



IS SOCIAL MEDIA ABOVE THE LAW?

- Darryl Broderick

The extent to which social media (including Twitter, Facebook and YouTube) is subject to the rigours of the law has been called into question by what has transpired in relation to the “Super Injunction” obtained by the Premiership footballer, Ryan Giggs, and the subsequent identification of him, in apparent breach of the Super Injunction, on Twitter. A Super Injunction is a Court Order preventing not only publication of particular facts or allegations but also of the existence of the Court Order itself. The Giggs Super Injunction has never been lifted, despite arguments in Court from The Sun to the effect that the injunction served no purpose given the widespread identification of Mr Giggs on-line. We are entitled to identify the footballer in question given that he was identified in the House of Commons by a British MP availing of parliamentary privilege. Prior to the disclosure in the House of Commons, Mr. Giggs had been identified, in apparent breach of the Super Injunction, by in excess of 75,000 “tweeters”. What does all of this mean for social media forums and users?

Liability of Social Media Forums in Ireland

Social Media Forums can avail of a Defence under the E-commerce Directive provided they can prove that they do not have actual knowledge of illegal activity or of illegal information posted on their forums and when informed of such activity or information they act “expeditiously” to remove or prevent such information being published. This Defence is open to internet service providers (ISPs) which would include the likes of Twitter and Facebook but it can only be availed of if the ISP can prove that it did not monitor or filter information

published on a particular forum. In May, 2011 the businessman and race horse owner, J.P. McManus, sought an injunction against Facebook over the alleged failure to take down a number of profiles purporting to be Mr. McManus. The injunction proceedings were struck out when Mr. McManus received undertakings from Facebook to take down the profiles. Mr McManus, however, is maintaining a claim for damages.

Liability of Social Media Users in Ireland –

Defamation

There is no doubt that Twitter users can be sued for defamation over their “tweets”. Earlier this year the musician, Courtney Love, paid a sum of \$US430,000 to a fashion designer who alleged Love had defamed her in a tweet. Legal commentators in the US, where the law suit was brought, agreed that the same legal rules applied to Twitter and other forms of social media as applied to other publications such as newspaper articles. Last November a New Zealand cricketer, Chris Cairns, won court approval in England to pursue a defamation case over a Twitter message posted by a cricketing administrator. A case taken in the Irish Courts against Bebo over an on-line posting was settled last year.

Breach of Privacy

The Giggs case related to an alleged breach of privacy. Again, the rules that apply to newspapers, radio broadcasts, television and other media also apply to social media. There is no privacy legislation enacted in Ireland. The Irish High Court has held in several recent cases that damages can be awarded for breach of privacy if the published matter is private in the ordinary sense of the word and if it can be proved that publication was deliberate, conscious and unjustifiable. Publishing material obtained by the illicit tapping of a private phone call has been

held to be a breach of privacy in this country. The Irish courts have expressed the view that publishing the details of an illness of a public figure could amount to a breach of privacy.

The English courts, in awarding damages for breach of privacy to former Formula One chief Max Mosley, expressed the view that “the sex life of any individual is essentially his or own business”. There is no reason to believe that the Irish courts would differ in their view. Indeed the High Court in the context of a pre publication injunction hearing in the case of *Cogley v RTE* indicated, in reiterating the Irish courts reluctance to grant injunctions restraining publication, that this reluctance would not apply in situations where the information was of a “significantly private nature and where there was no, or no significant, legitimate public interest in its disclosure”. The Court indicated it would favour the grant of an injunction in such instances as “the information, once published, cannot be unpublished”.

Contempt of Court

Besides the privacy issue in the Giggs case, there is also the issue of whether the Twitter posters who have revealed his name can be prosecuted for contempt of court, having breached the Order not to identify Mr. Giggs. These persons have certainly exposed themselves to an action for contempt of court which could ultimately lead to their imprisonment. Will it be possible for the Court and/or Mr. Giggs to identify those who have posted the tweets?

The English High Court granted Mr. Giggs an Order requiring Twitter to reveal the identities of the tweeters that breached the Super Injunction. This is an Order which the Irish Courts could make and they did so in a case which involved the website rateyoursolicitor.com. In the Giggs case, the question was whether Twitter, based in California, would abide by the Order when technically it was not subject to it, being based in another jurisdiction. Twitter has indicated that it is prepared to co-operate with the English courts but how this pans out remains to be seen. Even if details are handed over by Twitter, they may be meaningless as it is possible for Twitter users to set up accounts in such a way that they can remain anonymous.

What is likely to happen?

It is likely that at some stage the likes of Twitter is going to be forced, by Court Order, to hand over information which would identify posters of material which is defamatory or in breach of privacy or in contempt of a Court Order. This may yet happen in the Giggs case although it is an extreme situation given the number of Tweets that revealed his identity in breach of the Super Injunction in question. One could certainly see a Court in Ireland or England being willing to facilitate a claimant with a view to ensuring that social media users felt subject to the law like other publishers.

What lies ahead in an Irish Context?

Is it the end of the Super Injunction? Probably not. People will think twice before seeking to obtain one after the Giggs situation but there appears to be a judicial willingness to grant them in certain limited circumstances in particular where children may need to be protected. For example, Super Injunctions may be granted for a very short period of time to allow a person who is having an affair time to tell his/her children of that fact before it became public. The law on defamation, privacy and contempt of court will eventually catch up with social media before probably being over taken again by further technological developments. However, even in the absence of any changes in the law, social media users and forums, will need to be wary of acting with impunity as the law, even as it stands, is sufficient to protect, in most instances, those whose rights are infringed by social media users.

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