Neutral Citation Number: [2014] EWCA Civ 1277

Case No: A2/2014/2442

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
Queen's Bench Division
The Hon Mr Justice Bean
[2014] EWHC 2468 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/10/2014

Before:

LADY JUSTICE ARDEN
LORD JUSTICE JACKSON
and
LORD JUSTICE McFARLANE

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Between:

OPO	**Appellant**
- and -	
(1) MLA	**Respondents**
(2) STL	

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- -

Matthew Nicklin QC (instructed by **Aslan Charles Kousetta LLP**) for the **Appellant**
Hugh Tomlinson QC (instructed by **Bindmans LLP**) for the **First Respondent** and **Jacob Dean (**instructed by **Simons Muirhead & Burton)** for the **Second Respondent**

Hearing dates: 14-15 August 2014

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Approved Judgment

Lady Justice Arden:

Threat of publication of allegedly harmful book

1. The claim in this case is to stop publication of a book ("the Work") which, on the claimant's case, is likely to cause psychological harm to the claimant. He is the writer's young son. The Work is semi-autobiographical, written, but not yet published, by a talented young performing artist ("MLA"). To preserve the anonymity of the parties to these proceedings, he is known as MLA. He has obtained a high degree of distinction in his chosen career despite having had a tormented childhood. When he was still very young, he was for many years the subject of sexual abuse, not at home but at school. He was traumatised by this, as well as suffering physically, and it has led him to have episodes of severe mental illness, and to have got a thrill out of self-harm. Yet despite all that he has now been able to speak out about his experiences and to describe them. He brings them together in an artistic and insightful way in the Work. He has found a means through his art of coping with the trauma and the past. In the Work, he provides new perspectives on the subject of his professional work, with also descriptions of the past abuse and illnesses he suffered as a result. It is striking prose. It is said that the Work contains an important message of encouragement to those who have suffered similar abuse to speak about their past.

2. There is, however, a major problem yet to be confronted. The Work is dedicated to his son by his first marriage, now dissolved. His son, OPO, lived in the UK until his parents' divorce but now lives with his former wife in another country ("Ruritania"), on his mother's case to get specialist help unavailable in the UK. He has dual British and Ruritanian nationality. But father and son keep in touch by Skype and father has rights of staying access four times a year, sometimes in this country and sometimes in Ruritania. OPO is approaching his teenage years. OPO is the claimant in these proceedings.

3. OPO suffers from significant disabilities: he has a diagnosis of a combination of ADHD (attention deficit hyperactivity disorder), Asperger's, Dysgraphia and Dyspraxia. A child psychologist, who saw him in 2009 before he moved to the place where he now lives, has reviewed his notes and spoken to the medical team now in whose care he now is. She confirms that he has communication difficulties typical of someone with a diagnosis of Asperger's: she was told by his team that he processes information very much in his own way. Her opinion is that no child should read the graphic description of the way that MLA suffered because of the sexual abuse. She notes that OPO is now "computer savvy" and will in her opinion find the Work online. Her view is that MLA has no idea of the damage it will cause OPO. She works with children who have been traumatised by what they have found on the internet. His reactions are unpredictable: he could self-harm because the Work makes that all right. She does not consider that he can be coached in order to manage the possibility of his reading the Work.

4. MLA rejects this evidence. He says in his witness statement that he has often discussed difficult topics with his son and he considers that he would be able to approach him for loving reassurance regarding the past. In any event this expert has not had any recent contact with OPO.

5. There is now another report in evidence from a psychologist who has seen OPO recently. This time the psychologist had seen the Work as it is proposed to be published. This report shares the view that the Work would distress any child of his age. It expresses the view that the Work would be likely to exert a catastrophic effect on OPO's self-esteem and to cause him enduring psychological harm. The report considers that OPO would view himself as responsible for some of his father's psychological distress and would also view himself as being an extension of his father. He might attempt to act out some of the descriptions in the Work. It would not be possible to talk to him about the Work in advance.

6. OPO is aware of his father's professional achievement. He is described by his mother's lawyer in her country of residence as a particularly intelligent child who is very proud of his father. He does not know about the sexual abuse or the scale of his father's self-harm, addiction and mental illness. There is expert evidence that, if OPO becomes aware of the scale of sexual abuse and self-harm described in the Work, he will be unable to cope with it and become greatly disturbed.

