A Countdown conundrum – star and blogger obtain order to reveal author of deleted tweets

The High Court has granted a *Norwich Pharmacal* order to a Countdown presenter and a campaigner over an anonymous Twitter account suspected of being operated by the defendant, Daniel Bennett.[1] The account-holder in question, tweeting under the pseudonym Harry Tuttle, had defamed them in a series of tweets alleging (among other things) dishonesty, hypocrisy and far-right politics – tweets that were later deleted. In an unusual feature of this case, the defendant had accepted legal liability for the account, but declined to confirm or deny being the author of the tweets. Yet in the judge's view that did not deprive the relevant claimants of the right to identify the author and to have the tweets and related data disclosed.

Background

Three individuals, David Collier, Rachel Riley and Tracy Ann Oberman, brought Part 8 proceedings against the defendant, Mr Bennett, a barrister, over a series of tweets under the pseudonym Harry Tuttle from an anonymous Twitter account, which the claimants suggested amounted to libel and harassment. Mr Collier is a blogger, researcher and campaigner against anti-Semitism. Ms Riley is a television presenter on Channel 4's Countdown, and Ms Oberman is an actress. All three are Jewish and have taken public positions against the rise of anti-Semitism in the UK in recent years. Mr Bennett is also Jewish.

The account-holder, who remains anonymous, but who the claimants suspect to be Mr Bennett, removed the tweets from public view in or around July 2019. Accordingly, the claimants sought *Norwich Pharmacal* relief to identify the author and to obtain copies of the tweets. In the alternative, under rule 31.16 of the Civil Procedure Rules (**CPR**), they sought pre-action disclosure (**PAD**) of the tweets and surrounding metadata and analytics.

In what Mr Justice Saini described as a "rather unusual and striking feature" of this case, Mr Bennett "publicly accepted responsibility" (and so legal liability) for the account, accepting that he controlled it and could readily access the tweeting history that was deleted from public view. Yet when Saini J asked the defendant's counsel at the hearing whether Mr Bennett's position was that he was the author of the tweets, was not or declined to answer, counsel indicated that Mr Bennet declined to answer.

Mr Bennett had made statements in the media that he is not Harry Tuttle, which the claimants considered to be dishonest. Yet the claimants – rightly in the judge's view – did not rely on this allegation in a Part 8 claim without oral evidence, and so the claim was advanced on the basis that Mr Bennett was not the author of the tweets, and that the relief sought would reveal the true identity of the author, who could then be properly pursued in a defamation and/or harassment claim.

Harry Tuttle and the tweets

According to the claimants' evidence, the Harry Tuttle account was used between 2017 and 2019 as a medium to harass and defame a number of Jewish people, including multiple barristers and the claimants' solicitor. Saini J quoted Hugo Rifkind in The Times, describing Harry Tuttle as "a pro-Corbyn footsoldier in the Labour antisemitism wars", who would "heap scorn on prominent Corbyn-sceptic Jews".

On 9 July 2019, a "detective tweeter" tweeted at the account suggesting that Harry Tuttle ought to meet Daniel Bennett, on the basis that the two shared the following characteristics, gleaned from tweets from the account in mid-2019:

[1] *David Collier, Rachel Riley & Tracy Ann Oberman v Daniel Bennett* [2020] EWHC 1884 (QB).

(a) they were both barristers;

(b) their area of practice was workplace injuries;

(c) they lived in Bristol; and

(d) they lived in Liverpool in their youths and attended King David School there.

This, according to the claimants, was the "outing" of Mr Bennett as Harry Tuttle. Following this tweet, the account immediately became private and deleted all of its followers, also removing its tweeting history from public view. At this time, the claimants' solicitor wrote to Mr Bennett indicating that litigation was likely, and that he must preserve the tweets for the purpose of disclosure, which he agreed to do.

Shortly thereafter, Mr Bennett apologised to various individuals, including David Wolfson QC, for what had been said by the account, admitting it had been set up by him in 2010, but that it had since "drifted with many involved". He denied that the tweets directed at Mr Wolfson were written or authorised by him.

***Norwich Pharmacal* application**

After some urging from the judge to narrow the scope of the relief they were seeking, the claimants ultimately sought disclosure of (i) the true identity of the author of the tweets complained of, and (ii) all tweets by Harry Tuttle (as well as metadata and analytics) from March 2018 to 9 July 2019 that referred to the claimants, by name or other reference, and that contained statements to the effect of (or to a similar effect of) the alleged libels.

