[IE] High Court refuses orders directing Facebook Ireland to remove allegedly defamatory posts

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The High Court has ruled on the liability of internet intermediaries for defamatory posts by third parties on their platforms in the case of Muwema v Facebook Ireland Ltd. The plaintiff, Fred Muwema, a Ugandan lawyer, took issue with three allegedly "highly offensive and defamatory publications" posted on a Facebook page in March 2016. The publications were posted by a person identified only by the pseudonym 'Tom Voltaire Okwalinga' ("TVO"). Justice Donald Binchy in the High Court granted the order for disclosure of the identity and location of the person(s) operating the impugned page. However, he refused the injunctions sought under s. 33 of the Defamation Act 2009 directing Facebook to "takedown" the material already posted and to prevent its further publication, on the basis that Facebook Ireland Ltd had "available to it a statutory defence" of "innocent publication" provided for under s. 27(2)(c) of the 2009 Act.

The plaintiff had written to Facebook seeking the removal of the "Reported Content" from its site and also sought disclosure of the IP address of TVO. Following Facebook's refusal of the plaintiff's request, the plaintiff sought a number of orders in the High Court. This included an order directing Facebook to identify the person or persons behind the pseudonymous account and their location ("Norwich Pharmacal order"). The plaintiff also sought injunctions pursuant to s. 33 of the 2009 Act, requiring Facebook to "takedown" the material already posted on the defendant's website platform, and to prevent TVO and others from re-posting the same material.

S. 33 of the 2009 Act provides that the High Court may make an order prohibiting the publication or further publication of the statement if "(a) the statement is defamatory, and (b) the defendant has no defence to the action that is reasonably likely to succeed" (for a recent judgment, see IRIS 2016-4/18). Justice Binchy accepted that the statements made against the plaintiff were prima facie defamatory for the purposes of paragraph (a), but stated that Facebook could rely on two defences for the purposes of paragraph (b).

The first defence is provided by s. 27 of the 2009 Act, which provides a defence of innocent publication, where "a person shall not be deemed to be the author, editor or publisher of statement to which an action relates if, in relation to any electronic medium on which the statement is recorded or stored, he or she was

responsible for the processing, copying, distribution or selling only of the electronic medium or was responsible for the operation or provision only of any equipment system or service by means of which the statement would be capable of being retrieved, copied distributed or made available." According to Justice Binchy, this appeared "to capture the circumstances giving rise to the proceedings." Justice Binchy acknowledged that there were articles "elsewhere on the internet" concerning Muwema, including articles about him "concerning the very matters concerned in these proceedings." Justice Binchy accepted that those articles arose from interviews that Muwema himself gave "in order to deny the very allegations" with which the proceedings concerned. Justice Binchy stated that Muwema was "perfectly entitled to give such interviews to defend his reputation but having chosen to do so, he himself became "a participant in the publication of the allegations, so that anybody conducting the most rudimentary Google search... will be presented with articles which repeat the same allegations." Justice Binchy stated that there was "significant merit" in the argument made by the counsel for Facebook that "the genie was out of the bottle" and "injunctive relief would be in vain."

Justice Binchy stated that the jurisdiction of the Court to make the orders (save for the "Norwich Pharmacal order") is "subject to the limitations prescribed by parliament in s. 33 of the 2009 Act. He stated that 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 Justice Binchy's view, this applies as much to a "takedown" order as it does to a prior restraint order. Moreover, the judge held the application "should also be refused because it would service no useful purpose, having regarding to the availability of publications containing the same and other damaging allegations" about Muwema "elsewhere on the internet".

Finally, Justice Binchy held that Regulations 15-18 of the E-Commerce Directive 200/31/EC, as transposed into Irish law by European Communities (Directive 2000/31/EC) Regulations (SI No 68 of 2003), also provided Facebook with "another line of defence", namely the "hosting defence", which grants intermediaries an exemption from liability for only hosting.

Muwema v Facebook Ireland Ltd [2016] IEHC 519

http://www.courts.ie/Judgments.nsf/09859e7a3f34669680256ef3004a27de/4dfdcbb6d27a627780258034005368 67?OpenDocument