7. In days before the internet, OPO could probably have been protected from harm. But the internet makes that much more difficult. His mother has blocked a number of sites to which he could go on the internet, but this is not a total answer. OPO is already aware of his father's entry on Wikipedia, and so it is too late to block that. The Wikipedia entry is likely after publication of the Work to contain a cross-reference to it. His school friends may tell him about it, and so on.

8. So OPO brings these proceedings by his litigation friend to seek to stop the publication of MLA's account of the abuse he suffered as a child or his suicidal thoughts, his history of mental illness or incidents of self-harm anywhere in the world. These proceedings have been anonymised by order of the court and this appeal was heard in part in private and otherwise subject to restrictions on publication of any material from the Work or any material that might directly or indirectly identify OPO.

9. This court is not dealing with the trial of the action but with an interim injunction. That makes a difference to the analysis because the court is concerned only with the question whether there ought to be an injunction to cover the period until the decision at trial. Moreover, in this situation, the court can make no findings of fact because it has not heard the witnesses.

10. However, because OPO seeks an injunction which affects MLA's freedom of expression, he has to satisfy a higher test in addition to those normally applicable to an application for an interim injunction. The normal basis for an interim injunction is that there is a serious issue to be tried and the balance of convenience favours an

injunction. Where, however, an interim order would affect the right to freedom of expression, section 12 of the Human Rights Act 1998 ("the HRA") provides that the court must be "satisfied that the applicant is likely to establish that publication should not be allowed." Moreover, section 12(4) of the HRA requires the court to have particular regard to the importance of that right, and, where the proceedings relate to literary material, to the extent to which it has already been published and to which it would be in the public interest for the material to be published.

11. Each side has a right protected by the European Convention on Human Rights ("the Convention"). In the case of OPO, it is the right to respect for his private and family life guaranteed by Article 8 of the Convention. In the case of the defendants (MLA and his publisher), there is a right to freedom of expression guaranteed by Article 10 of the Convention. In addition members of the public have the right under Article 10 to receive the publication. The rights conferred by Articles 8 and 10 on their face conflict, but they are "qualified rights" which may be restricted in order to protect the rights of others. So the court has to balance the two rights in the manner which Section 12 requires.

12. English law does not recognise a wrong based on invasion of privacy as such (*Wainwright v Home Office* [2004] 2 AC 406). The courts have developed a wrong, now known as "misuse of private information" ("MPI"), which is one of the three wrongs which OPO asserts is threatened by publication by the Work.

13. The publisher of the Work is STL. STL has already caused the Work to be printed, and arrangements have been made for its distribution both in the UK and elsewhere but not in Ruritania.

14. The father has already agreed to alter the Work to remove passages that might cause harm to OPO, removing for example a letter in it addressed to his son. However, his mother does not consider that the changes to the Work have gone far enough.

15. In proceedings taken in the Ruritanian court, the father's case was that OPO would not be likely to view the Work until he had reached the age of majority and that the mother's characterisation of OPO's needs have been overstated and exaggerated. He denies that the mother relocated in order to enable OPO to get specialist help. He is proud of his ability to speak out about the issue of his past abuse to assist other individuals who face similar forms of abuse and mental illness, and refers to the fact that after an interview he gave one of his abusers was arrested and charged with indecent assault. He does not intend his son to view the Work until majority. He contends that he has been the subject of several television documentaries with substantial viewing figures and that these documentaries have had no impact on his son. There have been many newspaper articles since 2009 giving details of interviews with MLA in which his abuse as a child has been mentioned, but none in such a lasting or major way as the Work.

16. The mother did not know the full details of the father's history when she married him.

17. After OPO was born, MLA had a further mental breakdown, which he attributes to his son's birth. He had a further breakdown when his son went to school.

18. In 2009, the parents had an exchange of emails ("the 2009 emails") in which MLA recognised that publication of details about his past might cause OPO real harm. This exchange also shows that MLA recognised that OPO should not be given these details until he was of an appropriate age, and also that MLA was anxious that OPO should not suffer the same fate as himself. The mother expressed concern about the father exposing the child to damaging details of his past. In his response, the father expressly confirmed:

> "I agree that [the child] should not be exposed to any press-related matter, therefore I will be very careful not to mention him in any interview/public related event for the time being and definitely not until he reaches in any case an appropriate age, where he will be able to understand and form his own judgements...."

19. The parents were divorced in the UK in 2009. They agreed terms contained in a schedule to an order of the High Court dated 15 June 2009. Recital K provides:

> "And Upon the parties agreeing to use their best endeavours to protect the child from any information concerning the past previous history of either parent which would have a detrimental effect on the child's well-being."

