Neutral Citation Number: [2023] EWHC 231 (KB)

Case No: QB-2021-002673

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/02/2023

Before :

MASTER DAVISON

- -

Between :

JAMES WILSON	**Claimant**
- and -	
(1) JAMES MENDELSOHN	
~~**(2) PETER NEWBON**~~	
(3) EDWARD CANTOR	**Defendants**

- -
- -

Mr Gervase de Wilde (instructed by **Direct Access**) for the **Claimant**
Ms Beth Grossman (instructed respectively by **3D Solicitors** and **Patron Law**) for the **First and Third Defendants**

Hearing dates: 17th January 2023

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Approved Judgment

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MASTER DAVISON

Master Davison :

1. I begin with a narrative which is substantially taken, with gratitude, from the judgment of Mr Richard Spearman KC dated 30 March 2022 in which he tried a preliminary issue as to meaning. (The neutral citation of the judgment is [2022] EWHC 715 (QB).)

2. The claimant is a part-time law lecturer at Sheffield Hallam university and a non-practising solicitor. He operates the Twitter account @per_incuriam. The first defendant is a law lecturer at the University of the West of England. Until his untimely death, the second defendant was a lecturer in the Humanities Department of Northumbria university. The third defendant is a former restaurateur. Each of the defendants operates (or operated) a Twitter account: @jmendelsohn77; @petenewbon; @eddycantor. The defendants followed each other on Twitter. The first defendant and the claimant previously knew each other personally through working together at the University of Huddersfield.

3. This is a claim for libel, misuse of private information, harassment, and breach of data rights in large part concerning a Facebook post which was originally published on or about 3 December 2018 ("the Facebook Post"). The author and original publisher of the Facebook Post was the mother of a child at a primary school. The claimant was the father of a child at the same school. It came into being following interaction between her and the claimant outside the school. The identity of the mother and the name of the primary school are irrelevant to the issues which arise in these proceedings. I have therefore anonymised the mother as “Ms K” and I have omitted the name of the school.

4. The Facebook Post comprised a photograph of the claimant, apparently taken by Ms K, together with the following text, which appeared underneath that photograph:

> "Does anyone have any idea who this weirdo is, think he is from the Birkby area in Huddersfield, I was dropping my daughter off at … Junior school this morning, he has approached me by banging very hard on my car window asking me to turn my car engine off, I replied i am in the drop off zone its raining heavily the windscreen is getting steamed up, i was literally park up for a few minutes, this weirdo then had the nerve to take pictures of my car, of me, and my Daughter, he was very rude and i took a picture of him so that i could inform other parents and the school that this freak takes kids pictures. This is harassment he has my Daughters picture in his phone, I am fuming, I want to find out who he is, please share and help me find out who he is. Thanks."

5. The photograph which accompanied these words was taken in daylight and shows a man (the claimant) facing directly at the camera. He is wearing a short double-breasted navy blue coat which is fully buttoned up, pointing his right arm and hand at roughly shoulder height towards his right hand side, and holding the handles of a shopping bag or small item of luggage in his left hand. The expression on his face seems in keeping with the gesture and suggests that he is making a point or possibly rebuking someone. Around his neck he has what appears at first glance to be a scarf, or the collar of some inner garment, which is predominantly light grey or white in colour, but which can be seen on closer inspection to be a supporting neck brace or

collar. Behind him are a wall, a lamppost or similar post bearing what looks like a camera sign, and several trees.

6. Some 20 months later, on or about 12 August 2020 and 13 August 2020, the Facebook Post was republished as part of a Twitter thread to which the claimant had become a party. The thread concerned antisemitism, the state of Israel and criticism of Israel by the left and it began with the second defendant "quote-tweeting" a tweet on this topic. The claimant entered the conversation with the observation: "You are of course free to engage in a robust defence of the conduct of the Israeli state. But you have to accept that others can engage in robust criticism of the Israeli state?". He linked an article about Israel in the London Review of Books by Sir Stephen Sedley. The claimant's participation in the conversation was not welcomed and there followed a Twitter "spat" in which the other participants (including the second defendant) castigated his stance and his reference to and reliance on the LRB article (which he repeatedly re-posted). There came a time, about an hour into the conversation, when the claimant pointed out that Sir Stephen Sedley was Jewish and had experienced antisemitism and was therefore entitled to define it. He twice suggested that this was a heavy blow to the position adopted by the second defendant. It was at this point, or shortly afterwards, that the second defendant posted the screenshot of Ms K's Facebook Post ("the screenshot") with the caption or message: "I see yer Da is doing 'community watch' again". He went on to post it a further three times with the messages: "'this freak takes pictures of kids' apparently"; "Indeed. Quite so. As when this mother described the man who allegedly photographed her children as a 'freak' – for instance. One much (sic) uphold her right to free expression in what sounds like a situation of harassment"; and "Ranting at people is so unattractive, don't you think, eh?"