Saini J set out the four conditions to be met for *Norwich Pharmacal* relief to be granted, stemming from case law as a "workable and practical test under CPR 31.18", namely:

(a) *arguable wrong* – the applicant must demonstrate a good arguable case that a form of legally recognised wrong has been committed against them by a person;

(b) *mixed up* – the respondent must be mixed up in the wrongdoing, so as to have facilitated it;

(c) *possession* – the respondent must be able, or likely to be able, to provide the information or documents necessary to enable the ultimate wrongdoer to be pursued; and

(d) *overall justice* – disclosure from the respondent must be an appropriate and proportionate response in all the circumstances of the case, bearing in mind the exceptional but flexible nature of the *Norwich Pharmacal* jurisdiction.

The first three conditions are hurdles that the applicant must overcome before reaching the last condition, though certain matters touched on in the first three conditions will feed into the final analysis. Saini J dealt with each condition in turn.

Consideration of the four conditions

<u>Arguable wrong</u>

Regarding Mr Collier, on the evidence, there were a substantial number of tweets by Harry Tuttle "to the effect that he acts against the best interests of Jewish people, that he is dishonest and falsely fabricates allegations against Mr Corbyn, is hypocritical, a fraudster, a racist and supports violence". Although the tweets in question were deleted, there were "trace elements" of tweeting of this nature, namely screenshots of tweets, partial tweets from Google searches and replies to the tweets from Mr Collier and others.

As to Ms Riley, there was no evidence before the court of actual tweets (even trace elements), but her solicitors submitted sworn evidence to the effect that the account had tweeted statements alleging that that she had made deliberately dishonest comments about anti-Semitism in the Labour Party, that she was hypocritical, and that she had made false allegations of anti-Semitism in order to discredit Jeremy Corbyn in order "to save tax".

Ms Oberman's evidence was "substantially weaker", submitting in general terms that false statements were made about her by the account, as well as accusations that she was a troll and a bully on Twitter.

Mr Bennett submitted that the "serious harm" test set out in section 1 of the Defamation Act 2013 was not met and that these were merely "bad-tempered debates", as well as raising issues of limitation. The judge indicated that these remained points for argument at trial, but he could not decide them at this stage, given that the whole purpose of the present application was to enable the claimants to pursue the wrongdoer. In other words, no claim had been pleaded yet to which the defendant could respond.

Mr Bennett also argued that there was no publication of the tweets, and so they could not be defamatory. This argument was given short shrift by Saini J, who said, "it also seems to sit ill in the mouth of the claimed publisher of alleged libels, who has deleted the publications (and thereby denied access to a claimant) to pick holes in the claimants' cases as to publication (and content of the tweets) and as to harm when he holds the very publications".

Saini J held that arguable wrong was met for Mr Collier and Ms Riley on the basis of the evidence presented, Mr Collier's being stronger than Ms Riley's, on the basis that the relevant statements, if made, were arguably defamatory and a sufficiently arguable case on serious harm could be inferred. Ms Oberman did not meet the condition, though, due to the "vague and non-specific" evidence presented, and her claim for relief accordingly fell at the first hurdle.

Saini J was not, however, satisfied that arguable wrong was met for the claimants' claims in harassment, since the evidence did not explain how the alleged misconduct met the threshold for criminal liability, as required for a harassment claim.

Mixed up and possession

The defence counsel accepted that these two conditions were met for Mr Collier and Ms Riley. On the former, on Mr Bennett's own case, he facilitated or authorised the tweets. On the latter, Mr Bennett accepted that he knew the identity of the account-holder and author of the tweets and had possession of the deleted tweets.

Overall justice

The defendant's main argument was that a *Norwich Pharmacal* order was unnecessary where he had already publicly and in correspondence admitted legal liability for the account, and so he should be the correct defendant to any claim. He also argued that the claimants' overall cause of action was weak, and that they had not established the essential elements for a defamation claim.

Yet Saini J held that overall justice favoured an order for the following reasons:

(a) The defendant's acceptance of legal liability did not preclude the claimants from being entitled to sue all wrongdoers and to obtain injunctive relief.

