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WHAT IS REQUIRED FOR A HARASSMENT BY PUBLICATION CLAIM TO SUCCEED?

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In *Sube & Anor v News Group Newspapers Ltd & Anor (Rev 1)* [2020] EWHC 1125, Mr Justice Warby (as he then was) distilled several points that had arisen from the limited number of authorities that have addressed claims for harassment by publication to the world at large (hereinafter simply referred to as 'harassment by publication'). The headline-grabbing point was that Warby J considered that the relevant authorities meant that "nothing short of a conscious or negligent abuse of media freedom" would justify a finding of harassment in a case where harassment by publication constitutes the course of conduct complained of. Whilst not an insuperable obstacle, the threshold for a claimant to succeed with such a claim had undoubtedly been set – or re-confirmed as being – very high.

The recent case of *McNally v Saunders*

Perhaps emboldened by Warby J's comments, the Defendant in *McNally v Saunders* [2021] EWHC 2012 issued an application for strike out and summary judgment in respect of a claim for harassment in which the content complained of largely comprised of statements that the Defendant had published online. The Claimant was at all material

times Director of Public Health at Sandwell Metropolitan Borough Council (“the Council”). She is a psychologist by training. The Defendant is a semi-retired former solicitor who describes himself as a “citizen journalist”. In that capacity he publishes a blog called “In the Public Domain?” which is also known as “The Sandwell Skidder”. The Claimant’s blog and related social media accounts published content about the Council, its activities and its elected members and officers.

The Claimant’s video

The charity Mind promotes Mental Health Awareness Week so that people who have experienced mental health problems can share their stories with others who might be suffering in silence. The primary objective is to destigmatise mental illness.

The Claimant decided to make a short video to coincide with Mental Health Awareness Week 2020 in which she disclosed that she had struggled with mental health since she was a child, had self-harmed and had once nearly been sectioned under the Mental Health Act (“the Video”). She stated that “as a community...we are much better at both asking for mental health support when we need it and also at offering help to other people who are having mental health problems and that has got to be a good thing”. While it is not clear from the Court’s judgment whether this was the first time the Claimant had publicly revealed her mental health problems, the disclosures plainly related to episodes in her life where the Claimant was at her most vulnerable, and in those circumstances, she might have expected, notwithstanding her public servant status, that the Video would not become ‘fair game’ for even her most ardent opponents and critics. Ad hominem attacks frequently occur in politics – both at a national and local level – but rarely do they extend to matters concerning an individual’s health, criticism of which is, quite rightly, generally considered to be off limits. The Video was published on the Council’s Facebook page on 22 May 2020 and remains available online.

The content complained of

The Claimant’s case was that the Defendant harassed her by publishing a series of blog articles and tweets and sending emails to the Chief Executive of the Council. The Judge considered the language of the posts and tweets as a whole, and considered that they conveyed the dominant impression of trenchant criticism of the Claimant, rather than simple abuse.

On 4 June 2020, the Defendant tagged the Claimant in the following tweet:-

“Noting your video outburst @Lisa_McNally1 did you make #sandwell council aware of your significant mental health issues at interview?”

On 5 June 2020, the Defendant published a long blog post dealing with a range of issues. The blog included a subheading “Lisa, ‘Me, Me, Me.’ McNally?” and included the following words:-

- “Dr McNally in [sic] not the sort of doctor who asks gentleman to cough whilst holding their balls – at least not in a diagnostic context but is a ‘Chartered Psychologist’.”
- “...what a time to release this narcissistic garbage – right in the middle of the biggest public health crisis in living memory...”
- “You are [a] very well paid person in a professional position in the middle of a major emergency McNally. Please shut the f*ck up about yourself and concentrate on the very real public health crisis engulfing Sandwell!”

After a further blog post by the Defendant on 10 June 2020, the Claimant “blocked” the Defendant on Twitter, which the Defendant then referred to in a subsequent blog post on 2 July:-

“Meanwhile Super Mc [the Claimant] has been blocking loads of people on Twitter including myself. This hitherto assiduous self-publicist (who took time out from Covid duties to ‘courageously’ make a video about her own seemingly very serious mental health issues) appears to have a thin skin.”.