7. In addition, as part of a separate thread which began on 13 August 2020 with the observation: "You do appear to follow Jews around the internet with the sole purpose of poking them", the third defendant, on 15 August, published a Tweet comprising a screenshot of the Facebook Post together with the following message: "Define weird". This Tweet remained live until around 19 April 2021.

8. The second defendant came to have the screenshot of the Facebook Post because it had been sent to him by the first defendant as part of a conversation conducted between them by direct message on Twitter. The conversation was in July 2020. It was about the claimant and was couched in derogatory language. It included the first defendant telling the second defendant about a workplace complaint that had been made against the claimant when they (the claimant and the first defendant) were working in the same department. The Facebook Post itself had been taken down by Ms K on about 4 December 2018 after she was asked to delete it by an officer from West Yorkshire Police. But in the meantime it had come to the first defendant's attention and he had made a screenshot of it. He provided the screenshot to the second defendant with the intention (as the claimant alleges) of the second defendant using it as ammunition against the claimant.

9. The Claim Form was issued on 6 July 2021. Particulars of Claim were served with the Claim Form. On 22 November 2021, and by consent, I directed the trial of the following preliminary issues: (a) the natural and ordinary meaning(s) of the Facebook Post and each of the Tweets complained of in the claimant's claim for libel; and (b) in respect of each publication complained of (i) whether each meaning found is

defamatory of the claimant at common law; (ii) whether it made a statement of fact or was or included an expression of opinion; and (iii) insofar as it contained an expression of opinion, whether, in general or specific terms, the basis of the opinion was indicated. I further directed that, by 4.30pm on 20 December 2021, each defendant should file and serve a written notice of his case on each of the Preliminary Issues. The defendants duly complied with that direction.

10. On 15 January 2022, the second defendant sadly died. On his death, the claimant's cause of action in defamation against him abated, although the claimant's other causes of action against him survived against his estate. However, the claimant's pleaded case includes the contentions that the first defendant (a) is liable "as the 'author' of the Facebook Post for the purposes of section 10 of the Defamation Act 2013" in respect of each of the second defendant's Tweets identified above and also in respect of the third defendant's Tweet identified above and (b) is liable "in damages or compensation for the … reasonably foreseeable … republications" of each of those Tweets (see paragraphs 44.3 and 44.4 of the Particulars of Claim) and/or as an accessory who assisted the tortious conduct (see paragraph 44.5).

11. In these circumstances, by order dated 14 February 2022, Nicklin J directed (a) that the hearing of the trial of the Preliminary Issues should go ahead to determine the Preliminary Issues in relation to the claim against the first and third defendants, (b) that the remaining parts of the claimant's claim (being the non-defamation claims) against the second defendant should be stayed pending either an application to substitute personal representatives of the second defendant's estate or the filing of a notice of discontinuance, and (c) that the status of the claims against the second defendant's estate should be reviewed at the aforementioned hearing.

12. Thereafter, on 15 March 2022, the claimant and the second defendant's widow, acting in her capacity as executrix of the estate of the second defendant, entered into a Settlement Agreement. The main terms of that Agreement are (a) the Estate agrees to make a payment "in reflection of the claimant's legal costs of dealing with the consequences of [the second defendant's] death and the complexity of resolving any matters as to the involvement of the Estate"; (b) the Estate will conduct a disclosure exercise with a view to providing the basis for an order for Third Party Disclosure to be sought against the Estate; and (c) in consideration for the foregoing, subject to certain caveats, the claimant will not apply to join the Estate as a party to the present claim.

13. I will hereafter refer to the second defendant as “Dr Newbon”. “The defendants” means the first and third defendants.

Meaning

14. Mr Spearman KC’s finding on meaning was as follows:

> “47. In my view, so far as concerns the Facebook Post, this is not a complex case. I find that:
>
> (1) The natural and ordinary meaning of the Facebook Post is:

> "The Claimant objected to a mother leaving her car engine running while dropping her daughter off at junior school, banged on her car window, was very rude to her, and took pictures of her, her car, and her daughter, which he retained on his phone. That conduct was unwarranted and worrying, was the conduct of a weirdo and a freak, and amounted to harassment."
>
> (2) The statement contained in the first sentence is a statement of fact.
>
> (3) The statement contained in the second sentence is a statement of opinion.
>
> (4) The basis of that statement of opinion is clearly indicated, and consists of the sequence of events which is described in that statement of fact.
>
> (5) Both statements are defamatory at common law."

15. Following the preliminary issue on meaning, the first and third defendants filed Defences which sought to justify the defamatory statements on the basis that so far as they were statements of fact they were true or substantially true and so far as they were opinion an honest person could have held that opinion based upon facts which existed at that time.