(b) The claimants' common-law rights to access to justice allowed them to identify and sue in a public process those who have defamed them. The law does not allow one joint tortfeasor to protect others by taking on all liability himself, but instead common-law process provides for a public hearing, including public identification of the alleged wrongdoer. This applies to all civil

claims, but is particularly important in libel proceedings because of their "vindicatory aspect". Disclosure of the identity of the author of the tweets is therefore necessary if the claimants are to sue the author in accordance with the common-law process.

(c) Disclosure in this case would be limited and proportionate, and not an onerous exercise on the part of the defendant. He could recover the tweets in "but a few keystrokes".

(d) This was not (as Mr Bennett submitted) a "fishing exercise", but a request for a confined category of publications that were readily identifiable and went to the core of the cause of action.

(e) It was "highly unmeritorious" for the defendant to argue that there was no viable claim in libel because the claimants had not pleaded the publications, having accepted that he deleted them all from public view and held copies. He had not argued that the libels were not in fact published, but had only sought to "poke holes in the case … while holding material which would allow them to plug those holes".

(f) The defendant had not argued that he owed some form of confidentiality to Harry Tuttle, or that some form of public interest would be undermined were he to make disclosure.

(g) The defendant argued that the claimants' application was "a continuation of politics by other means" rather than a genuine attempt to protect legal rights, to which Saini J responded, "so what?" He explained that "absent special situations governed by the tort of abuse of process, the civil law is not concerned with why victims of wrongs seek relief from the courts", adding that the "sole issue is whether they have a sound legal claim".

(h) Finally, there were no significant delays on the part of the claimants in seeking a remedy. They took action expeditiously once the tweets of 9 July 2019 linking Mr Bennett to Harry Tuttle were published.

Accordingly, Mr Collier's and Ms Riley's claims for *Norwich Pharmacal* relief succeeded.

Pre-action disclosure application

Saini J addressed this application, pleaded in the alternative, for the sake of completeness, in case it became relevant in future. Applying the initial test set out at CPR 31.16, Saini J held that the jurisdictional thresholds were satisfied for Mr Collier and Ms Riley, namely that: (a) the respondent and applicant were both likely to be parties to the putative proceedings (as accepted by Mr Bennett); (b) the defendant's obligations of standard disclosure would extend to the documents in question; and (c) the claimants established a "real prospect" that the disclosure would be desirable in disposing fairly of the proceedings or assisting a resolution of the dispute without proceedings.

The second test applied was whether, as a matter of discretion, an order for disclosure should be made, considering all the facts of the case, including (per *Black v Sumitomo Corp* [2001] EWCA Civ 1819): (a) the nature of the loss complained of; (b) the clarity of the issues raised; (c) the nature of the documents requested; (d) the relevance of any protocol or pre-action inquiries; and (e) the opportunity that the complainant has to make his case without pre-action disclosure.

In this respect, the judge referred to the points in the claimants' favour as a matter of overall justice, which all pointed "firmly" towards exercising the discretion for PAD for Mr Collier and Ms Riley, who sought the "limited core documents" showing publication of arguably defamatory content, whose scope was not in dispute and which could be easily provided. Accordingly, their narrowed claims for PAD succeeded.

Again, Ms Oberman's claims for PAD were dismissed, as she could not at this stage show a sufficient prospect of success, and all three claimants' PAD applications in their harassment claims were rejected on the same basis.

Comment

Although this judgment dealt with an "exceptional jurisdiction with a narrow scope" in *Norwich Pharmacal* relief, it illustrates important general points on access to justice and the common-law process for defamation claims. It emphasises the importance of identifying the tortious wrongdoers themselves in order to conduct fair and public proceedings, particularly in libel claims with their "vindicatory aspect".

It is also worth noting the judge's dismissal of the defendant's submission that this was a mere "fishing expedition". As the judge emphasised: "I do not consider that seeking the identity of a publisher and a limited number of focussed publications … can be regarded as 'fishing' for a cause of action in libel." He was similarly withering about the "highly unmeritorious" argument that there could be no action in libel for failure to plead the tweets in question, given that the defendant had removed them from public view.

This will provide comfort to claimants who might fear they have been deprived of a cause of action in libel because tweets (or other publications) have been removed or deleted by a defendant. There must, however, be sufficiently detailed evidence (by way of partial evidence or clear and precise sworn testimony), or else claimants might find their applications rejected, as happened to Ms Oberman in this case.

In parallel, those operating online under a cloak of anonymity might think twice about what they tweet, knowing that deletion is not necessarily enough to protect against a libel claim. That will be consonant with claimants.

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