

CASE NOTES

Freedom of expression – protection from harassment – right to private life - proportionality

R v Graham Linehan, Westminster Magistrates' Court, 25 November 2025

Introduction

In this case a district judge found the defendant not guilty of harassment under the Protection of Harassment Act 1997; although guilty of criminal damage for destroying a phone owned by the complainant. The complainant was Sophie Brooks, a born male who presents as a woman and who champions trans rights, and who was 17 at the time of the incidents. The case raised extra media awareness as the defendant, who has spoken in strong terms on the topic of trans rights, is a well-known writer and speaker, and responsible for the brilliant comedy series *Father Ted*, and *The IT Crowd*. The case also raised more general issues concerning the acceptability of free speech (on social media) and the rights of others not to be exposed to speech and conduct amounting to harassment.

Section 1(1) of the 1997 Act provides that a person must not pursue a course of conduct, (a) which amounts to harassment of another, and (b) which he knows or ought to know amounts to harassment of the other. Under, s.1(3)(c), there is a defence where the course of conduct was reasonable, which allows the courts to consider free speech norms and to balance free speech with the other interests of the claimant. Thus, the behaviour must reach a certain level of seriousness before it amounts to harassment, and there is a boundary between conduct which was unattractive, even unreasonable, and conduct which was oppressive and unacceptable. Thus, the Act provides a suitable framework for balancing both the interests in free speech and private life.

Facts and decision

The defendant posted more than 20 posts about the complainant over a period of 11 days. The messages included phrases which the judge described as 'deeply unpleasant and unattractive'. Using phrases such as 'sociopath', 'psycho', 'domestic terrorist' 'homophobic brats', 'grooming' 'scumbags', 'malignant narcissists' and 'buffalo bill' (serial killer in "Silence of the lambs"), he also posted pictures online of the complainant and referred to obtaining information about the complainant including where the complainant may study. He also regularly referred to the complainant with male pronouns, which the complainant described as rude, but not alarming or distressing under the 1997 Act.

In the judge's view this course of conduct did not cross the threshold of being 'oppressive and unacceptable' beyond being merely *unattractive, annoying or irritating*. Further, the gravity of the conduct was not sufficient to sustain criminal liability, given the context of the dispute and the exchanges. That context included the defendant's genuine belief that the complainant had been infiltrating and disrupting gender-critical events. This belief is also protected by Article 9 of the European Convention on Human Rights, provided it is not inconsistent with basic notions under the Convention, or constitutes an unreasonable attack on the democratic rights of others. Other factors included the complainant's online conduct towards others – in other words a strong

defence of the counter argument – and the fact that most of the posts had not tagged the complainant. Further the court found that the evidence showed that the complainant was not as alarmed and distressed as had been portrayed in the case brought against the defendant. This was because she had not articulated those feelings before the court and had continued the general debate online and at conferences.

Commentary

Domestic law places several restrictions on individuals who use their right to free speech to send messages that might cause them distress or other harm. These include the harassment laws applicable in the above case and other public order laws (ss. 4 and 5 of the Public Order Act 1986). Further, recently the ex-footballer Joey Barton received a suspended jail sentence for sending a ‘grossly offensive’ message to three public figures, in breach of s.1 of the Malicious Communications Act 1988. The Joey Barton case will be considered below, but in all these cases, the judge, or jury, must determine whether the defendant has crossed the boundary between free speech and a breach of the criminal or civil law, balancing established principles of freedom of expression and the rights of others, as articulated in the Human Rights Act 1998, with the rights of those targeted by such speech.

The 1997 Act can be used to restrain or seek redress for various acts of personal intrusion, such as persistent abuse, criticism and other personal attacks; including speech that causes alarm and distress. The Act is used when the defendant’s conduct is persistent, and under the Act there must be a course of conduct (established in this case) which then amounts to harassment. The Act thus protects various personal and privacy rights of the complainant; in addition to claims for defamation (protecting reputation), misuse of private information (the domestic law’s breach of privacy claim), and data protection. As these rights need to be weighed against the defendant’s right to free speech, cases under the Act require a careful balance between the right to private life (under Article 8 of the European Convention), and freedom of expression under Article 10. Both rights are given effect in domestic law under the Human Rights Act 1998, and the domestic courts must consider the jurisprudence of the European Court of Human Rights in deciding claims, and defences, under the Act. Failure to achieve a proportionate balance in that respect might lead to an appeal to the European Court (*Pal v United Kingdom*, Application No. 44261/09, decision of the European Court of Human Rights 30 November 2021). This is particularly the case where both parties are discussing and exchanging views on matters of public debate, where it is common to see heated exchanges between both sides.

