Neutral Citation Number: [2015] EWCA Civ 206

Case No: B2/2013/0584

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM LEEDS COUNTY COURT
His Honour Judge Gosnell
1LS50081

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/03/2015

Before :

LORD JUSTICE LONGMORE
LORD JUSTICE RYDER
and
LORD JUSTICE BRIGGS

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Between :

(1) MELVYN LEVI **(2) CAROLE LEVI**	**Appellants**
- and -	
(1) KENNETH BATES **(2) LEEDS UNITED FOOTBALL CLUB LIMITED** **(3) YORKSHIRE RADIO LIMITED**	**Respondents**

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- -

MR SIMON MYERSON QC (instructed by **FORD & WARREN SOLICITORS**)
for the **APPELLANTS**
MR JACOB DEAN (instructed by **CARTER RUCK**) for the **FIRST RESPONDENT**
Attended by **BRANDSMITHS** for the **SECOND RESPONDENT**
The **THIRD RESPONDENT** did not appear and was not represented

Hearing date : 18th February 2015

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Judgment

Lord Justice Briggs :

1. This appeal raises the important question: to what extent, if at all, may a person who has been harmed (or who anticipates harm) from harassment aimed at someone else (the target) avail herself of the protection of the civil remedies afforded under the Protection from Harassment Act 1997 ("the Act")? In this case the Second Appellant, Mrs. Carole Levi, was found by the trial judge to have suffered alarm and distress as the result of the pursuit by the First Respondent, Mr. Kenneth Bates, of a personal grudge against her husband, Mr. Melvyn Levi, the First Appellant, arising out of their mutual business dealings, which manifested itself in conduct between 2005 and 2011 which the judge found amounted to the statutory tort of harassment against him. But Mrs. Levi failed in her claim against Mr. Bates and others because the judge also found that, save on one occasion, his conduct was not targeted at her. Accordingly, that one instance which the judge found was so targeted could not amount to a course of conduct sufficient to constitute the statutory tort of harassment, as against her.

2. The concept of "targeting", as a necessary element in the statutory tort of harassment, is not to be found expressly set out anywhere in the Act itself. Rather, it has emerged from judicial interpretation of the statutory definition of the tort, first by this court in *Thomas v News Group Newspapers Limited* [2001] EWCA Civ 1233, [2002] EMLR 78 in which, at paragraph 30, Lord Phillips MR said that "harassment" is generally understood as describing conduct "targeted at an individual". More recently, in *Dowson (and others) v Chief Constable of Northumbria Police* [2010] EWHC 2612 (QB), in a passage expressly adopted by the trial judge in the present case, Simon J said that it was essential as a matter of law, for a claim in harassment to proceed, that it be proved (inter alia) that the relevant conduct "is targeted at the claimant".

3. In many, perhaps most, harassment cases, including almost all of the reported cases, this question will not arise. The claimant is indeed the intended target of the perpetrator's course of conduct. But it may not infrequently happen that a course of conduct which, because it is targeted at him, is clearly harassment as against A, causes just as much alarm and distress to B, even though B is not the intended target of the perpetrator's misconduct, although foreseeably likely to be harmed by it. Borrowing a phrase used in cross-examination at the trial, B suffers collateral damage from the perpetrator's conduct targeted at A, the risk of which the perpetrator knew or ought to have known, but about which he was wholly indifferent.

4. Collateral damage in the form of foreseeable alarm and distress may arise in two quite distinct ways. B may be the spouse or partner of A, or a close member of the same family, and may suffer alarm and distress merely because the harassment of A alarms or distresses B out of her natural concern and sympathy for A. But the effect of the perpetrator's conduct upon B may arise not merely from her sympathy for A, but because the particular nature of the perpetrator's course of conduct causes her direct alarm and distress, although not targeted at her. Sometimes B may be affected in both those ways. As the judge put it, in relation to two of the aspects of Mr. Bates' conduct of which complaint was made:

> "They are not targeted at her (*Mrs. Levi*) but she is affected by it both out of concern for her husband and in this example out of concern for her own safety too."

B may, furthermore, be more vulnerable than A to being harmed by the relevant course of conduct, so much so that she may be harmed while A has the fortitude simply to shrug it off.

The Facts

5. The unfortunate events which led to this litigation arose from the affairs of Leeds United Football Club. Mr. Levi was a prominent member of a consortium of local businessmen (known as the Yorkshire Consortium) formed to rescue the club from financial collapse by taking it over through the medium of a limited company vehicle in 2004. The takeover proved to be a temporary palliative, and the club was later taken over again (through a purchase of shares in the vehicle company) by a consortium led by Mr. Bates. Even this did not prevent the club eventually going into administration, and it was later rescued by another company promoted by Mr. Bates called Leeds United Football Club Limited, the Second Respondent, in May 2007. Its parent company, Leeds City Holdings, also beneficially owned Yorkshire Radio Limited, the Third Respondent which operated, at least in 2010, as the club's own local radio station. The Second Respondent attended the appeal by solicitors to adopt the submissions made on behalf of the First Respondent. The Third Respondent did not attend and was not represented. Through a 76% shareholding, Mr. Bates was at the material time in *de facto* control of the club, and of the Second and Third Respondents. This enabled him to write a regular column in the club's published match programme for each home game, and to direct the making of announcements on the radio station. By those methods Mr Bates' views were communicated to a potential audience of more than 100,000 supporters of the club.