On 1 August 2020, the Claimant referred again to the Claimant having blocked him:-

“After my article appeared Super Mc blocked me on Twitter. But this sensitive soul has also started blocking anyone who follows me too...And if you too want to join the ‘Blocked by Super Mc Club’ please follow MY twitter account ‘lol’”

On 2 October and 26 November 2020, the Defendant stated on Twitter that the Claimant was a “braggart blocker”, “weirdo Director of Public Health” and “weirdo #sandwell Director of Public Health McNally”.

On 3 January 2021, the Defendant sent a complaint about the Claimant to the Chief Executive of the Council, which he copied to the Claimant. The gist of the complaint was that the Claimant had used her personal Twitter account to publish articles and information critical of the Conservative Government’s handling of the COVID-19 pandemic. The complaint was marked “THIS IS NOT A PRIVATE AND CONFIDENTIAL COMMUNICATION”, which the Claimant says indicated to her that the Defendant was intending or threatening to share it publicly.

On 4 January 2021, the Defendant sent an email to the Claimant asking for her CV. The Claimant stated that this email went to her “junk” folder and she never received it. It was therefore not one of the communications complained of.

On 6 January 2021, the Defendant wrote a blog post which included a section which appeared under the subheading “The Rise and Rise of Lisa McNally!” and contained the following words: “Since Covid started one figure in bent Labour Sandwell has been ubiquitous in the media – the Director of Public Health, ‘Dr’ Lisa McNally”.

On 21 January 2021, the Defendant wrote again to the Chief Executive of the Council to complain about the Claimant. This complaint was also marked “THIS IS NOT A PRIVATE

AND CONFIDENTIAL COMMUNICATION” and focused on the Claimant’s routine use of the title “Dr” when speaking on medical issues, which the Defendant believed might mislead people into thinking that the Claimant was a medical practitioner.

On 27 January 2021, the Defendant published a further blog post which was titled “The ‘Dr’ Lisa McNally Mystery!” and included the following words:

“On her infamous mental health video [post passim] Sandwell’s McNally stated, ‘I am a psychologist. I trained as a psychologist...I spent MANY YEARS as a professional offering support for mental health’. As above, she won’t elaborate on this for your benefit.

Despite the global pandemic Sandwell’s egocentric McNally felt the need to share her personal medical history with us and recounted this weird tale:

‘I was nearly sectioned onto a mental health ward, a psychiatric ward in a hospital. One of the reasons they agreed to let me go home and be cared for at home was because I was supposed to be working in that mental health ward the next day.’

It’s all me, me, me stuff whereas this must have been terrifying for the poor, vulnerable, folk on the ward and very distressing for her professional colleagues who had to deal with her as well as their existing patients”.

The Claimant placed a link to this post on his blog’s Facebook group under the heading “When is a doctor not a medical doctor?”. This appeared immediately above a photograph of a street sign bearing the words “Bell End”. He also shared the link on his Twitter account, tagging the accounts of councillors, local MPs and journalists.

The impact on the Claimant

The Claimant asserted that the Defendant’s conduct had a pernicious impact on her mental health. She stopped using Facebook to post any significant content because she was afraid of the comments the Defendant might make about her. She stated that she had become very reluctant to accept any invitations from the media for interviews because she feared that the Defendant might publish further adverse comments about her. The Claimant sought counselling and her family had also been negatively affected by the Defendant’s alleged harassment.

The relevant tests

An application for strike out under Civil Procedure Rule 3.4(2)(a) requires the Court to be ‘certain’ that the Claimant’s Particulars of Claim disclose no reasonable grounds for bringing the claim.

The Judge stated that in order to succeed with the summary judgment application, the Defendant needed to show:-

(a) there was no real prospect that the Claimant will establish both:

the course of conduct complained of amounted to harassment; and

that the Defendant knew or ought to have known that his course of conduct amounted to harassment; and/or

(b) there is no real prospect that the Defendant will fail to establish that in the particular circumstances the pursuit of the course of conduct was reasonable

In order for conduct to amount to harassment, it must cross the boundary between that which is unattractive, even unreasonable, and conduct which is oppressive and unacceptable.

