent newspaper called at the appellant's home twice and asked him whether the well-known loyalist Johnny Adair was residing there. Both the plaintiff and his house were photographed without his consent. The following day page 7 of the Sunday World displayed photographs of Mr Adair, the appellant and the appellant's home arranged under the title "Adair's Lair?". The photographs of the house and Adair occupied the upper half of the page and a photograph of the plaintiff was positioned beside the text on the lower half of the page. Across the middle of page was written "Was this Johnny's new hideout near the Antrim Coast?". The thrust of the article was that there was a possibility that Adair had been residing at the appellant's home during

some unspecified period in the recent past. The appellant is quoted in the article as denying this.

[3] The appellant's principal claim is for damages for misuse of private information and for breach of his right to respect for his private and family life and his home. He also claims damages for breach of statutory duty pursuant to Section 13(1) of the Data Protection Act 1998. He maintains that he had a reasonable expectation of privacy, that the subject matter of the photographs was private and that the photographs were taken in a private place. The appellant points out that the respondent subscribes to the Press Complaints Commission Code and was at all material times aware that the Code states that it is unacceptable to photograph individuals in a private place without their consent. The Code makes clear that private places are public or private property where there is a reasonable expectation of privacy.

[4] The appellant claims general damages for distress, hurt feelings and loss of dignity and for the infringement of his right to privacy. He further relies on certain pleaded consequences:

- (a) On or about Tuesday 26 August 2008 the appellant was spat on and verbally abused.
- (b) On Tuesday 26 August 2008 or early 27 August 2008 the appellant's house was vandalised.
- (c) In or about August or September 2008 the appellant was shopping when remarks were made about the respondent's article and the appellant being associated with Johnny Adair.
- (d) On Thursday 18 September the appellant's house suffered a graffiti attack.
- (e) On 6 October 2008 the appellant's house suffered a smashed window.
- (f) As a result of these matters the appellant had to move house and requested an alternative property from the Northern Ireland Housing Executive.
- (g) On 1 May 2009 the appellant received a threatening letter containing the words "Who's Adair's Liar?". This matter was reported to the police who are still investigating.

[5] The respondent admits the publication but denies any breach of the appellant's rights. The respondent specifically invokes the defences of public interest and qualified privilege and asserts that its right to freedom of speech under Article 10 ECHR is engaged. The respondent notes the distress allegedly suffered by the appellant but points out that there is no supporting medical evidence.

[6] Subsequent to the decision of McCloskey J on 16 May 2010 the respondent re-published photographs of the appellant, his house and Adair in a full page article entitled "Sunday World Wins Blow for Press Freedom". The article repeated the substance of the original article but its theme was that the remittal of the action had struck a significant blow for press freedom by limiting the amount of damages payable for breach of privacy.

[7] The learned trial judge described the emergence of the cause of action based on misuse of private information and noted its affinity with the long established duty of confidentiality and the more recent protection given by Article 8 ECHR. He then reviewed a number of the cases in which comparatively modest damages were awarded for publications involving the unauthorised disclosure of personal information. He noted that the decision in Mosley v News Group Newspapers [2008] EWHC 1777 in which an award of £60,000 was made was centred on the recording on private property of sexual activity and thus belonged to the extreme of intimate intrusion.

[8] It is not in dispute that the learned judge correctly noted that the onus was on the respondent to establish to the satisfaction of the court that the full amount of the appellant's claim was likely to be within the monetary jurisdiction of the County Court and that the court should accept such version of the facts advanced on behalf of the plaintiff as was entitled to reasonable credence (see Clinton v Chief Constable of the Royal Ulster Constabulary [1999] NI 215 at 221).

[9] Applying those principles he proceeded on the basis that the appellant would ultimately prove on the balance of probabilities all of the key allegations made on his behalf including those relating to unsavoury events and experiences post-dating the offending publication. He noted that the appellant was not to be compensated for any alleged damage to his reputation but that the object of any award of damages was to provide him with fair and reasonable compensation for any proven injury to his feelings and for mental distress. He also accepted that the appellant may be able to recover an element of aggravated damages which in light of Clinton was unlikely to significantly increase the award of compensatory damages. He noted that prior to the offending publication the appellant was unknown to the public at large but concluded that the main element of private information relating to the appellant allegedly misused was where he lived. He concluded that a person's identity and appearance were unlikely to be capable of misuse since in the vast majority of cases these are obvious to or relatively ascertainable by the public at large.

[10] This passage was criticised by the appellant on the basis that although it may be correct that the publication of a celebrity's appearance would be unlikely to be capable of misuse because the celebrity would be well known to the public at large the same is not true for someone who is not so known. We consider, however, that the point being made by the learned judge was that an article in which the appellant was named would fairly readily within the locality in which he lived result in his identification by many members of the local community. That seems to us to be a relatively unexceptional conclusion.