6. Business transactions which occurred during the successive changes in the control of the club, between companies owned or controlled by Mr. Bates, Mr. Levi and by a Mr. Weston, Mrs. Levi's former husband, led Mr. Bates to harbour serious grievances against Mr. Levi and Mr. Weston. The first related to a call option granted to the Bates consortium over shares in the Yorkshire Consortium's vehicle company. The second related to a debt owed to the club by a company owned by Mr. Weston, and a dispute whether that debt could be set off against a much larger debt owed by the club to another company owned by Mr. Weston and Mr. Levi. It is for present purposes irrelevant whether Mr. Bates' grievances were real or imagined. The present proceedings, and libel proceedings by Mr. Levi which preceded them, arise out of the manner in which Mr. Bates sought to vent his ire upon Mr. Levi by reason of those grievances, mainly in editions of the club's match programme, but also by announcements on the radio station.

7. In his careful and clear reserved judgment handed down on 7th June 2012, HHJ Gosnell provided, at paragraph 7, a succinct summary of the conduct of Mr. Bates and the other two Respondents alleged to amount to harassment. I can do no better than quote it verbatim:

" 7 The allegations of harassment

There are a number of allegations of harassment pleaded by the Claimants. The fact that the particular words were used is not disputed by the Defendants as they

are mainly recorded in documents. It is fair to say that the Defendants deny that the words used are capable of amounting to harassment and have a number of other technical arguments in respect of the same which I will deal with later. I will accordingly set out all the allegations of harassment made by the Claimants so that in due course I can decide whether any or each of them are capable of amounting to harassment. Where I have set out an article written by the First Defendant this is an extract from his column in the match programme unless stipulated otherwise:

a) In an article entitled "This *is The Story Behind the Recent Headlines*" published in the programme on 25th September 2006 the First Defendant claimed that the First Claimant was claiming that he "*was going to get the club back"*. He also stated that the First Claimant and another were acting like a "*pair of money grabbing spivs*".

b) In an article entitled "*Making Steady Progress But There is Still A Long Way to Go"* published in the programme on 28th September 2005 the First Defendant wrote *" we are saving Melvyn Levi's free tickets which reduces our attendance by 3*". He concluded the article: *"on a final note, what exactly was Melvyn Levi's involvement in the Bramley League Club? I hear all sorts of stories and understand that their ground is now covered in housing. How did that come about?"*

c) In an article entitled "Just *to Bring You Up To Speed*" published in the programme on 17th October 2006 the First Defendant called the First Claimant a "*shyster*" and claimed the First Claimant was trying to blackmail him. This was the first of the successful defamatory allegations.

d) In an article entitled "The *Enemy Within*" published in the programme on 3rd March 2007 the First Defendant wrote that the First Claimant's father must be "*turning in his grave at his antics*". The First Defendant wrote that the First Claimant's demands were "*little short of blackmail";* that his behaviour was "*totally scurrilous*"; and described the First Claimant's behaviour as unpleasant and dishonourable. The First Defendant suggested that readers should put questions to the First Claimant to justify his behaviour, publishing the Claimants' home address. This was the second of the successful defamatory allegations.

e) In an article entitled "Why *Mr Levi Why*" published in the programme on 10th March 2007 the First Defendant accused the First Claimant of trying to frighten off would-be investors and trying to blackmail him personally into paying the First Claimant money to go away. The First Defendant wrote: "*Thanks Melvyn. By the way, you do know that your phone number is in the book don't you"*. This last sentence was blanked out in most programmes but the Claimants allege that it could still be read clearly from both the front and behind the page. The phone number was clearly that of both Claimants. This was the third successful defamatory article.

f) In an article entitled "*Progress on Many Fronts*" published in the programme on 11th April 2008 the First Defendant wrote "*we have now*

decided to refer the matter [the Yorkshire Consortium's running of the club] to the appropriate authorities and call for a full investigation into the circumstances surrounding the original takeover of Leeds United .....PS On Wednesday I received a telephone call from Charlie Sale, a sport gossip columnist at a daily tabloid. He had received a phone call from Melvyn Levi, anxious to tell about his forthcoming libel action against me which will be heard in the High Court in June. This should be hilarious. Levi will be asked to explain the allegation that Roman Abramovich has blacklisted me with English banks. All documented of course. Don't miss the Melvyn Levi Comedy Show in the High Court available across all the British Media, including Yorkshire Radio". It is the Claimants` case that the matter was not referred to the appropriate authorities and no documents have been produced to support the fact that the First Claimant made these allegations against the First Defendant.

g) On 21st December 2010 a process server employed by a company instructed by the Second Defendant's Jersey lawyers attempted to personally serve the First Claimant with court papers at his home. At the time of his visit only the Second Claimant was present and so service was not effected. The First and Second Defendants were aware that the Claimants` solicitors were Ford and Warren of Leeds and service could have been arranged through them. The Claimants allege that the decision to attempt personal service at the Claimant's home without warning was a further act of harassment.

h) On 26th December 2010 Leeds United were playing Leicester City away and the match was being broadcast live by the Third Defendant. During the match two announcements were made. The first at around 1420 said :