20. That order was registered in Ruritania.

21. The mother's case is that this provision was specifically included as both parents recognised that the father's history of abuse, mental illness and self-destructive behaviour would be exceedingly damaging to OPO, particularly due to his Asperger's and that both parents agreed to shield him from damaging information. The father published a previous life story pseudonymously in March 2008. MLA's case on Recital K is that he agreed to keep his son's name out of the papers and any publicity but he did not agree that his own history would not be publicised. Even so, the first drafts of the Work did name OPO, but MLA says that the Work would not have been published in the form (though he does not make it clear what amendments he would have made of his own initiative).

22. MLA did not tell the mother in advance about the Work. He sent a first draft to the publisher in December 2013. In March 2014, someone leaked a copy to the mother. This original version contained details of incidents which suggested that OPO's birth had triggered a mental breakdown by MLA and a letter addressed to OPO, and referred to OPO by his true name.

23. MLA has never filed any expert evidence as to the effect of publication on OPO. A single expert was proposed but MLA in effect rejected this way forward.

24. MLA has not previously disclosed to his son the scale of his mental health issues. OPO has been told by his mother that his father was in hospital with mental health issues. OPO saw from the Wikipedia entry that his father had been the subject of abuse; he asked his mother about this and she simply said that someone had been unkind to him at school. One of the experts who has spoken to OPO thinks that he was not aware of the sexual abuse.

25. MLA's case is also that the Work is intended for an adult market. That would normally mean that children would not obtain it. However, OPO's case is built on the assumption that he would seek to obtain more information about it because it is written by his father.

26. In his witness statement, MLA says:

> "49. I accept that knowing what happened to me could upset [OPO], or embarrass him, but I do not accept that it will be harmful if dealt with in the right way. I feel that [OPO] would be proud to have a father who has come through difficult times and succeeded despite those times, who speaks out against injustice and, in doing so, helps others. I recognise that [OPO] may already be very well aware of troubling parts of my background and I remain available to him to talk about it in a way which makes sense to him. When I speak to him about this I will do so in a sensitive, age-appropriate and loving way and I am eager to seek additional guidance from an appropriate expert so that [his parents] approach this matter in a consistent way. This is a matter of appropriate co-parenting and healthy communication with [his mother] – things I have tried to do consistently since our divorce. If this cannot be done by agreement then I believe the proper forum for resolving disputes is [the Ruritanian court.]"

27. The publisher, STL, contends that restraint on publication of the Work would cause serious financial loss and would be an unjustified and disproportionate interference with the right to freedom of expression. The publisher announced in September 2013 that it had bought the rights to the Work and that the Work would be published in August 2014. The proposed publication date was moved to 9 September 2014. The Work will be published in England and Wales and will become available as an eBook in the UK. The Work was printed after the judge gave judgment and has since been delivered to the publisher and the printed copies are held in warehouses in the UK. The evidence of the publisher before the judge was that it may not be commercially possible to push the publication date back by a few weeks and if it is not published on 9 September 2014 it may not be published at all. That remains the position though the publisher has now taken the step of having the Work printed. The publisher hopes that the Work will be serialised in a national newspaper.

28. STL contends that the Work could not be published without some autobiographical material because, as Mr Nicklin for OPO submits, the autobiographical material is intertwined with the material about the subject matter of MLA's profession.

29. The publisher considers that, irrespective of any financial loss, the Work:

> "is an important and valuable piece of work, written by someone who has found a way through difficulties associated with childhood abuse and mental health problems. [The publisher] believes that the author has much to offer to the those currently wrestling with such issues, as has already been demonstrated by his writings and broadcast experiences, and that the [Work] is a serious contribution to public discussion about them."

OPO relies on three legal wrongs

30. OPO claims an injunction against publication of the Work on the basis that by publication the father will commit one or more torts by publishing the Work:

i) he will misuse private information about himself that will interfere with the son's private life;

ii) he will be liable in negligence to the son;

iii) he will cause intentional harm and thus become liable under the well-known but seldom used principle in *Wilkinson v Downton* [1897] QB 57 (which makes it a wrong in certain circumstances intentionally to inflict mental suffering).