In the present case, the judge considered all the surrounding facts before making his decision but was obviously influenced by free speech norms that govern the distinction between acceptable and unacceptable speech. This is specially the case when the dispute involves a matter of public debate and interest, which both sides in this case had entered without reservation. However, there are limits to permissible speech, where it goes beyond being shocking and offensive, or annoying, and constitutes oppressive and unreasonable conduct.

The decision in this case can be contrasted with the recent decision of the High Court in *Hibbert v Hall* [2024] EWHC 2677 (KB), involving an action brought by an individual who had suffered life-changing injuries during the bombings at the Manchester Arena in 2017, together with her relatives. They brought a harassment action against an independent journalist, who repeatedly claimed that the attack was an elaborate hoax orchestrated by public sector agencies, and involved ordinary citizens, including the claimants, portraying fake injuries. The claimants also complained of the defendant’s continued publication of four videos, a film and a book in which he accused them of lying about their presence at the arena and their injuries, and that he had attended the daughter’s home and secretly filmed her without permission. The High Court held that that course of conduct was unacceptable and oppressive, not merely unattractive or unreasonable. Although the defendant’s Article 10 (freedom of expression) rights were engaged in this case, it was held that the defendant had repeatedly published false allegations over many

years on a variety of platforms and had done so for commercial gain. Further, that conduct had a natural tendency to cause serious distress, especially when those targeted were vulnerable.

In *Hibbert*, the defendant claimed that he had engaged in the course of conduct for the purposes of the detection and prevention of crime, and that it was reasonable in all the circumstances. However, the court found that although the subject-matter of the attack was important, the words spoken and written by the defendant were not. The false allegations were grave and had led a very large number of people to wrongly believe that the attack was a hoax, that the claimants were not injured in the attack, which amounted to unreasonable conduct. The defendant was subsequently ordered to pay £45,000 by way of damages to the claimants, an award that might deter such attacks in the future as well as compensating the complainant for the loss they had suffered.

The facts and decision in *Hibbert* are obviously very different from the present case, where the defendant in the present case was merely commenting on matters attracting subjective opinion, whereas the defendant in *Hibbert* refused to accept the truth surrounding the bombings. Hence the normal caution showed by the courts in finding a breach of the 1997 Act, where there is a genuine attempt to engage in a public debate, was, rightfully, not followed in *Hibbert*. Obviously, not all cases fall into the broad categories represented by these two cases, but the courts can usually detect the factors that draw a distinction between oppressive speech and actions and ones that are merely (annoying). These factors include whether there was a matter of public debate, the motivation of the defendant, the repetition of the behaviour, and, particularly relevant in this case, whether the complainant was truly and adversely affected by the defendant's speech and conduct.

As in *Hibbert*, the courts will often assess motivation of the defendant's course of conduct; to decide whether there is still a link between the defendant's speech and actions and an attempt to take part and continue a debate on a matter of public interest. Thus, in *Hibbert*, the defendant persisted with his behaviour when any reasonable person would have known that the assertions were untrue and causing further harm to the family. In contrast, in the present case, however hurtful the defendant's words were, he was continuing the public debate on trans issues, never losing sight of that debate for purely personal reasons; even though we might accept that the exchanges had also become personal after a certain time.

The present decision will be seen as a victory for those who advocate free speech, including the right to disagree with prevalent views on sexual diversity and equality. This is particularly important when the words used by the defendant are in response to counter views expressed by the complainant (or their supporters). The law thus allows a certain level of 'tit-for-tat' in this context (*Pal v United Kingdom*), and the involvement of the complainant in the national debate on trans issues was vital to the judge's finding in this case. On the other hand, the law should ensure that the boundary separating strong, but acceptable speech, and harassment, does not justify unreasonable and harmful attacks on individuals, and groups, particularly because of their beliefs or sexual orientation and practices. This is particularly so as the state owes a duty (in domestic law and under the European Convention – under Articles 8 and 14 (freedom from discrimination) - to secure equality and diversity and provide redress in appropriate cases. Failure by the law or the domestic courts to achieve the correct balance can, therefore, lead to further claims by unsuccessful litigants.

Whether the magistrates achieved that balance in this case is debatable, and as the law is being developed on a case-by-case basis, another court, on similar facts, might have convicted. In the meantime, speakers are allowed to employ shocking and distasteful speech and terms to express their views on controversial topics. This is the hallmark of a democratic society, which practices broadmindedness, pluralism and tolerance (*Handyside v United Kingdom* (1976) 1 EHRR 737). There is certainly no general duty on individuals to respect the rights and sensitivities of others when exercising their right to free speech, despite Article 10 stating that the right carries with it

‘duties and responsibilities.’ All restrictions on free speech must relate to a legitimate aim (including the rights of others), and there is no general right to be free from shock or offence or annoyance. This makes free speech, and this area of the law so unpredictable and interesting, particularly where social media is available to express one’s view immediately and freely. It is not the role of the law to improve the quality of speech and police how (intelligent) people express their views on matters of public interest. This applies even where the defendant is a former public officer (*R (on the application of Miller) v College of Policing* [2021] EWCA Civ 1926). Thus, it is not usually valid for the state or the authorities to claim that a view could have been expressed in a less offensive way. The courts appear to accept that hurtful things will be directed at opponents, including on social media, and that both sides should tolerate the hurt and discomfort that follows from such exchanges. That might, for many, be a sad reflection of modern society, and the use on social media to disseminate views and opinions in a ‘crude’ fashion, but provided the speaker keeps within those very broad boundaries, it represents a belief in free speech, and a desire to keep such exchanges out of the courts.