> *"Leeds United are currently searching for the whereabouts of Melvyn Levy to serve him some papers in relation to a High Court action in Jersey. Now , if you've seen the former Leeds United director , you're being asked to get in touch with Yorkshire Radio and let us know where and when you saw him"*

The message was substantially repeated again at 1605 hours. It emerged quite late in the trial that a similar message had been broadcast three times on 22nd and at least once on23rd December 2010.

i) In an article entitled "*Onwards and Upwards*" published in the programme on 1st January 2011 the First Defendant wrote:

> "*On another topic, after five years, we have issued a writ against Robert Weston in Jersey. We are claiming that he personally misappropriated £190,400 of season ticket holder's money in May 2005.*
>
> *In parallel we have issued a writ against Melvyn Levy (a former Leeds United director) on grounds that he aided and abetted Weston. As I write, we have not served Mr Levi with his writ as his wife said he was away until New Year which makes me speculate as to why they*

> *split for the festive season. No matter, the procedure will be processed in 2011.Watch this space for continuing exciting news of a saga which will soon challenge Coronation Street as a long running soap"*

j) In an article entitled "*Our Destiny is in Our Hands"* published on 2nd April 2011 the First Defendant wrote as follows:

> "We *had a good week in the courts ……In a separate case we are suing Robert Weston and Melvyn Levy personally in respect of matters pertaining to the Admatch affair in the Jersey High Court and we expect the matter to be heard in the next twelve months …we will stick to the facts and hopefully win through on all counts, reclaim our costs and teach the Defendants a lesson*"
>
> Although the Defendants deny that his article constitutes harassment they admit it was published in breach of a contractual undertaking given in these proceedings not to publish matters concerning the First Claimant without giving at least seven day's notice to his solicitors."

8. It is clear from a Scott Schedule provided by Mr. and Mrs. Levi that they both relied, as constituting harassment of them, upon items (a), (c), (d), (e), (g), (i) and (j). But only Mr. Levi relied upon items (b), (f) and (h). Mr. Levi had however brought libel proceedings arising out of the publications summarised in items (c), (d) and (e). Those proceedings went to trial in 2009, at which Mr. Levi was successful, and was awarded £50,000 in damages. Although therefore he relied upon those three items as part of the relevant background, the judge ruled that Mr. Levi could not therefore obtain damages for harassment in respect of the course of conduct specified in items (a) to (f) (ending in April 2008), having already obtained libel damages in respect of the same course of conduct. That ruling did not, of course, affect Mrs. Levi.

9. A little more needs to be said about items (d) and (e). The match programmes of which they formed a part were published by the Second Respondent to a large readership of Leeds United supporters. Their combined effect was that the chairman of the club was inviting its supporters generally to take his side in a business dispute between him and Mr. Levi, by confronting Mr. Levi with questions about his alleged dishonourable conduct, both at his home (whether by visit or letter) and by the use of his home telephone number, when Mr. Bates was aware that Mr. Levi shared both the home and that residential telephone number with his wife.

10. The judge accepted evidence from Mrs. Levi that, quite apart from being upset and angry about Mr. Bates's articles about her husband in the match programmes "on his behalf", she was particularly concerned about the publication to club supporters of their home address and, albeit indirectly, their home telephone number. At paragraph 25 the judge said:

> "It caused them both a huge amount of worry, she said, and concerns that disgruntled Leeds supporters might appear at their home. The Police advised them to take precautions and a special response alarm was fitted at their home. They were

> supplied with personal radio activated alarms to wear around their necks and they were advised not to leave the house unless they had to."

The judge regarded Mrs. Levi as a truthful witness, and accepted her evidence that the effect of the itemised conduct upon her had been to cause her real psychological harm, both in the earlier period (2006-8), and in the later period (2010-11).

11. The judge found, in summary, that none of the publications summarised in (a) to (f) in 2007-8 were targeted at Mrs. Levi and that, during the later period, the only publication which was targeted against her was item (i), which contained the unpleasant (and in fact untrue) insinuation that Mr. and Mrs. Levi were spending the Christmas period split apart. But this isolated publication could not, on its own, constitute a course of conduct sufficient to satisfy the requirements of the statutory tort of harassment, even if it might have done as part of a series.

12. It is important to focus upon the judge's reasons for concluding that items (d) and (e) were not targeted at Mrs. Levi. Again, and in fairness to the judge, it is convenient to quote his reasoning in full, in paragraphs 52 and 53 of the judgment:

> "52. In the article dated 3rd March 2007 it states:
>
> > "*Perhaps you would like to ask Mr Levi some questions and ask him to justify his behaviour which is damaging Leeds prospect of advancement. Mr Levi lives at Wike Ridge House, 3 Wike Ridge Gardens, Leeds LS17 9NJ"*
>
> Whilst leading counsel for the Claimants submits that this is targeted at the Second Claimant as it is also her address which is revealed I am not convinced that she is actually the target of this invitation to the fans to confront the First Claimant. I have little doubt that if anyone were to consider whether she might be affected by the suggested confrontations the answer would certainly be yes but that is not the test. When football stars have their private lives exposed their family are almost always badly affected but this is just an unfortunate consequence of the media intrusion. At one point when cross-examining the First Defendant leading counsel for the Claimants suggested that the Second Claimant was merely "collateral damage" to him. He was seeking to criticise the First Defendant's lack of consideration for her position but it seems to me this is an apt, if somewhat brutal, description of how the Second Claimant has been affected by these articles. They are not targeted at her but she is affected by it both out of concern for her husband and in this example out of concern for her own safety too.
>
> 53. In the article dated 10th March 2007 she is mentioned in passing but only to remind readers that Mr Weston was her first husband. The passage which is pleaded as harassment however is: "Thanks Melvyn. By the way, you do know that your phone number is in the book don't you ". The Claimants contend that as the number in question is their