Application to strike out

16. On 27 July 2022 the defendants applied to strike out / grant reverse summary judgment in their favour on the majority, but not all, of the claims made by the claimant. I gratefully adopt the summary of the claims and the scope of the application from Ms Grossman's skeleton argument.

17. In respect of the first defendant:

> (1) A claim in harassment contrary to the Protection from Harassment Act 1997 arising out of alleged accessory liability for Dr Newbon's publication of the Facebook Post (which is part of the Application) and the workplace complaint (which is not);
>
> (2) A claim in misuse of private information for the publication of the Facebook Post to Dr Newbon and, on the basis of accessory liability or on principles arising out of contended foreseeable damage, of the publication of the Facebook Post by Dr Newbon and the third defendant on Twitter (part of this Application);
>
> (3) A claim in libel arising out of Dr Newbon's publication of the Facebook Post by Dr Newbon and the third defendant on Twitter (alleged as accessory liability/pursuant to s10 Defamation Act 2013/for foreseeable damage) (again, part of this Application) (as regards Dr Newbon, this claim abated);
>
> (4) Claims in data protection (on various grounds) arising out of the Facebook Post (not part of this Application); and
>
> (5) In data protection and misuse of private information out of the publication to (and then by) Dr Newbon of the Workplace Complaint (not the subject of this Application);

18. In respect of Dr Newbon:

(6) Claims in misuse of private information, pursuant to the GDPR, in libel and in harassment for publication of the Workplace Complaint on Twitter (these claims have now been discontinued/abated); and

(7) Claims in misuse of private information, pursuant to the GDPR, in libel and in harassment for publication of the Facebook Post on Twitter (these claims have now been discontinued/abated);

19. In respect of the third defendant:

(8) Claims in harassment, misuse of private information, libel and data protection arising out of his publication of the Facebook Post on Twitter (all part of the Application).

The grounds for the application

20. In the interests of economy, I will not recite the very familiar CPR rules and principles of law governing applications to strike out / for summary judgment and I will give no more than the briefest summary of the grounds relied upon by the defendants. I will then proceed directly to a discussion of and my conclusions on each limb of the application. The submissions of counsel appear sufficiently from that discussion.

i) **Harassment** The defendants submitted that the technical requirements of the 1997 Act were not and could not be made out; that there was no real prospect of the claimant demonstrating that the tweets were sufficiently oppressive and unacceptable as to amount to harassment; and that the claim was a *Jameel* abuse.

ii) **Libel** The defendants submitted that the threshold of "serious harm" could not be met and that the libel claim was a *Jameel* abuse.

iii) **GPDR** The third defendant submitted that his tweet was part of his personal or household activities and therefore not within the scope of the GPDR.

iv) **Misuse of private information** The defendants submitted that the screenshot did not contain material in which the claimant could have had a reasonable expectation of privacy and that the MPI claim was a *Jameel* abuse.

Harassment

21. The principles governing harassment claims were summarised by Nicklin J at paragraph 44 of his judgment in *Hayden v Dickinson* [2020] EWHC 3291 (QB). It is a long and detailed summary, which is appended to this judgment.

22. I deal first with the claim in harassment against the first defendant.

23. The prohibition of harassment in section 1 of the 1997 says that a person "must not pursue a course of conduct which amounts to harassment of another". In the case of a claim of harassment made by a single person, the requirement set out in section 7(3)

(a) is for "conduct on at least two occasions in relation to that person". Ms Grossman submitted that it was "doubtful whether each publication could be said to be a distinct act" and, further, that the short timeframe and the fact that the publications were all in the course of a single conversation meant that the conduct lacked the quality of *persistence* which the authorities required; (see (i) of Nicklin J's summary ("the summary")). The difficulty with the submission is that there were eight tweets, all of which either included or referred to the screenshot. Although the tweets were part of one conversation, the duration of the conversation during which the offending tweets were published was several hours and the whole conversation spanned two separate days. I agree with Mr de Wilde that there is an analogy with the kind of harassment which takes place when a person repeatedly accosts and intimidates another in a public place with unwanted and oppressive speech. Both are, in my view, at least arguably "courses of conduct" within the meaning of the Act. The fact that there were eight tweets seems to satisfy the requirement of *persistent* conduct.

