

# DILLON EUSTACE

DUBLIN BOSTON NEW YORK TOKYO



# PRIVACY LAW: HIGH COURT VINDICATES FREEDOM OF PRESS

Dillon Eustace advised Independent Star Limited, publisher of the Irish Daily Star and the Star on Sunday ("the Star"), in a leading privacy law application heard in the Irish High Court. The injunction application was brought by the plaintiff, a serial violent rapist, against the Star and other newspapers seeking damages and injunctions prohibiting publication of his photograph or details of his whereabouts on the grounds that this was an unjustified interference with his right to privacy. The plaintiff argued that the publicity was forcing him to lead a nomadic existence as he had been forced to move accommodation on several occasions as a direct result of the media coverage of him and he was unable to try to rebuild his life and reintegrate back into normal society.

The media argued that the plaintiff was a man who had such a history of repeat offending that he constituted a real risk to the safety of the public and that the public had a right to know what he looked like and where he was in order that they could take appropriate measures for their own safety

The judgment in the interlocutory injunction was delivered by Ms. Justice Mary Irvine on 18 June 2010. Having considered the privacy case law of other jurisdictions as well as the provisions of the **Irish Constitution** and the **European Convention on Human Rights Act**, **2003**, the judgment dealt with the principles involved in injunctions and the balancing of rights of privacy and the public interest. The Court stated that the test for granting interlocutory relief in Ireland is a flexible one to be adapted to the circumstances of a particular case and that in the context of this application it had to be applied in a manner compatible with the European Convention on Human Rights.

The Court was satisfied that the plaintiff had established a fair issue to be tried and that his claim was not frivolous or vexatious. However, the Court confirmed the view previously expressed by the High Court that where freedom of expression is sought to be restricted by an interlocutory order the plaintiff is required to demonstrate, by proper evidence, a convincing case to bring about curtailment of the freedom of expression of the press or that he is likely to establish at the trial that the publication complained of should not be allowed. The Court stated that the plaintiff must adduce proper evidence to support his claim.

Critically, while not pre-judging what evidence the plaintiff might ultimately produce at any future trial, the Court held that the plaintiff had not adduced proper or cogent evidence at the interlocutory stage to demonstrate that he was likely to succeed at the trial in restricting the further publication of photographs identifying him and/or the publication of his address. The Court noted that the plaintiff had not alleged an actual threat to his life or that he had been assaulted or threatened in any way despite the publicity of which he complained. The Court

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considered it to be a significant omission that the plaintiff had not adduced any statistics regarding attacks on sex offenders or the effect of publicity on the likelihood of such attacks in circumstances where the burden of proof is on the plaintiff.

While recognising the plaintiff's right to privacy, the Court decided that the plaintiff had not demonstrated by proper evidence a convincing case that his privacy had been unjustifiably intruded upon such as would justify the court in curtailing the media's freedom of expression pending the full trial.

The Court referred to the inherent danger of prior restraining orders which, it said, should only be made following a close and penetrating examination of the factual justification. The Court drew a distinction between information of a significantly private nature and information in respect of which there is a public interest. In this case the Judge found that the publication of the photographs and details of the plaintiff's whereabouts contributed significantly to the debate and the public interest and in particular that such knowledge may allow members of the public to adjust their behaviour in whatever manner they feel might best to protect them from any risk to which they may legitimately feel exposed. In assessing the potential risk posed by the plaintiff, the Judge took his history of repeat offences into account. The Judge contrasted the evidence on the risk of re-offending put before the Court in an Affidavit of the Star's managing director, with the lack of evidence put forward by the plaintiff. The Judge described it as a serious omission in such an application that the plaintiff had not adduced written evidence from the prison authorities as to his efforts at rehabilitation while in prison or in respect of any counseling and its effect, if any, on the risk of re-offending. The Judge also noted the absence of evidence from the probation service and from any medical expert regarding the issue of risk.

In the particular circumstances of the application, based on the evidence before the Court, the Judge decided that the degree of public interest in the plaintiff's identity and his whereabouts must be deemed to be very considerable indeed. The Court left open the possibility that in another case with different evidence the public interest argument may be outweighed by the plaintiff's right to privacy but that the plaintiff here had produced no evidence that the anonymity he sought would facilitate his re-integration into the community thus reducing the risk of re-offending to the benefit of the community.

In view of its earlier findings the Court did not consider it necessary to consider in any detail the balance of convenience arguments but it did outline a number of issues which would have been relevant to that issue including the fact that much of the material objected to was already in the public domain. The judge considered that if the plaintiff were to succeed in a full trial then damages would be an adequate remedy and the Court noted that the plaintiff's

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undertaking as to damages could carry limited weight given that he is a man of limited means.

While the decision in this application is merely one designed to govern the status quo pending a full trial of the action, it is a very good illustration of the issues which will be taken into account by the Courts in an application to protect the privacy of an individual where there is said to be a countervailing public interest in publication. It appears clear that if the material objected to is very private in nature then the Courts are likely to protect the individual's right to privacy but where the information has a significant public interest aspect then the Court will require compelling arguments supported by cogent evidence before the freedom of expression of the press would be curtailed.

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