> own home number then the harassment applies to both of them. For the same reasons enunciated in the preceding paragraph I do not accept this. The offending words specifically refer to the First Claimant by his first name and that being the case your number must be taken to be the singular form of that word rather than the plural. Again it seems the First Claimant was encouraging fans to contact the First Claimant to complain about his conduct. No doubt the Second Claimant would have been affected by this if it had happened but in my judgement it was not the intention of the First Defendant that she be harassed by it. He was asked in cross-examination why he didn't give more consideration to the Second Claimant's feelings and health. He replied that she didn't come into his calculations at all. This may not make him an attractive character but it does tend to support his argument that he has not targeted the Second Claimant. I accept there may be an objective element where a Defendant does not intend to target a victim but ought to know that he is targeting her. I do not think that even objectively these articles can be construed as targeting the Second Claimant."

13. Two points arise from that passage. The first is that, as emphasised by Mr. Jacob Dean for Mr. Bates, the judge analysed the question of targeting on both a subjective and an objective basis. His subjective basis was to ask: at whom did Mr. Bates intend that the two articles be targeted?

14. The second point is that it is less clear how the judge conducted his objective analysis, in the last two sentences of paragraph 53. Doing the best I can, I consider that he probably had in mind, as objective targeting, a situation where a reasonable observer would regard the publication as targeted against the victim, in circumstances where the perpetrator ought to have realised that. Despite Mr. Dean's attempt to submit otherwise, it does not seem to me that the judge regarded the concept of objective targeting as including a situation where the relevant conduct is plainly aimed by the perpetrator at a particular victim, but is of a nature where it would foreseeably harm (in the sense of causing alarm or distress to) another person, because of her proximity to the intended victim, for example by living in the same house. I say that because it is apparent from paragraphs 52 and 53 that the judge regarded it as clear that an invitation by Mr. Bates to supporters to visit or telephone Mr. Levi at his and his wife's house would be likely to affect her as well as him, not merely out of sympathy for him, but out of concern for her own safety, as he found had in fact occurred.

The law

15. For present purposes, the relevant provisions of the Act (with effect from 2005) are as follows:

> "**1 Prohibition of harassment**
>
> (1) 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.

[(1A) …

(2) For the purposes of this section [or section 2A(2)(c)], the person whose course of conduct is in question ought to know that it amounts to [or involves] harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to [or involved] harassment of the other.

(3) Subsection (1) [or (1A)] does not apply to a course of conduct if the person who pursued it shows—

(a) …

(b) …

(c) that in the particular circumstances the pursuit of the course of conduct was reasonable.

2 Offence of harassment

(1) A person who pursues a course of conduct in breach of section 1 is guilty of an offence.

(2) A person guilty of an offence under this section is liable on summary conviction to imprisonment for a term not exceeding six months, or a fine not exceeding level 5 on the standard scale, or both.

(3) …

3 Civil remedy

(1) An actual or apprehended breach of section 1 may be the subject of a claim in civil proceedings by the person who is or may be the victim of the course of conduct in question.

(2) On such a claim, damages may be awarded for (among other things) any anxiety caused by the harassment and any financial loss resulting from the harassment.

…

7 Interpretation of this group of sections

(1) This section applies for interpretation of [sections 1 to 5A]

(2) References to harassing a person include alarming the person or causing the person distress.

[(3) A "course of conduct" must involve—

(a) in the case of conduct in relation to a single person (see section 1(1)), conduct on at least two occasions in relation to that person, or

(b) …

(4) "Conduct" includes speech."

16. Before turning to the authorities, Articles 8 and 10 of the ECHR have an obvious bearing upon the interpretation and application of the Act, in particular where the conduct complained of consists of, or includes, speech or published material. As frequently happens, Articles 8 and 10 are likely to pull in opposite directions. The conduct complained of may well impact upon the victim's private life, but a broad interpretation of harassment, in relation to speech or published material, may plainly engage Article 10, if the court is minded to prohibit it, or visit damages upon the defendant.

17. As will appear, the judge had these considerations well in mind, but they were not either conclusive or indeed of any real significance in relation to the issue which has arisen on this appeal. This is because, applying the well-known balancing test explained by Lord Steyn in *Re S (a child)* [2004] UKHL 47, [2005] 1AC 593, the judge concluded, after an intense scrutiny of the facts, that Mr. Bates' publications were motivated by a personal grudge against Mr. Levi arising from their business dealings, rather than a desire to explain genuinely held views about matters of interest to the fans of Leeds United: see paragraphs 67 to 73 of the judgment. These conclusions supported his finding that there was harassment against Mr. Levi, and they have not been appealed.