~~24.~~ I also regard the tweets as having, at least arguably, "crossed the boundary between that which is unattractive, even unreasonable, and conduct which is oppressive and unacceptable"; (see (ii) of the summary). The parties agree that the single meaning rule does not apply to the harassment claim and that the court can consider the range of reasonably available meanings – which would include that the claimant was a "weirdo" who posed a risk to children. That this was an available meaning is borne out by the fact that in the wake of the original Facebook Post the claimant was approached by an unknown male who accused him in a threatening tone of "being the weirdo who hung around the school taking photos of children". To repeatedly confront the claimant with tweets of that nature (or even tweets bearing the single defamatory meaning found by the judge) seems to me at least arguably to have crossed the boundary into conduct which was "oppressive and unacceptable". I have borne in mind that the test is an objective one; (see (iv) of the summary); it is not based upon the claimant's own subjective response to the material. I have also not overlooked the need to "pay due regard to the importance of free expression and the need for any restrictions upon the [Article 10] right to be necessary, proportionate and established convincingly"; (see (vii) & (viii) of the summary), nor the need to consider the "context and manner in which the information is published"; ((ix) of the summary). I agree with Ms Grossman that after the claimant's initial (and obviously unwelcome) participation in the Twitter conversation the tweets directed at him might be characterised as part of a "heated public debate". The abuse directed at him at that point in the conversation might have been no more than merely pungent and offensive. But, as Mr de Wilde submitted, it is clear that when the screenshot of the Facebook Post was posted the conversation rapidly took on a different and altogether more sinister tone and character.

~~25.~~ Neither party laid much emphasis on the requirement that the conduct "must be of an order which would sustain criminal liability under section 2"; (see (ii) of the summary). This requirement emanates from the case of *Majrowski v Guy's and St Thomas's NHS Trust* [2007] 1 AC 224; see also *Conn v The Council of the City of Sunderland* [2007] EWCA Civ 1492. The Court of Appeal in *Conn* said that the "touchstone for recognizing what is not harassment for the purposes of sections 1 and 3 will be whether the conduct is of such gravity as to justify the sanctions of the criminal law"; see judgment of Gage LJ at paragraph 12. The requirement adds a level of gravity and seriousness to the phrase "oppressive and unacceptable", though

its precise parameters are not easily defined.[1] To the extent that a decision is required (because Ms Grossman did not specifically take this point) the conduct in this case appears to me, at least arguably, to meet that threshold.

~~26.~~ Based upon some remarks made by Nicklin J at paragraph 73 of *Hayden*, Ms Grossman submitted that the claimant's primary remedy in the face of the harassment was "self-help", i.e. withdrawal. It is true that the claimant could have removed himself from the conversation after the first posting of the screenshot and thereby avoided harassment / further harassment. But this would not have undone the harm that he alleges he stood to suffer. He chose to resort to other means of self-help – essentially by making formal complaints and, in the case of the third defendant, asking him to take down the tweet (Dr Newbon having already done so voluntarily). It is not very attractive for the defendants, who put the claimant in this position, to say that he should have exercised their suggested form of self-help or that he has been insufficiently robust and resilient. The first defendant and Dr Newbon themselves acknowledged in private conversation on Twitter that to allege publicly that the claimant "took photos of other people's children" was not something they would wish on themselves: ("Tbf to him, I wouldn't love it").

~~27.~~ For these reasons I consider that the claimant has a harassment claim against the first defendant which has a real prospect of success.

~~28.~~ The claim against the third defendant can be dealt with more shortly. In the case of the third defendant, he tweeted the screenshot with the text "Define weird" on one occasion only. Ms Grossman submitted that there was therefore no "course of conduct". That does indeed seem to me to be a knockdown blow to the claim against the third defendant in harassment. Although the third defendant published further tweets, none of these, it seems to me, could be characterised as going beyond the merely offensive. They were designed to goad and taunt the claimant. Some of them referred to the tweet of the screenshot, but, unlike Dr Newbon's tweets, they did not re-post it. In short, none of the further tweets could be called a second occasion of actual harassment. Mr de Wilde said that the claim was saved by the fact that the offending tweet remained live for nine months before it was taken down. During that time, although it would have moved down the third defendant's Twitter feed, it remained accessible to the public. Mr de Wilde referred me to *Law Society v Kordowski* [2011] EWHC 3185 (QB) in support of the proposition that publication on a website was ongoing and that distress and alarm would accordingly be continuous; see paragraphs 61 and 64 (which are, in fact, summarising the claimant's counsel's submissions rather than part of the judge's conclusions or reasoning). But *Kordowski* was a case on very different facts. The website was the notorious "Solicitors from Hell" website and it was a reasonable inference that the clients of the solicitors concerned, or others, would refer them to the site on more than one occasion; see paragraph 67. (The requirement for "at least two occasions" applied because although the action was a representative action brought by the Law Society the entries on the website each concerned an individual solicitor or firm.) It is, perhaps, doubtful whether a reference to the site by a third party would amount to "conduct" by the

[1] Others have noted the slightly uneasy role of the criminal threshold in harassment cases: "… the relationship between the gravity of the crime and its tortious equivalent is not a precise one since a tort action may lie even though the facts would not persuade a prosecuting authority to pursue the case criminally"; see Clerk & Lindsell on Torts 23rd Ed at 14-21 and the case of *Veakins v Kier Islington Ltd* [2009] EWCA Civ 1288.

defendant. But that is by the by because in this case there is, anyway, no such inference to be drawn.

