

ELSA Ireland

National Moot Court Competition II

Saturday, April 22nd

The logo for ELSA, featuring the word "elsa" in a stylized, blue, lowercase serif font. The letters are bold and have a slight shadow effect.

The European Law Students' Association

IRELAND

Information Technology Law

Hate speech and gender-based harassment

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Case Problem

Nia Gyasi, who is of mixed Irish-Ghanaian heritage, runs an organisation named Sunlight Ireland, which seeks to bring greater transparency to public administration by assisting with Freedom of Information requests and hosting information obtained in response to such requests. It relies on philanthropic donations from various overseas foundations and limited public fundraising for income.

The *Irish Chronicle* newspaper carries an article on the organisation. This attracts little attention at first, but after it has been available for three weeks, it attracts the attention of the Borders Management Movement (BMM), an online website whose members oppose inward migration to Ireland, particularly from countries and ethnicities that do not share what it calls 'a shared European heritage'. Racist and misogynistic comments are posted on the *Irish Chronicle* site, along with allegations of fraud.

The *Chronicle* uses human moderators and software to monitor comments on its site. The moderators do not read or vet every comment before publication. A simple algorithm brings stories which attract a significant number of comments in a short time or the use of common obscenities and offensive phrases to the attention humans. However, as the BMM site has a small membership, the build-up of comments is slow and the language used is not obviously inflammatory, and therefore this system does not flag them. The human moderators are supported by an 'artificial intelligence' system which uses machine learning to try to emulate the actions of a human moderator. This does scan every comment but it also does not pick up the commentary on this particular article. It is not possible to say why it did not do so, but the developers think it is likely to be for the same reason as the failure on the part of the human moderators.

Amongst the comments made on the article are the following:

"Someone from such a background should really leave the running of this country to those who know better."

"I think she may have seen a little too much sunlight herself."

"Public administration requires a rational mind, and it is clear that this woman does not have one."

"This is just another SJW on a mission to sort out something that is not her problem. But what I want to know is why she is being treated like a charity. It's clear from looking at her that she needs all the help that she can get, but I wonder where all of that money is going?"

"I'm not sure that it's right to use 'snowflake' for someone from her background, but she certainly thinks that she is special. She really should respect her betters and let other people who are better qualified get on with the real hard work of being in charge."

"I've had enough of outsiders, like these political lobbyists pretending to be charities and this SJW, coming here and telling us how we should do things when we are perfectly capable of doing it ourselves."

"This woman is obviously trying to construct a narrative where there isn't one. This is typical female behaviour, generating drama when there is no need."

"If you get the accounts for this organisation (try it, they're available online), you'll see that it spends a lot on travel. This is more than a little suspicious given that it is essentially a website. I wonder where the money is going?"

"This organization could do with a little transparency itself. She seems very well-dressed. Where exactly is all of that funding going?"

One month later, Ms Gyasi is directed to the comments by a friend and is shocked. She brings the comments to the attention of the *Chronicle*. The comments are immediately deleted. She sues the *Chronicle* for defamation and also seeks orders to discover the identity of those posting. The latter orders are granted and she takes separate proceedings against some identifiable individuals.

When the main defamation action comes to trial in the High Court, the *Chronicle* accepts that some of the comments are defamatory but argues first, that the comments were not published by it but by its users; second, that it took down the comments as soon as it was aware of them and therefore is entitled to the benefit of the safe harbour provisions in the Electronic Commerce Directive. Ms Gyasi claims that the existence of human moderators and automatic monitoring of comments means that the *Chronicle* was constructively aware of the comments before she complained. She also relies on the European Court of Human Rights precedent in *Delfi v Estonia*.