18. As already noted, the first mention of the concept of targeting as an aspect of the constituents of the statutory tort of harassment appears in *Thomas v News Group Newspapers Limited* [2001] EWCA Civ 1233. Under the heading "The Nature of Harasssment", Lord Phillips said this, at paragraphs 29-30:

> "29. Section 7 of the 1997 Act does not purport to provide a comprehensive definition of harassment. There are many actions that foreseeably alarm or cause a person distress that could not possibly be described as harassment. It seems to me that section 7 is dealing with that element of the offence which is constituted by the effect of the conduct rather than with the types of conduct that produce that effect.

> 30. The Act does not attempt to define the type of conduct that is capable of constituting harassment. "Harassment" is, however, a word which has a meaning which is generally understood. It describes conduct targeted at an individual which is calculated to produce the consequences described in section 7 and which is oppressive and unreasonable. The practice of stalking is a prime example of such conduct."

19. In *Trimingham v Associated Newspapers Ltd* [2012] EWHC 1296 (QB), Tugendhat J sought to explain a larger passage in Lord Phillips' speech which included that which I have quoted above. At paragraph 53, he said:

> "The word 'targeted' is not in the statute. I take Lord Phillips to be using it to give guidance as to what is meant in s 7(3) by the words 'conduct in relation to a … person': those words are to be interpreted restrictively to comply with s 3 of the Human Rights Act 1998."

20. That analysis cannot be taken to be literally correct, because section 7(3) only had the quoted words added to it in 2005, whereas the *Thomas* case was heard and decided in 2001. But the general proposition cannot be gainsaid that, for a course of conduct to amount to harassment, regard must be had to the terms of the ECHR, and to Article 10 in particular, where the conduct consists of speech or published material.

21. Later, when dealing with the particular facts, which concerned publications about the conduct of a prominent politician, with whom the claimant had had a relationship, Tugendhat J said this, at paragraphs 270-271:

> "270. The main target of the articles complained of is Mr Huhne. Ms Trimingham is named in them only because of the very important secondary role she played in the events relating to Mr Huhne. She is not even named by the Defendant in all its articles about Mr Huhne, but only in less than half of them.
>
> 271. I would not wish to say that it is impossible that a secondary character to a story, such as Ms Trimingham is in publications about Mr Huhne, might ever succeed in a claim for harassment for speech directed to the primary character, such as Mr Huhne is. If such a case occurs, the court will have to consider it on its own facts…."

22. In *Majrowski v Guy's and St. Thomas's NHS Trust* [2005] EWCA Civ 251, [2005] QB 848 (in the Court of Appeal), Auld LJ quoted Lord Phillips' reference to targeting with approval, but without further elucidation. More to the point, May LJ cited the same passage, and continued, at paragraph 82:

> "Thus, in my view, although section 7(2) provides that harassing a person includes causing the person distress, the fact that a person suffers distress is not by itself enough to show that the cause of the distress was harassment. The conduct has also to be calculated, in an objective sense, to cause distress and has

> to be oppressive and unreasonable. It has to be conduct which the perpetrator knows or ought to know amounts to harassment, and conduct which a reasonable person would think amounted to harassment. What amounts to harassment is, as Lord Phillips said, generally understood. Such general understanding would not lead to a conclusion that all forms of conduct, however reasonable, would amount to harassment simply because they cause distress. Employees may be distressed, and understandably so, by managerial conduct which, for instance, being properly and reasonably critical of an employee's poor performance, is entirely within the proper and reasonable scope of the manager's functions and duties."

May LJ went on to note that the fact that harassment under the Act is not only a tort, but a criminal offence, is also bound to:

> "colour any appreciation of conduct which amounts to harassment. It would, I think, reinforce the view of a reasonable person that harassment is serious conduct calculated to produce the consequences described in section 7(2) and which is oppressive and unreasonable."

23. In the *Majrowski* case in the House of Lords [2006] UKHL 34, [2007] 1AC 224 Lord Nicholls emphasised the requirement that conduct needed to be shown to be oppressive, to amount to harassment. At paragraph 30, he said:

> "Courts are well able to recognise the boundary between conduct which is unattractive, even unreasonable, and conduct which is oppressive and unacceptable. To cross the boundary from the regrettable to the unacceptable, the gravity of the conduct must be of an order which would sustain a criminal liability under section 2."

24. At paragraph 6, Baroness Hale observed that:

> "All sorts of conduct may amount to harassment. It includes alarming a person or causing her distress: section 7(2). But conduct might be harassment even if no alarm or distress were in fact caused. A great deal is left to the wisdom of the courts to draw sensible lines between the ordinary banter and badinage of life and genuinely offensive and unacceptable behaviour."

25. Finally, as I have said, Simon J imported Lord Phillips' requirement for targeting into his summary of what must be proved in order for a claim in harassment to succeed, in *Dowson & others v The Chief Constable of Northumbria Police* [2010] EWHC 2612 (QB), at paragraph 142, but without any further elucidation of what the targeting requirement meant, other than, and for the first time, that the conduct should have been targeted at the claimant.