The decision

With scant hesitation, the Judge granted the Defendant's application giving the following reasons:-

- The conduct complained of was not "targeted" at the Claimant. The Judge stated that "most publications to the world at large are not targeted at another person, even if they are about another person.". The Judge acknowledged that a series of tweets which are directed "at" someone might be regarded as conduct targeted at them but the ability to "block" a user means that a Claimant can avoid being targeted in this way. The Judge noted that the Defendant complained about being blocked by the Claimant but stated that that Claimant had not alleged that the Defendant had sought to bring his tweets to the Claimant's attention by any other means.
- Even though the Judge found that the Defendant's blog is not part of the mainstream press or media, he considered that it was still "journalistic material" and should accordingly be afforded enhanced protection under Article 10 of the European Convention on Human Rights (freedom of expression).
- The abrasive tone and style of the Defendant's publications did not deprive him of, or weaken, his freedom of expression rights. It is trite law that freedom of expression rights protect not only the anodyne but the irritating, the unwelcome and the provocative. In *Redmond-Bate v Director Of Public Prosecutions* [1999] EWHC Admin 733 Sedley LJ made his view clear: "freedom only to speak inoffensively is not worth having". Whilst acknowledging that the Defendant's "repeated references" to the Claimant's mental ill-health came "closer than anything else to tipping this case into the oppressive and unreasonable category", the Judge considered that this did not amount to harassment because:-The Claimant had decided to put the information about her mental health into the public domain and that an individual who does so "must expect that, while many people are likely to comment favourably, some may choose to make comments that are adverse"-The Claimant occupied a public health role and therefore must expect to be subjected to greater scrutiny than a private individual; and-The Defendant's criticisms related to the performance of the Claimant's public functions.

Comment

The Judge's decision in this matter was interesting for the following four reasons.

- On the face of it, it is perhaps slightly surprising that articles which were about the Claimant (at least in part) were not found to be targeted at her. Headings or subheadings in certain articles specifically mentioned the Claimant: "The Rise and Rise of Lisa McNally" and "The 'Dr' Lisa McNally Mystery!". The Claimant was also 'tagged' in the Defendant's tweet on 4 June 2020 and the Judge described the language of the posts and tweets as a whole as containing "trenchant criticism" of the Claimant. In any event, the Court of Appeal authority of *Levi v Bates* [2015] EWCA 206 made clear that it is "not a requirement of the statutory tort of harassment that the claimant be the (or even a) target of the perpetrator's conduct.". Provided that the conduct complained of is targeted at "someone", the Claimant may still bring a claim for harassment if he or she is foreseeably likely to be directly alarmed or distressed by it. In the present case, however, it appears that the Judge considered that the alleged harassment was not targeted at anyone at all.

- This is at least the second judgment in which the Court has indicated that a claimant can, and perhaps should, take steps to mitigate any damage and distress caused by alleged harassment. The Judge in this case explained how a claimant could 'block' a user on social media to avoid being targeted. Similarly, in *Khan (formerly JMO) v Khan (formerly KTA)* [2018] EWHC 241 (QB), Mr Justice Nicklin stated that a claimant can "exercise a degree of self-help by simply deleting the emails he receives". Whilst taking practical steps to reduce the impact of alleged harassment is eminently sensible, claimants who bring such claims are not under any duty of mitigation (such a principle relates to the law of damages), and there is risk that in focusing too much on what the claimant did, or should have done, the seriousness of the defendant's wrongdoing is underplayed or overlooked. Further, while deleting messages sent by the perpetrator, or blocking them, might appear to be a very straightforward solution, it may, in certain circumstances, be more difficult to persuade a claimant that this should be done. If, for instance, a perpetrator is making threats in their correspondence about what they might do next (e.g. contact an employer), which is common in harassment by publication claims, a victim may understandably wish to be forewarned, to try to take steps to mitigate any potential further damage.

- The Judge's comment about how a claimant should expect certain individuals to comment unfavourably on a claimant's voluntary disclosure of sensitive information is difficult to square with Lord Justice Simon's remarks in *Hilson v McCarthy* [2019] EWHC 1110. In *Hilson*, which was referred to by the Judge in the present case, the Court held that 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. Lord Justice Simon stated:-

"To give one example, the contents of full electoral register can be made available to any member of the public who wishes to consult it, but it does not follow that to tell someone that they know where they live cannot in its proper context constitute conduct which may amount to harassment. Nor does the giving out of information necessarily involve an implicit consent for the use of the information for the purpose of harassment. **People do not put information into the public domain so that it can be used against them in this way.**" (emphasis added).