The High Court agrees with her and finds against the *Chronicle*. While it does accept that the *Chronicle* is an "intermediary service provider" within the meaning of the European Communities (Directive 2000/31/EC) Regulations 2003 (SI 68/2003), it relies upon section 2 of the European Convention on Human Rights Act 2003 and the *Delfi* case, and it concludes that the measures taken by the site administrators were insufficient. In particular, as the site invited readers to comment on the stories which it carried, it had to expect that user-provided contributions would occur with relative frequency, and that some of these would be inflammatory and perhaps unlawful. The existence of an automated monitoring system means that there was actual knowledge of the comments. The *Chronicle* is liable for the clearly racist statements and the potentially defamatory allegations of fraud. However, although it finds that the latter two categories of statement are unlawful, relying on the ECHR case of *index.hu*, it finds that while the gender-based comments are offensive and demeaning, they are not unlawful, holding that to so find would be to unfairly limit freedom of speech.

Both parties appeal to the Court of Appeal; the *Chronicle* appeals against the general finding of liability, while Ms Gyasi appeals against the finding that demeaning gender-based statements are not unlawful.

Rules of the Competition

1. Teams

- Teams shall consist of a minimum of two people, with a maximum of three people
- Two team members will submit the oral arguments during each round.
- If the team consists of more than two members, the speakers may be alternated for each round
- The fees for the competition are as follows:
 - o ELSA Member: €40 per team member
 - o Non-ELSA Member: €50 per team member
- Deadline for registration of teams is Monday 3rd April 2017 at 6pm

2. Written Round

- There shall be two rounds of the competition: a written round and an oral round
- Each team must submit memorials for the Appellant and Respondent
- Memorials must have a maximum word count of 1,750 words
- All written memorials should use the OSCOLA Ireland referencing system
- The deadline for submission of the written memorials is Monday, 10th April at 10am
- Memorials should be sent to ypmoot@elsa-ireland.ie no later than the specified deadline

- Each written submission will be given a mark out of 50.
- The marking scheme is as follows;
 - o Command of the issues, including application of relevant law to the facts of the Competition Question (30),
 - o Structure and clarity of the submission (20).

3. Oral Round

- The Oral Round will take place on Saturday, 22nd April 2017

- Team will have 10 minutes before the commencement of pleadings to read their opposition's memorials
- Teams will have 7 minutes to give their oral arguments
- Teams will have 3 minutes to give their rebuttals
- The order of the oral submissions in each round shall be as follows;

Team X (Appellant): Member 1
 Team X (Appellant): Member 2
 Team Y (Respondent): Member 1
 Team Y (Respondent): Member 2
 Team X (Appellant): Member 1 Rebuttal
 Team X (Appellant): Member 2 Rebuttal
 Team Y (Respondent): Member 1 Rebuttal
 Team Y (Respondent): Member 2 Rebuttal

- Preliminary Round Oral Submissions
- Each individual speaker will be given a mark out of 100 for each oral presentation including their rebuttal.
- The marking scheme is as follows;
 - o Command of the issues, including application of relevant law to the facts (30)
 - o Persuasiveness (30)
 - o Ability to answer questions/ respond to points made (20)
 - o Structure and Clarity (10)
 - o Courtroom Manner (10)
- Scoring will not reflect the merits of the facts of the case but only on the quality and force of legal arguments.
- The team mark per Preliminary Round will be based on each of the individual team members' marks for their oral presentations (and will be out of a total of 200 marks).
- Post Preliminary Overall Marks;
- The team's final overall mark after the Preliminary Rounds have been completed (out of a total of 500 marks) will be based on the addition of the marks earned from the written submissions (out of a total of 100 marks) and each of the individual team member's oral submissions from each of the Preliminary Rounds (out of a total 400 marks).
- The 4 teams with the highest overall marks will progress to the Semi-Finals.

- In the event of a tie for a position in the Semi-Finals, the team with the higher marks for their written submissions will progress to the Final.
- If it remains a tie after the marks for the written submission marks have been compared, then the team who received the higher marks for their oral submissions in the first Preliminary Round will progress to the Final.
- Semi-Finals;
- Each team competing in the Semi- Finals will be assigned their opposition randomly.
- The Judge(s) of the Semi-Finals will decide which teams progress to the Final. There will be no marks awarded for submissions during these rounds.

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