Analysis

26. The critical question, for present purposes, is whether in transforming Lord Phillips' phrase "targeted at an individual" to the phrase "targeted at the claimant", Simon J went a step too far. In my judgment he did. He may easily be forgiven for doing so in a case which, like the *Thomas* case, disclosed no disconnect between those who were targeted, and those who suffered the consequences. *Trimingham* was the first case where that disconnect arose on the facts, and Tugendhat J was careful to leave open the question whether the person who was not the primary target, but who was harmed in the relevant sense by the publications, could complain of harassment. It was however a classic case where the publications consisted of journalism about matters of intense and legitimate public interest, so that the claimant's claim was dismissed mainly on Article 10 grounds which did not require him to decide the question which arises on this appeal. This is, so far as I know, only the second case in which such a disconnect between the target and the victim has arisen. The question now has to be decided because, for the reasons given by the judge, Article 10 rights to freedom of speech are not decisive.

27. There are two main reasons why I consider that it is not a requirement of the statutory tort of harassment that the claimant be the (or even a) target of the perpetrator's conduct. The first is that I do not consider that Lord Philips had that question in mind. The purpose of the passage in his judgment in the *Thomas* case which I have cited was not designed to identify who may complain of harassment, but rather to draw out of the well-known word 'harassment' the concept that it is targeted behaviour, by which I mean behaviour aimed at someone, rather than behaviour which merely causes alarm or distress without being aimed at anyone. Lord Phillips' immediate example was stalking, conduct which is plainly targeted at someone.

28. The value of targeting as a concept is that it excludes behaviour which, however alarming or distressing it may be, is not aimed at directed or anyone. For example, a person may drive his fast sports car on regular occasions through a neighbourhood in a way that causes foreseeable alarm and distress to pedestrians and parents of young children. It may amount to speeding, careless or dangerous driving, but it is not harassment because it is not targeted at anyone at all. The driver is merely selfishly enjoying himself.

29. My second reason for concluding that, provided that it is targeted at someone, the conduct complained of need not be targeted at the claimant, if he or she is foreseeably likely to be directly alarmed or distressed by it, is that I cannot conceive why Parliament should by implication rather than express words (for there are none) have deliberately excluded from the protection of the Act persons who are foreseeably alarmed and distressed by a course of conduct of the targeted type contemplated by the word harassment. The only express requirement is that the claimant be a victim of the relevant course of conduct: see section 3(1).

30. Lord Phillips' example of stalking is again in point. A stalker may typically target his or her conduct at a former sexual partner who has, by the time the objectionable course of conduct begins, formed a new partnership with someone else. The stalking may be as alarming and distressing to that new partner as it is to the target, or even more so. Of course, in many cases, the target may achieve practicable protection for his or her new partner by obtaining the requisite injunction in a civil harassment claim, but this is by no means inevitable. The target may be indifferent to the conduct complained of by the new partner, or may simply be averse to civil litigation. Why

should the law make protection from harassment for the new partner dependent upon the target taking the requisite proceedings?

31. Nor do I regard the fact that harassment is criminal conduct a good reason for excluding the victim of collateral damage, however important its criminal character may be for the identification of the type or seriousness of the relevant conduct. That analysis can be carried out as between the perpetrator and the target. If it is serious enough to be properly regarded as criminal, then it seems to me that the victim of collateral damage from the same conduct ought to be able to sue for harm foreseeably caused by it.

32. Mr. Dean protested that to include the victims of collateral damage in this way would be to widen the class of potential claimants under the Act to an alarming and indeterminate degree, and would enable the partners or close family members of targets of harassment to bring claims merely by asserting alarm and distress felt by way of natural sympathy for their spouse, partner, child or other close relation. The judge made much the same point.

33. I agree that alarm or distress suffered out of nothing more than sympathy for the targeted victim of harassment is insufficient to found a claim under the Act. The claimant must be harassed by it, in the sense that the conduct complained of must have some direct effect upon the claimant (in terms of causing foreseeable harm, usually, but not limited to, alarm and distress). This is because section 3(1) of the Act confers a right to bring a civil claim upon persons who are or may be the victim of the course of conduct in question, and because section 1(1) requires that course of conduct to amount to harassment of another. My view that the harm to the claimant must be foreseeable arises from section 1(1)(b) because of the requirement that the perpetrator knows or ought to know that the relevant course of conduct amounts to harassment.

34. The result of that analysis is that the ability to bring a harassment claim extends beyond the targeted individual only to those other persons who are foreseeably, and directly, harmed by the course of targeted conduct of which complaint is made, to the extent that they can properly be described as victims of it.

35. The confined nature of this additional class of potential claimant is well illustrated by the facts of this case. Mrs. Levi derives no right to claim from her understandable sympathetic distress at Mr. Bates' campaign of vilification against her husband. She derives her claim in my view because Mr. Bates chose to incite his club's supporters to participate in that campaign by directing hostile acts at Mr. and Mrs Levi's home, as I have described. It was plainly foreseeable that, if any significant number of supporters of the club responded to Mr. Bates' incitement, they would cause Mrs Levi alarm and distress by attending or telephoning her home. It was equally foreseeable that, as the judge found in fact happened, the mere publication of that incitement in the club's match programmes would, once it came to Mrs. Levi's attention, cause her alarm and distress by an apprehension that this is what would shortly occur, even if, in the event, no supporters took up the cudgels on Mr. Bates' behalf. That class would extend beyond the target Mr. Levi so as to include, and be limited to, any other persons resident to Mr. Bates' knowledge at the Levi family home, provided perhaps that they were old enough to pick up the telephone or answer the front door-bell.