29. It follows that there are no reasonable grounds and no real prospect of success for this limb of the claim against the third defendant, which therefore falls to be dismissed.

Libel

30. The focus of the defendants' attack on the libel claim was the requirement that the claimant prove "that the publication complained of has caused, or is likely to cause, serious harm to [his] reputation"; see section 1(1) of the Defamation Act 2013. Ms Grossman sought to demonstrate that the claimant would not be able to meet this burden because (in summary) the defamatory meaning as found by the judge was, in the scale of things, not very serious; he had showed no actual historic impact and the wider circumstances of publication militated against any serious harm being caused.

31. It would be relatively unusual summarily to dismiss a claim on this ground in circumstances where there had been a trial on meaning, a meaning defamatory at common law had been found, there was a full and apparently credible plea of serious harm (see paragraph 34 of the Amended Particulars of Claim) and disclosure – including disclosure of the analytics demonstrating the readership of the tweets – had not yet taken place. For the reasons that follow, it would be inappropriate to do so in this case.

32. First, the defamatory meaning. Although it will, of course, not bind another judge, the defamatory meaning amounts, in my view, to a finding that what was alleged was quasi-criminal conduct – that conduct being harassment of Ms K and her daughter. The allegation that the claimant took pictures of them (a statement of fact) and that this was the conduct of "a weirdo and a freak" (a statement of opinion) added a more troubling aspect to the tweet. I would tend to agree with the plea at paragraph 34.1 of the Amended Particulars of Claim that serious reputational harm is at least a likely consequence of such publication. That plea finds support from the facts – pleaded in the Particulars and described in the claimant's witness statement – that in the immediate aftermath of the Facebook Post he was threatened or harassed on his way to and from the school. On one of those occasions (and as I have already mentioned) there was explicit reference to him hanging around the school taking photos of children.

33. It is true that, as Ms Grossman pointed out, the tweets 18 months later on Twitter had a different context. A reader coming upon those tweets would see that they were essentially retaliatory, intended to convey the point that the claimant was a busybody who did not just "jump [in] on other people's threads" but also sought to police (though Dr Newbon put it as "harassing") mothers who left their car engines running on the school run. Nevertheless, as already observed above, when the screenshot was posted, the character of the Twitter spat changed. I do not think that the context served to lessen, or much lessen, the gravity of what was alleged. And I think that there is still a respectable, inferential case of serious harm.

34. Equally pertinently, the extent of publication is relevant to "serious harm" – the relevant metric being the number of "impressions" on Twitter. There is little evidence about this at the present time and there are a number of options regarding the

obtaining of it. These are set out in paragraph 70 of the claimant's witness statement. Dr Newbon had around 2,500 followers, the third defendant around 180. From that alone it is reasonable to infer substantial publication. I presently see no reason to doubt the claimant's evidence that, higher education in the north of England being a relatively small world, "it is very likely that I will identify followers of the second defendant who know me". This is, as it seems to me, a classic case to bear in mind the sixth of the *Easyair* principles, namely that "the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that *a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge* and so affect the outcome of the case". I must also bear in mind the well-known and acknowledged fact that a claimant in a libel claim "may find it difficult, if not impossible, to identify or produce evidence from publishees in whose eyes their reputation has been damaged" and also that harm can be done to the reputation of a claimant of whom a publishee was, at the relevant time, ignorant; see generally Duncan & Neill on Defamation, 5th Ed at 4.16.

35. In respect of the claim against the first defendant only it was submitted that he could have no liability as the "author" of Dr Newbon's tweets within the meaning of section 1 of the Defamation Act 2013. Whether he was an "author" or an "editor" by virtue of having made the screenshot of Ms K's Facebook post and sent it to Dr Newbon is a question I decline to decide on this application. If I decided it, it would make no difference to the outcome because the claimant puts his case against the first defendant on two other bases, which are not challenged. If I found the point unarguable, it would, it is true, remove the issue from the scope of the trial leading to a very minor saving in costs and/or time. But (a) my first impression is that it is arguable and (b) this point, upon which there is no authority and which is of potentially wide-reaching importance, is better left for trial, where it can be more fully debated. That is perhaps especially so where the claimant's pleaded case is that the first defendant was the "author" but, for the first time at the hearing, Mr de Wilde said he was also the "editor". That was a new way of putting the claim, on which Ms Grossman had only a limited opportunity to respond.

The claim against the third defendant under the GPDR

36. The claim is for compensation pursuant to Article 82 of the General Data Protection Regulation (EU) 2016/679 for the unlawful processing of the claimant's personal data in the form of the Facebook Post. The first defendant does not seek to strike out this claim. But the third defendant does on the basis of the words I have italicised in Recital 18:

> "This Regulation does not apply to the processing of personal data by a natural person *in the course of a purely personal or household activity and thus with no connection to a professional or commercial activity. Personal or household activities could include correspondence and the holding of addresses, or social networking and online activity undertaken within the context of such activities*. However, this Regulation applies to controllers or processors which provide the means for processing personal data for such personal or household activities."