• There can be little dispute that the Defendant's Article 10 rights were engaged in this case. However, it is unclear to what extent in reaching his decision the Judge relied on observations made in previous cases about how successful claims for harassment by publication against the conventional news media will be "rare and exceptional" and, if he did, whether this was the correct approach. A publisher's Article 10 rights are undeniably one reason why claims for harassment by publication against mainstream publishers seldom succeed, but it is unlikely to be the sole factor. The Independent Press Standards Organisation (IPSO) is the independent regulator for the newspaper and magazine industry in the United Kingdom and has a Code of Conduct to which its members must adhere. The Code has a clause which relates explicitly to harassment and states that "journalists must not engage in intimidation, harassment or persistent pursuit" and, in respect of discrimination, "the press must avoid prejudicial or pejorative reference to an individual's race, colour, religion, sex, gender identity, sexual orientation or to any physical or mental illness or disability". While some readers might consider IPSO to be a toothless press watchdog, it is difficult to imagine that if it regulated the Defendant's blog it would not find that at least some of his publications were in breach of its Code. Similarly, it might be difficult to conceive of a situation where the Court condones a mainstream publisher who repeatedly refers to a claimant's mental health, often in highly insensitive and insulting terms. Mr Justice Warby appeared to draw a distinction in *Sube* between harassment which "involve[s] the persistent publication of embarrassing or otherwise unwelcome statements, true or false, on the internet or on social media" and "a course of conduct consisting of publication in or by the conventional news media". It will be interesting to see whether this distinction is developed in future cases.

What is now required for a harassment by publication claim to succeed?

While successful harassment by publication cases will be rare because of the latitude afforded to publishers in the proper exercise of their freedom of expression rights, the fact that this case was disposed of summarily – effectively meaning the claim was unarguable – might have raised a few eyebrows amongst lawyers acting for claimants. In future, a claimant might be well-advised to plead that a defendant knew, or ought to know, that his course of conduct amounted to harassment, to pre-empt an application for summary judgment. In *McNally*, during the course of the hearing counsel for the Claimant clarified that the Claimant's case was that simply that the Defendant "ought to have known" that what he was doing amounted to harassment, which meant "at trial, the key questions for decision would depend on an objective assessment of the tweets, posts and emails" and which, in turn, diminished the extent to which oral evidence "would add in a significant way to the materials now before the court.". It would be interesting to know whether the application for summary judgment would have been decided differently if this clarification had not been provided by the Claimant's barrister (the Judge's words suggest that it would).

While *McNally* demonstrates that claimants who bring harassment by publication claims can face an uphill struggle, it does not sound the death-knell for claims of this nature. Since *McNally*, the Claimant in *Davies v Carter* [2021] EWHC 3021 succeeded at trial with

her harassment by publication claim. The Judge in that case summarised the oppressive and unpleasant elements of the publications complained of as follows:-

“In short, the publications amount in substance to repeated vilification, and unwarranted demands for money. Moreover, these demands were made in circumstances in which the Defendant had never sought compensation through normal channels (such as writing to Red Communications to ask for a refund or breach of contract litigation against Red Communications). This conduct has continued for three years and I accept the Claimant’s evidence that she has experienced psychological distress and stigma impacting upon her Article 8 rights. She has also been forced to remove her presence from the internet, itself an infringement of her Article 10 rights and particularly problematic for her as a senior professional in marketing and communications. I accept that a finding of liability interferes with the Defendant’s Article 10 rights, but that interference is justified and proportionate given these circumstances. Failure by the Defendant to prove a defence of truth underlines that conclusion.”

While harassment by publication claims may be “rare and exceptional”, they continue to be available to claimants in appropriate circumstances, and they often have the benefit of providing a claimant with much broader injunctive relief than they would secure if they had brought a claim for defamation and/or misuse of private information, two claims that are commonly advanced in conjunction with, or as alternatives to, a claim for harassment by publication.