Judge rejects claimant's claim

31. In his judgment dated 18 July 2014 (handed down in private), Bean J took the view that OPO's claim was an attempt by the mother to stop the father from selling his life story to the public because she believes that it would traumatise their child if he were to learn about it. He found that the danger to the child was not the publication of the Work but the fact that extracts from it would become available on the internet:

> "12. The factual evidence is that it is most unlikely that the claimant would come into possession of the book as such: but that he is a bright 11 year old who does Google searches on his father which would lead him to reviews of the book, extracts from it or references to its contents in (for example) his father's Wikipedia entry. In a witness statement, filed during the hearing before me, the mother states that the claimant found a reference to his father having been abused as a child and asked her what that meant. The mother has blocked certain sites on the claimant's computer but of course will not have the same

> degree of control over what he might view at school or elsewhere."

32. The judge held that there was no cause of action for MPI because the information was about MLA, not about the private lives of OPO or his mother.

33. The judge further held that there was no cause of action in negligence on the grounds of policy. Negligence requires a duty of care, breach of the duty of care and damage. The judge held that on policy grounds the law did not impose a duty of care on a parent to his child in respect of matters arising out of the child's upbringing. He cited the following passage from the judgment of Lord Woolf MR in in *Barrett v Enfield LBC* ([1998] QB 367 at 377) in a passage approved by Lord Hutton in the House of Lords [2001] 2 AC 550 at 587:

> "…[P]arents are daily making decisions with regard to their children's future and it seems to me that it would be wholly inappropriate that those decisions, even if they could be shown to be wrong, should be ones which give rise to a liability for damages."

34. The judge rejected liability under the third cause of action. He held that the principle in *Wilkson v Downton* did not extend beyond false reports:

> "34.*Wilkinson v Downton* was analysed by Hale LJ in *Wong* in terms which Mr Nicklin submits are fully satisfied in the present case:
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> > 'For the tort to be committed, as with any other action on the case, there has to be actual damage. The damage is physical harm or recognised psychiatric illness. The defendant must have intended to violate the claimant's interest in his freedom from such harm. The conduct complained of has to be such that that degree of harm is sufficiently likely to result that the defendant cannot be heard to say that he did not 'mean' it to do so. He is taken to have meant it to do so by the combination of the likelihood of such harm being suffered as the result of his behaviour and his deliberately engaging in that behaviour.'
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> 35. However, even a judgment of Baroness Hale is not to be treated as a statute. I do not read it as creating or approving a tort consisting of doing any deliberate act which is likely to cause an individual emotional harm amounting to recognisable psychiatric injury. If such a tort had existed at common law, much of the modern statutory law of harassment would have been unnecessary. Moreover, liability under *Wilkinson v Downton* does not depend on any pre-existing relationship such as parenthood nor any pre-existing duty of care. If the defendants are to be liable for psychiatric injury to the

> claimant, why not to any other vulnerable individual who reads the book or extracts from it? The floodgates which Mr Nicklin invites me to open seem to be very wide indeed. I decline to open them. As for parental liability in tort, the policy arguments set out by the Court of Appeal in *Barrett v Enfield LBC* are also in my judgment applicable *mutatis mutandis* to *Wilkinson v Downton.* "

Roadmap for this judgment and overall conclusions

35. I shall examine each of the three causes of action on which OPO relies in turn in the light of the parties' submissions. I conclude that the judge was right to hold that there was no cause of action for MPI or negligence for the reasons he gave. In relation to liability under *Wilkinson v Downton* I consider that OPO has demonstrated that if his allegations are made out at trial all the elements of this wrong are present.

36. The next question is whether section 12 of the HRA is satisfied. I consider that the prospects of establishing the cause of action are, in the light of the evidence before this court, sufficiently favourable to pass the restrictions in section 12 of the HRA on orders to prevent publication.

37. I have to go on to consider a further point which the judge did not consider, namely whether English law applies. For this purpose the primary rule is that the law of the place where the damage occurs applies but this can be displaced if there are sufficiently favourable prospects at trial of the wrong being held to be "manifestly more closely connected" with the UK than with Ruritania since all the decisions about publication are taken in the UK.

No cause of action for MPI

38. Mr Nicklin, for OPO, submits that a normal adult might be able to come to terms with the Work because normal adults can separate experiences out and can communicate their fears. But children with Asperger's syndrome are simply unable to cope. This led MLA to accept Recital K in the divorce settlement. Contrary to what is said in para 49 of his witness statement, there is no arrangement for controlled disclosure of the Work to OPO. The wrong of MPI does not require that OPO should come across the information in the Work as soon as it is published.

39. Mr Hugh Tomlinson, for MLA, submits that in all the decided cases the claimant was the owner of the private information - the person to whom the information relates and whose expectation of privacy is violated if it is published. OPO accepts that the private information belongs to MLA. To recognise a cause of action in those circumstances merely because Article 8 (respect for private and family life) is engaged would be a huge innovation.