37. This Recital somewhat expands that in the GDPR's statutory predecessor (in which it was phrased as an exception). It was submitted to embrace the third defendant's

Twitter account "which was purely for the pursuit of his personal interests" making a claim against him untenable.

~~38.~~ The third defendant's Twitter biography describes him thus: "Used to be a lot of things. Now just raging against anti Semitism, populism and the silence of clever people". This, together with what little other evidence I have, indicates that these are indeed the scope and aims of his online activity. It is at least arguable that data processing of this type would be within the scope of GDPR. The offending tweet was an attack by the third defendant on someone who was not part of his household or of a circle of friends on Facebook, but, rather, a stranger with whom he had political differences. The third defendant has filed no evidence to support the proposition that this was all a "purely personal or household activity" and I agree with Mr de Wilde that this is an inherently implausible stance for him to take. Although it concerned the predecessor statutory regime, the words of the ECJ in *Buivids v Datsu valsts inspekcija* (ECJ) C-345/17 at paragraph 43 still have resonance:

> "… since Mr Buivids published the video in question on a video website on which users can send, watch and share videos, without restricting access to that video, thereby permitting access to personal data to an indefinite number of people, the processing of personal data at issue does not come within the context of purely personal or household activities: see, by analogy *Lindqvist's* case [2004] QB 1014, para 47; *Tietosuojavaltuutettu v Satakunnan Markkinapörssi Oy* (Case C-73/07) [2008] ECR I-9831; [2010] All ER (EC) 213 , para 44; *Ryneš's* case [2015] 1 WLR 2607 , paras 31 and 33 and the *Jehovan todistajat* case [2019] 4 WLR 1, para 42."

~~39.~~ This is another instance where the sixth of the *Easyair* principles is engaged and this is plainly a matter for trial – not strike out or summary judgment.

Misuse of private information

~~40.~~ The issue is whether the screenshot of the Facebook Post which Dr Newbon tweeted contained information in which the claimant had a reasonable expectation of privacy. Ms Grossman's description of it being a picture of the claimant in a public place together with an account of a dispute which had just taken place between him and Ms K is accurate. But there are some added features:

~~i)~~ The actions of the claimant which the Facebook Post described amounted to the quasi-criminal activity of him harassing Ms K and her daughter.

~~ii)~~ The location was outside the school which the claimant's daughter attended. The Facebook Post did not say this (because Ms K made clear that she did not know who the claimant was and there is no sign in the photograph of the claimant's daughter). But that does not change the fact that the claimant was photographed outside his daughter's school having just done the school run. The expression "yer Da" (part of the caption to the first tweet of the screenshot) suggested, correctly, that he was a parent.

~~iii)~~ It is the claimant's case that the first defendant had been alerted to the post by a former student who had emailed him "to see if he could get in touch with me [the claimant] to let me know about it". The clear inference is that the

student's objective was to protect the claimant from the damaging consequences of the Facebook Post and its further dissemination. If so, the first defendant's action in sending it to Dr Newbon in the knowledge (it must presently be assumed) that he might publish it, was to do the very thing which the student was trying by her actions to avoid.

41. In these circumstances, I am not persuaded that the claimant has no "real prospect" of demonstrating a reasonable expectation of privacy. The authorities suggest that information or purported information concerning past criminal behaviour gives rise to that expectation. The judgment of the Supreme Court in *ZXC v Bloomberg* LP [2022] UKSC 5 at paragraph 52 says that it "normally, but not invariably" would do so. It seems to me at least arguable that this would extend to quasi-criminal behaviour. The location of the photograph is relevant. I agree with Mr de Wilde that a parent would not normally expect to be photographed on the school run, even after dropping off their child. Lastly, it may well be relevant that the circumstances in which the first defendant came to learn of the Facebook Post impressed upon him that the information was intended to protect the claimant's interests, not to harm them.

***Jameel* abuse**

42. Ms Grossman relied upon this ground to strike out all the claims set out above, save for the GPDR claim against the third defendant, and it is convenient for me to deal with them compendiously.

43. Whilst the *Jameel* jurisdiction is a useful and salutary one, it would be fair to say that the experience of the judges of the Media and Communications List is that a properly pleaded defamation claim is rarely struck out on this ground. There are two central strands to *Jameel* abuse which are (1) the absence of any "real or substantial wrong" and (2) the lack of "a tangible or legitimate benefit proportionate to the likely costs and use of court procedures"; see the very helpful summary in *Tinkler v Ferguson* [2020] EWHC 1467 (QB) at [46]-[49]. The first strand has been largely supplanted by the introduction (in defamation claims at least) of the requirement to demonstrate serious harm. The second strand is recognised to be subject to the qualification that the court's case and costs management powers should usually be able to fashion a procedure by which the claim can be adjudicated upon in a proportionate way and that striking out a claim is very much a last resort. Another way of saying substantially the same thing is to observe that the second strand of *Jameel* abuse is subordinate to the first because it is hard to envisage circumstances where the court would be unable to resolve a "real or substantial wrong" in a proportionate manner. To this I would add the further observation that, notwithstanding the appeal to proportionality, court resources etc, applications by defendants to strike out for *Jameel* abuse are manifestly self-serving. Not only do the factors I have mentioned make *Jameel* applications an uphill battle from a purely legal standpoint, but, to be added to that, is the suspicion that such applications are often tactical.