The Malicious Communications Act 1988

The present decision can also be contrasted with the recent conviction of ex-footballer Joey Barton under s.1 of the Malicious Communications Act 1988 for posting several ‘grossly offensive’ messages with intent to cause distress or anxiety to television broadcaster Jeremy Vine, and sports broadcasters Lucy Ward and Eni Aluko. A jury had found him guilty on six counts of sending grossly offensive messages, including referring to Vine as a ‘bike nonce’ and superimposing the female broadcasters’ faces on a photograph of (serial killers) Fred and Rosemary West. Sentencing Barton, the judge noted that ‘robust debate, satire, mockery and even crude language may fall within permissible free speech’, but ‘when posts deliberately target individuals with vilifying comparisons of serial killers or false insinuation of paedophilia, designed to humiliate and distress, they forfeit their protection.’

Although the two cases were brought under different statutory provisions, Joey Barton verbally attacked the broadcasters without any prompt or excuse, whereas Lineham’s comments were part of an existing public debate which the complainant had actively taken part in. Further, although Lineham had used disparaging remarks, Barton had crossed the line by referring to one complainant as a ‘nonce’ (inferring that he was unsafe in children’s company), and with respect to the female broadcasters had been activated by racism and sexism in making many of his comments. It is also worth noting that one purpose of the ‘grossly offensive’ offences (particularly under s.127(1) of the Communications Act 2003), is to dissuade individuals and groups from misusing public messaging facilities: there being an element of public nuisance in the offence, which outlays the sending of indecent and obscene messages. That is not the aim of the offence under the Malicious Communications Act 1989, but that Act was passed for the specific purpose of regulating ‘poison pen’ letters, and thus a less tolerant approach to speech might be seen in cases brought under the 1988 Act.

The term ‘grossly offensive’ is not defined in either state, leading to the Law Commission recommending that they be replaced with a harm-based offence. That recommendation was not accepted, and the offences remain in force, despite the passing of the Online Safety Act 2023. In the meantime, the courts are charged with distinguishing between ‘grossly offensive’ messages and ones which merely cause shock and offence, which is tolerated in a democratic society. Thus, in *R. (on the application of Watson) v Chief Constable of Greater Manchester* ([2025] EWCA 954 (Admin)), the Court of Appeal held that a political commentator and blogger had not committed a breach of ss.1, or 127, below, of the 1998 Act when she had written social media posts about the murder of a transgender teenager in which he expressed the opinion that gender was biologically determined. In the Court’s view, the posts did not meet the threshold of “grossly offensive” as it was accepted that the commentator’s opinion about gender was one that should be tolerated in a democratic society and reflected society’s fundamental values of free speech. This included the need for tolerance of statements and opinions that some might find offensive or upsetting.

In addition, s.127(2) of the 2003 Act contains the offence of persistent use of communication networks to cause annoyance, inconvenience and needless anxiety to another; and it might be argued that Barton should have been charged with that offence. In *Scottow v CPS* ((2020] EWHC 3241), it was held that the provision could be read in line with s.3 of the Human Rights Act 1998 to ensure that it was consistent with the right to freedom of expression under Article 10 of the European Convention (as given effect to by the 1998 Act). Overruling a conviction under s.127(2) Warby J held that the trial judge had wrongly considered that that a conviction was justified in cases of ‘unkindness’ and ‘calling others names’, and that such a finding was inconsistent with Article 10.

In any case, the cases show that ‘grossly offensive’ free speech can be restricted for the purpose of protecting (the rights of others), but that shock and offence alone is insufficient to activate the provisions. Which provisions are chosen will depend on the type and regularity of the message, but in all cases the court must balance the purpose of the law with the speakers’ rights of free speech. Such a balance will also be undertaken in relation to civil cases brought by complainants; both under the laws of defamation and misuse of private information, with the defendant able to raise defences of truth and honest opinion, or that the statements were in the public interest. Such defences will be raised by Barton when he is sued in defamation by Jeremy Vine and Eni Aluko in 2026. His recent criminal conviction, above, will not settle those civil claims in defamation, although the basis on which he was convicted in that case is likely to influence the outcome of any decision of whether he had defamed the claimants, and what defences he may have under the Defamation Act 2013 (of truth and fair comment).

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