36. Furthermore, no freedom of speech considerations seem to me to impact upon this question. Provided that (as in the present case) the conduct complained of was sufficiently far removed from responsible journalistic comment about matters of genuine public interest to permit the targeted victim to sue, then I can think of no sensible reason why the victims of the collateral damage should not be similarly entitled. Whether their claim would succeed might depend upon a balancing of Articles 8 and 10 after an anxious scrutiny of the facts about them, rather than merely about the targeted victim, and might in a rare case produce a different outcome. But those considerations seem to me to provide no good reason for excluding the victims of collateral damage altogether from the right to bring a claim.

37. Returning to the facts, I consider therefore that the judge was wrong to exclude Mrs. Levi from a claim based upon items (d) and (e) in his itemised list of relevant conduct. Those two articles in the match programmes constituted harassment of Mrs. Levi not simply because they defamed her husband, but because they invited thousands of club supporters to intervene in a hostile manner, at her home, about a business dispute between her husband and Mr. Bates. Incitement of others to weigh in for the furtherance of a grudge about a private business dispute has nothing whatsoever to do with free speech, as the judge rightly observed.

38. That conclusion gives rise to the following additional questions:

    a) Did those two articles (d) and (e), which were published early in 2007, amount to a sufficient course of conduct, either on their own, or when aggregated with item (i), which occurred in late 2010?

    b) If so, is Mrs. Levi entitled to damages, and in what amount?

    c) Do those three publications (d), (e) and (i) justify a grant of an injunction to Mrs. Levi, which the judge refused?

    I will take those questions in turn.

39. I do not consider that item (i) can properly be aggregated with the two articles (d) and (e). A period of over three and a half years elapsed between them, and item (i) was very different in character. Whereas the 2007 articles specifically incited supporters to direct hostility to Mrs. Levi's home, the 2010 article amounted merely to a gratuitous and incorrect slur upon her relationship with her husband which involved no incitement of others to support Mr. Bates in his grudge. Ironically, item (h), namely the radio broadcasts asking club supporters to keep an eye out for Mr. Levi's whereabouts, might have been of a similar character to (d) and (e), in the sense that they could foreseeably have led to supporters staking out the Levi home with binoculars, so as to report upon his return. But item (h) was not relied upon at trial by Mrs. Levi, as the judge noted, and despite Mr. Myerson QC's best attempt to do so on her behalf, I consider it now too late to seek to reintroduce this item for the first time on appeal.

40. Nonetheless, I do consider that items (d) and (e) together amounted to a sufficient course of conduct. They were two separate publications, each pursuing the same objective of incitement, focussed upon the Levi family home in different ways, the first by direct visit (or perhaps letter) and the second by telephone. They shared the

same essential characteristics, they were closely connected in terms of time and two occasions are, by section 7(3)(a), identified, at least potentially, as sufficient for that purpose, although two will not always qualify. Accordingly, I consider that a cause of action for the statutory tort of harassment was established in Mrs. Levi's favour in 2007.

41. The judge's conclusion that Mrs. Levi failed, because she could demonstrate only one occasion upon which conduct of the requisite type was targeted at her, meant that he did not need to consider her claim in damages, which failed *in limine*, because she had no cause of action. The judge awarded Mr. Levi £10,000 damages, not for the harm caused in 2007 by items (d) and (e), but for the harm caused by the combined effect of items (h) and (i), which were both targeted at him, and amounted to a separate and distinct course of relevant conduct.

42. Mrs. Levi is, for the reasons already given, in my view *prima facie* entitled to damages, for any loss caused by the effect upon her of items (d) and (e) in 2007. Section 3(2) specifically includes damages for anxiety caused by the harassment. There are, as I have summarised, clear findings by the judge that Mrs. Levi was caused distress and anxiety by items (d) and (e), when she learned of them, even though no club supporters were shown to have responded to Mr. Bates' incitement. For the reasons which I have given, the publication in December 2010 is not to be aggregated with those items in 2007, as part of a course of relevant conduct.

43. The parties were at one in inviting this court to deal fully with the quantification of any damages, rather than impose upon the parties the delay, cost and further stress which might be occasioned by remitting the matter to the county court. Mr. Myerson pointed only to the £10,000 awarded to Mr. Levi as a relevant comparator, and did not seriously resist the suggestion that Mrs. Levi's loss might properly be compensated by a lower figure than awarded to him.

44. For his part, Mr. Dean sought to fend off any damages award for Mrs. Levi by reference to the delay which occurred between 2007 and the bringing of these proceedings. He suggested that this demonstrated that she had not in reality suffered any real harm, but this is demonstrably contrary to the judge's findings of fact, against which the Respondents have not cross-appealed. In my view, delay in claiming under the Act is no answer to a claim in damages until a statutory limitation period has expired.

45. The £10,000 awarded to Mr. Levi is not an altogether satisfactory comparator, because it relates solely to the harassment in 2010/11 rather than to the harassment in 2007 of which Mrs. Levi complains but for which Mr. Levi has already obtained substantial libel damages. I am satisfied that Mrs. Levi suffered substantially more than nominal damage, because of the judge's findings about the steps which she and her husband both had to take, once appraised of items (d) and (e), in terms of protecting themselves while at home, and because of his general conclusions as to the anxiety which those items caused her. The parties' sensible invitation to this court to quantify the damages inevitably involves the application of a broad brush. I would award Mrs. Levi £6,000.