44. This case is far removed from the facts of the *Jameel* case itself; see *Jameel (Yousef) v Dow Jones & Co Inc* [2005] EWCA Civ 75. In *Jameel*, publication was "minimal", the damage to the claimant's reputation was "insignificant" and there was no basis for an injunction to prevent future publication. None of those things can be said in this claim. Further, Ms Grossman accepted the principle (given emphasis by Nicklin J in *Tinkler*) that "in defamation claims, an important factor in the assessment of the value

of what is sought to be obtained by the proceedings is usually the element of vindication". In this case, the defendants have advanced defences of truth and honest opinion in very trenchant terms. The parties have also traded a long correspondence, not always phrased in temperate language. There is, in my view, something of an analogy with the case of *Mardas v New York Times Co* [2008] EWHC 3135 (QB) where the alleged libel included the accusation that the claimant was a "charlatan". This was a factor which Eady J took into account in reinstating an action struck out by Master Yoxall. These defendants seek to defend the opinion that the claimant is a weirdo, a freak and a harasser. I do not think that it can be said that in such circumstances this is a case where the claimant can gain no vindication worth having. Finally, there is the wider public interest in the "fair resolution of legal disputes"; see *Tinkler* at paragraph 48. This interest is "inherent in the value of any legitimate claim", which description would include this claim.

45. Similar considerations apply to the claim in harassment and the MPI claim. So far as these were concerned, the additional submission was made that the claimant had not sought interim injunctive relief or a restricted reporting order or ciphers. (Interim relief would not have been available to the claimant in the libel claim because of the rule in *Bonnard v Perryman* [1891] 2 Ch 269.) There is an obvious tension between, on the one hand, suggesting that the claimant would be in a stronger position if he had applied for an interim injunction and, on the other, suggesting that the costs of the claim will be disproportionate to any likely benefit. The claimant is a litigant in person – albeit a qualified lawyer who has taken advantage of advice and representation from specialist counsel – and someone of only ordinary means. He was entitled to take a view on the matters Ms Grossman complains of. An application for an interim injunction would have involved risk and expense. Anonymity / cipher orders require justification and are not granted automatically. Because at the date of commencement of proceedings there had already been more much more than minimal publication, anonymity would have conferred a limited benefit. Although it is true that these steps would have increased the claimant's chances of obtaining a permanent injunction, the diminished prospect of that remedy cannot be said to render the claim a *Jameel* abuse.

46. It seems to me that the above claims, whether taken collectively or individually, cannot be said to be a *Jameel* abuse and I decline to strike them out on that basis.

47. There is a short postscript. Ms Grossman also submitted that it was undesirable to have a claim comprising multiple causes of action which were merely different ways of saying the same thing. As a general proposition, I agree. And there might be cases where causes of action could on this ground be removed under the *Jameel* principle or (more likely) as part of general case management. But this is a power which would be exercised very sparingly. Litigants are *prima facie* entitled to deploy the causes of action at their disposal and there are often legitimate reasons to do so. To give just one example pertinent to this case, the claimant might lose his libel claim if the defendants proved the truth of the publications; but truth would not be an answer (or certainly not a complete answer) to the claims in harassment or misuse of private information. This is not a case for the sort of "pruning" which Ms Grossman advocated.

Conclusion

48. The application fails, save to the very limited extent set out above.

Appendix – *Hayden v Dickenson* [2020] EWHC 3291 (QB) [44] (Per Nicklin J)

i) Harassment is an ordinary English word with a well understood meaning: it is a persistent and deliberate course of unacceptable and oppressive conduct, targeted at another person, which is calculated to and does cause that person alarm, fear or distress; "a persistent and deliberate course of targeted oppression": Hayes -v- Willoughby [1], [12] per Lord Sumption.

ii) The behaviour said to amount to harassment must reach a level of seriousness passing beyond irritations, annoyances, even a measure of upset, that arise occasionally in everybody's day-to-day dealings with other people. The conduct must cross the boundary between that which is unattractive, even unreasonable, and conduct which is oppressive and unacceptable. To cross the border from the regrettable to the objectionable, the gravity of the misconduct must be of an order which would sustain criminal liability under s.2: Majrowski [30] per Lord Nicholls; Dowson [142] per Simon J; Hourani [139]-[140] per Warby J; see also Conn -v- Sunderland City Council [2007] EWCA Civ 1492 [12] per Gage LJ. A course of conduct must be grave before the offence or tort of harassment is proved: Ferguson -v British Gas Trading Ltd [17] per Jacob LJ.