Consideration

[11] It is well established that this court will not interfere with the assessment of damages by a lower court unless it is demonstrated that there has been some error of principle, misapprehension of the facts or the award was wholly erroneous (see Wilson v Gilroy [2009] NICA 48 applying Santos v Eaton Square Garage Ltd [2007] EWCA Civ 225). In this case we consider that this is the principle which we should apply to the assessment made by McCloskey J. We do not understand that any submission is made that the learned judge was guilty of some error of principle and the only submission relating to any misapprehension of the facts concerned the passage with which we dealt at paragraph 10 above. The issue for us is, therefore, whether it can be said that the assessment by the learned judge was wholly erroneous.

[12] It is common case that the court below carefully reviewed the emerging jurisprudence on the appropriate level of damages for misuse of personal information. In Campbell v MGN Limited [2002] EWCA Civ 1373 the Court of Appeal examined the emergence of the modern jurisprudence. It found that the publication of photographs of the plaintiff connecting her to drug rehabilitation had "trashed her as a person" but did not interfere with an award of £2,500 for breach of confidentiality and the Data Protection Act and £1,000 by way of aggravated damages. These figures were left undisturbed in the House of Lords.

[13] In Archer v Williams [2003] EWHC 1670 the issue was the disclosure by an employee in breach of a duty of confidence of private information relating to cosmetic surgery undergone by the plaintiff. Jackson J stated that general damages for injury to feelings should be kept to a modest level and should be proportionate. Such awards should be well below the level of general damages for serious physical or psychiatric injury. An award of £2,500 damages for breach of confidence was made. The appellant draws attention to the fact that the reference was to *serious* physical or psychiatric injury.

[14] In Douglas and Jones v Hello [2005] EWCA Civ 595 the issue concerned private information in the form of photographs relating to the plaintiffs' wedding. The court founded its decision on invasion of privacy and awards of £3,500 were made to each plaintiff for mental distress. These figures were left undisturbed on appeal.

[15] The appellant sought to rely on the levels of awards appropriate in discrimination cases within the workplace. Vento v Chief Constable of West Yorkshire Police [2002] EWCA Civ 1871 suggested that the top band of injury to feelings in such cases should normally be between £15,000 and £25,000 for a lengthy campaign of discriminatory harassment on grounds of sex or race, the middle band lies between £5,000 and £15,000 with the bottom band between £500 and £5,00 for isolated cases. Those figures are now nearly ten years old.

[16] The hurt and distress arising from discriminatory treatment within an employment relationship is in our view aggravated by the fact that an employee is entitled to expect compliance with the obligation of mutual trust and respect within that relationship. The context is, therefore, completely different and explains why the level of damages for hurt feelings will generally be higher in the field of discrimination in employment.

[17] Applause Store Productions Limited and Firsht v Raphael [2008] EWHC 1781 is a helpful case in demonstrating the diversity in awards for libel and misuse of private information. In that case the defendant set up a facebook account and created a link to a group entitled "Has Mathew Firsht lied to you?" and suggested that he had not paid money owed by him. The profile for the site purported to disclose personal details of the second named plaintiff and also referred to his company, the first named plaintiff. The information disclosed related to the second named plaintiff's sexual preferences, his relationship status, his political and religious beliefs and his date of birth. The court awarded £15,000 general damages for libel to the second named plaintiff but noted that damages for misuse of private information have been modest and awarded a figure of £2,000.

[18] The one exception to this trend is the decision of Eady J in Mosley v News Group Newspapers Ltd [2008] EWHC 1777. The complaint in that case related to the recording on private property of sexual activity and the learned judge suggested that such a situation may be at the extremes of intimate intrusion. The conduct of the defendants in contesting the case and persisting with Nazi and concentration camp allegations without success was taken into account in coming to an award of £60,000 for general damages. We consider that this was a quite exceptional case far removed from the background to the case with which we are concerned.

[19] We consider that Applause and Firsht v Raphael is helpful in demonstrating the considerable distinction between the level of general damages in libel and that in misuse of private information cases. If this had been a libel case based on a suggestion that the appellant had offered to provide a safe harbour for Adair on the

basis of the information available to us we would not have accepted a submission that the level of general damages would fall within the present county court limit. We consider, however, that the thrust of the decisions on misuse of private information demonstrates that modest damages are appropriate unless there are particular circumstances not associated with reputation which are properly to be taken into account. We do not consider that this is such a case and we are satisfied the learned judge was correct in his assessment that the appellant's damages can be compensated within the county court limit.

[20] We note that the learned judge gave leave on the basis that this was an action of some novelty and a ruling on the level of damages might give some guidance to facilitate settlement in similar cases. We consider that this judgment indicates the proper approach to the assessment of damages in such cases and do not consider that any issue of complexity arises.

[21] Accordingly we dismiss the appeal.

MR Shields BL

My Lords on account of this being a fairly novel area and this being the first judgement of its kind we would seek that an order for no cost be made

MR Fee QC: We seek our costs but P. L. A

LCJ:

usual Order Costs follow the event

As such I award costs in favour of the respondent but no order to be enforced without further order of the Court.