46. The question whether Mrs. Levi should have been granted an injunction at the trial is, in all respects other than in relation to costs, academic. In June 2012 the judge

granted Mr. Levi only a two-year injunction in respect of the harassment of him which took place in late 2010 and early 2011. By 2012, the relevant harassment of Mrs. Levi had occurred more than five years previously. Furthermore, by contrast with a claim for damages, delay in bringing proceedings is always an important discretionary factor against the grant of an injunction.

47. A claimant may of course seek a *quia timet* injunction against a threatened course of conduct which, if implemented, would amount to harassment: see again section 3(1), which permits civil proceedings in respect of an apprehended breach of section 1. But the judge gave good reasons, which have not been seriously challenged on appeal, for concluding that the single act of harassment against Mrs. Levi in late 2010 was a sufficiently one-off, isolated occurrence not to justify a reasonable apprehension of repetition. His reasons for that conclusion are to be found in an extempore supplementary judgment given on 7th June 2012. They were not in my view vitiated by his error of law in relation to targeting, and his decision was otherwise well within the discretion available to him.

48. Even if the error of law about targeting adversely affected the judge's decision, I would reach the same conclusion as he did on the facts which he found. The single act of harassment of Mrs. Levi in late 2010 arose because of Mr. Bates' careless and unjustified misinterpretation of what she told the process server when he sought to serve proceedings on her husband. Since the judge granted an injunction restraining further harassment of Mr. Levi, which afforded her practicable protection from being the subject of collateral damage from further harassment aimed at him, that particular swipe at her gave rise to no real prospect of repetition in the sense of some harassment of her alone.

49. For all those reasons I would allow Mrs. Levi's appeal, award her damages of £6,000 but decline to grant her an injunction. For completeness, I would dismiss that part of the appeal against the judge's order which refused her an injunction.

Lord Justice Ryder

50. This is a case in which the partner of the victim of harassment was affected by that harassment. The judge concluded that she was affected by the course of conduct not just because she was concerned about the effect of the harassment on its target, her husband, but also because she had concern for her own safety.

51. The conduct involved the use of her home address and her home telephone number by football supporters at the invitation of the perpetrator. The effect upon her was graphically described by the judge. She was a foreseeable victim. She was fortunate that the supporters had more sense or compassion than the perpetrator.

52. The judge accepted that there 'may' be an objective element where a defendant does not intend to target a victim but ought to know that he is targeting her. He ought to have held that targeting is an objective concept that includes a situation where the conduct complained of is not only intended to harm a particular victim, but would also foreseeably harm another person, because of her proximity to the intended victim. That necessitated an analysis of the facts in a way that in my judgment is missing in this case. There was a sufficient course of conduct connected in time and by the factual nexus to place Mrs Levi in the position of a person who would be

foreseeably harmed. She was accordingly entitled to damages and I would allow her appeal to that extent.

53. The effect of the harassment was of some significance and I agree with my Lord's assessment of damages in the sum of £6,000. I also agree that the judge was not wrong to refuse an injunction given the time delay and the lack of connection between the first two incidents and the third incident. I would accordingly dismiss the appeal in so far as it relates to the judge's refusal of injunctive relief.

Lord Justice Longmore

54. The judge held that Mrs Levi could not recover damages (or obtain an injunction) in respect of incidents (d) and (e) because the harassing conduct was aimed at her husband and not at her. For this purpose he relied on a dictum of Simon J in Dowson v Chief Constable of Northumbria [2010] EWHC 2612 (QB) that there must be conduct which occurs on at least two occasions which is targeted at the claimant, which itself appears to derive from a dictum of Lord Phillips MR in Thomas v News Group Newspapers [2001] EWCA Civ 1233; [2002] EMLR 78 para 30 that the harassing conduct must be targeted at an individual.

55. It is right that, for the statutory tort of harassment to occur, there must be a course of conduct which is aimed (or targeted) at an individual since that is inherent in the term "harassment". But I see no reason why it should be only that individual who can sue, if the defendant knows or ought to know that his conduct will amount to harassment of another individual. The tort (and crime) of harassment does not require an intent to harass any one individual; section 1 of the Act is clear that the question whether conduct is harassing conduct is an objective question for the fact-finder. If therefore a defendant knows or ought to know that his conduct amounts to harassment, he should be liable to the person harassed, even if the conduct is aimed at another person. A defendant is always entitled to show, pursuant to section 1(3) of the Act, that in the particular circumstances, his pursuit of the course of conduct was reasonable.

56. It may not be often that a person who is not the target of the harassing conduct will, in fact, be harassed. But a wife, or other close family member, may well suffer a feeling of harassment if a defendant publishes her and her husband's address with a view to encouraging members of the public to visit that address in an aggressive or hostile manner. The same applies to publication of a telephone number or a reminder to the public that what is her telephone number (as well as her husband's) can be found in the telephone book. If it is reasonable for one private individual to publish such information about another private individual, there will be no tort; but publication of such information in pursuance of a private grudge may well not be reasonable at all and was not reasonable in this case.

57. I agree with the reasoning of Briggs LJ, with his assessment of the damages to which Mrs Levi is entitled and that no injunction should be granted.