iii) The provision, in s.7(2) PfHA, that "references to harassing a person include alarming the person or causing the person distress" is not a definition of the tort and it is not exhaustive. It is merely guidance as to one element of it: Hourani [138] per Warby J. It does not follow that any course of conduct which causes alarm or distress therefore amounts to harassment; that would be illogical and produce perverse results: R -v- Smith [24] per Toulson LJ.

iv) iv) s.1(2) provides that the person whose course of conduct is in question ought to know that it involves harassment of another if a reasonable person in possession of the same information would think the course of conduct involved harassment. The test is wholly objective: Dowson [142]; Trimingham [267] per Tugendhat J; Sube [65(3)], [85], [87(3)]. "The Court's assessment of the harmful tendency of the statements complained of must always be objective, and not swayed by the subjective feelings of the claimant": Sube [68(2)].

v) Those who are "targeted" by the alleged harassment can include others "who are foreseeably, and directly, harmed by the course of targeted conduct of which complaint is made, to the extent that they can properly be described as victims of it": Levi –v- Bates [34] per Briggs LJ.

vi) Where the complaint is of harassment by publication, the claim will usually engage Article 10 of the Convention and, as a result, the Court's duties under ss.2, 3, 6 and 12 of the Human Rights Act 1998. The PfHA must be interpreted and applied compatibly with the right to freedom of expression. It would be a serious interference with this right if those wishing to express their own views

could be silenced by, or threatened with, proceedings for Judgment Approved by the court for handing down (subject to editorial corrections) Hayden -v- Dickenson harassment based on subjective claims by individuals that they felt offended or insulted: Trimingham [267]; Hourani [141].

~~vii)~~ In most cases of alleged harassment by speech there is a fundamental tension. s.7(2) PfHA provides that harassment includes "alarming the person or causing the person distress". However, Article 10 expressly protects speech that offends, shocks and disturbs. "Freedom only to speak inoffensively is not worth having": Redmond-Bate -v- DPP [2000] HRLR 249 [20] per Sedley LJ.

~~viii)~~ Consequently, where Article 10 is engaged, the Court's assessment of whether the conduct crosses the boundary from the unattractive, even unreasonable, to oppressive and unacceptable must pay due regard to the importance of freedom of expression and the need for any restrictions upon the right to be necessary, proportionate and established convincingly. Cases of alleged harassment may also engage the complainant's Article 8 rights. If that is so, the Court will have to assess the interference with those rights and the justification for it and proportionality: Hourani [142]-[146]. The resolution of any conflict between engaged rights under Article 8 and Article 10 is achieved through the "ultimate balancing test" identified in In re S [2005] 1 AC 593 [17] per Lord Nicholls.

~~ix)~~ The context and manner in which the information is published are all important: Hilson -v- CPS [31] per Simon LJ; Conn [12]. The harassing element of oppression is likely to come more from the manner in which the words are published than their content: Khan -v- Khan [69].

~~x)~~ The fact that the information is in the public domain does not mean that a person loses the right not to be harassed by the use of that information. There is no principle of law that publishing publicly available information about somebody is incapable of amount to harassment: Hilson -v- CPS [31] per Simon LJ.

~~xi)~~ Neither is it determinative that the published information is, or is alleged to be, true: Merlin Entertainments [40]-[41] per Elisabeth Laing J. "No individual is entitled to impose on any other person an unlimited punishment by public humiliation such as the Defendant has done, and claims the right to do": Kordowski [133] per Tugendhat J. That is not to say that truth or falsity of the information is irrelevant: Kordowski [164]; Khan -v- Khan [68]-[69]. The truth of the words complained of is likely to be a significant factor in the overall assessment (including any defence advanced under s.1(3)), particularly when considering any application interim injunction (see further [50]-[53] below). On the other hand, where the allegations are shown to be false, the public interest in preventing publication or imposing remedies after the event will be stronger: ZAM -v- CFM [2013] EWHC 662 (QB) [102] per Tugendhat J. The fundamental question is whether the conduct has additional elements of oppression, persistence or unpleasantness which are distinct from the content of the statements; if so, the truth of the statements is not necessarily an answer to a claim in harassment.

~~xii)~~ Finally, where the alleged harassment is by publication of journalistic material, nothing short of a conscious or negligent abuse of media freedom will justify a finding of harassment. Such cases will be rare and exceptional: Judgment Approved by the court for handing down (subject to editorial corrections) Hayden -v- Dickenson Thomas -v- News Group Newspapers [34]-[35], [50] per Lord Phillips MR; Sube [68(5)-(6)].