OPO

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The tort in *Wilkinson v Downton* began with an ill-advised practical joke in the late 19th Century. After a brief revival as part of a case which became a cause célèbre, the Supreme Court's decision in *Rhodes (previously 'MLA') v OPO* has largely sounded its death knell.

The case centred on a book written by James Rhodes, a concert pianist, author and television filmmaker. The book gives a searing and honest account of the serious sexual abuse he suffered as a child. His son, through his litigation friend, sought to prevent publication. The son suffers from significant disabilities, and a medical report (disputed by Mr Rhodes) concluded that if the child read the account of his father's abuse and other distressing material it would have a devastating effect on him psychologically. The claim was brought in (1) misuse of private information, (2) negligence and (3) deliberate infliction of emotional harm under the tort in *Wilkinson v Downton.*

Wilkinson v Downton, as many will recall from their student days, is a case from 1897 in which Mr Downton, as a practical joke, told Mrs Wilkinson that her husband had been severely injured in an accident. She, not surprisingly, did not see the funny side and suffered severe shock. When her case came before Mr Justice Wright, Mrs Wilkinson succeeded in a claim against Mr Downton. The Judge found that he had wilfully done an act with the intention of bringing about a particular consequence. Whilst Mr Downton did not intend to cause Mrs Wilkinson a serious illness, he did intend to frighten her. The tort has been little used since, although other common law jurisdictions have developed a tort of infliction of emotional harm.

At first instance The Right Honourable Lord Justice Bean refused the child's request for an interim injunction and struck out the claim. The Court of Appeal found the claim had sufficient prospects of success under the tort in *Wilkinson v Downton* for it to grant an interim injunction. That decision caused much public and press concern about whether the tort would be resurrected and used to restrict freedom of expression. Famous faces including Stephen Fry argued against such pre-publication restrictions. Before the Supreme Court, Article 19, English PEN and Index on Censorship were given permission to put in written submissions as interveners.

The Supreme Court allowed the appeal, refusing an injunction and restoring the order of Bean LJ. In doing so they drew the bounds of the tort in *Wilkinson v Downton* very narrowly. The Right Honourable Baroness Hale of Richmond and The Right Honourable Lord Toulson in the leading judgment set out the elements of the tort (albeit expressed to be *obiter dicta*):

a) The conduct element requiring words or conduct directed at the claimant for which there is no justification of excuse
b) The mental element requiring an intention to cause at least severe mental or emotional distress, and
c) The consequence element requiring physical harm or recognised psychiatric illness.

The Court found that Mr Rhodes had not directed his book towards his son: whilst it was dedicated to him, it was clearly directed at the public at large. Nor did Mr Rhodes have any intention to cause psychiatric harm of severe mental distress to the claimant.

It emphasised the very high level of protection afforded by the law to the telling of the truth. This is what Mr Rhodes was proposing to do, and as such his conduct was not without justification.

Whilst the court recognised that vulnerable children should be protected from harm as far as is reasonably practicable, it concluded that using the tort in *Wilkinson v Downton* was not the way to do this.

In Glanville Williams' *Learning the Law*, the case of *Wilkinson v Downton* is analysed in detail to explain the difference between the *ratio decidendi* and *obiter dicta*. As the current author, our own Master ATH Smith notes in the latest edition, 'If, however, a case ever arises in which Wright J's wide rule is thought to carry the law too far, the decision can be restrictively distinguished'. And that is what the Supreme Court has done in *Rhodes*. Indeed, the boundaries of the tort are now so narrowly drawn that the decision will be of more interest to academics than practitioners.

A part of the judgment that will be more useful in practice will be that on how tightly injunctions preventing publication must be drawn. The Court of Appeal had sought to prevent publication of 'graphic' descriptions. However, what is graphic and what is not is surely a matter of impression not susceptible to the necessary precision for an effective injunction. The Supreme Court said as much, referencing the fact that the right to freedom of expression applies not just to what is said, but the way in which it is said.

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