40. Mr Nicklin submits that that is not the limit on the use of private information. The tort is available because the intention is to publish information liable to cause harm to OPO's Article 8 right because Article 8 includes family and home. He submits that

the court has already recognised that the family unit can have rights interfered with by publication relating to parents.

41. The principal case on which Mr Nicklin relies is *K v News Group Newspapers* [2011] 1 WLR 1827, where the father sued for breach of MPI and his children's Article 8 rights were taken into account in determining whether an injunction should be granted. Mr Nicklin submits that the children could have sued for misuse of private information if the father had been unable to do so, for example because he was impecunious.

42. Mr Nicklin develops his submission by examining the way in which the tort of misuse of private information has been fashioned from breach of confidence. On his submission, the touchstone of MPI is that the claimant has a reasonable expectation that the material will remain private: it is not said that the material must be about you. Mr Nicklin does not seek to rely on other aspects of Article 8. He accepts that there has to be the publication of information about people.

43. Mr Tomlinson submits that in *K v News Group* the children could not have made their complaint separately and that there is no case in which third parties have been able to bring an action which does not relate to them or in respect of information which they do not own. The appellant is trying to convert the tort of MPI into a tort which affects the private life of the claimant. Mr Tomlinson submits that the cases which Mr Nicklin refers to are cases where, once people are properly before it, the court then balances all Convention rights. The rights of third parties such as the public to receive information and the rights of the children are then taken into account.

44. Furthermore, submits Mr Tomlinson, the child's interests do not take precedence. They are not a trump card: see *AAA v Associated Newspapers Ltd* [2013] EWCA Civ 554 at [10]. The court has to look at likelihood of damage and how serious that risk is. MLA contends that on analysis the risks are small. On the other side of the scales is the Article 10 right of the father and the publisher. This is a book about redemption through immersion in MLA's professional work. There is a positive message and that is a public interest consideration.

45. In my judgment, the case law on MPI does not go as far as Mr Nicklin suggests. If it did, the result would be that a person could sue whenever his family life was affected even if the information does not belong to him. This would create a large risk of liability for the person wishing to publish and huge uncertainty in the law. It would appear to apply even if the person proposing to publish the information was a third party and not a member of the family at all. The whole basis is unreal because the real complaint here is not the damage to family life but to the child himself.

46. Moreover, this court, on Mr Nicklin's submission, could borrow the case law from the family court jurisprudence on preventing publication of a parent's name in criminal proceedings where this will be contrary to the interests of a child. The family court will make such an order despite the public's right to know in deference to the Article 8 rights of the child (see *Re S* [2005] 1 AC 593). In my judgment, this line of

authority does not assist because this jurisdiction can only be exercised by the family court.

47. Since there is no cause of action for MPI, there are a number of matters which I need not decide. In particular I do not have to consider whether Article 8 is applicable or how the rights conferred by Articles 8 and 10 are to be balanced in accordance with the principles laid down in *Re S (FC) (A Child)* [2005] 1 AC 593, or whether disclosure is in the public interest, or whether the reasonable expectation of privacy is different in the case of a child from that of an adult. Likewise I need not consider whether to refuse an injunction for MPI because of information in the public domain: the fact that information is in the public domain is not necessarily a bar to a claim for MPI (see *CTB v News Group Newspapers Ltd* [2011] EWHC 1232 (QB)). Nor do I have to consider the possible application of section 11 of the Private International Law Act 1995 to this tort.

Negligence

48. The judge held:

> "Parents owe a common law duty of care to their children to protect them from physical injury in a variety of circumstances. Three obvious examples are: (a) as drivers of cars; (b) as occupiers of premises; or (c) as supervisors of young children. None of these duties is confined to parents; and there is no authority for a general common law duty of parents, enforceable by injunction or compensable in damages, to protect their children from emotional or psychological injury. In the Court of Appeal in *Barrett v Enfield LBC* ([1998] QB 367 at 377) Lord Woolf MR said (in a passage approved by Lord Hutton in the House of Lords [2001] 2 AC 550 at 587):
>
> > '…..[P]arents are daily making decisions with regard to their children's future and it seems to me that it would be wholly inappropriate that those decisions, even if they could be shown to be wrong, should be ones which give rise to a liability for damages.'" (judgment,[29])

49. Mr Nicklin submits that the judge was wrong insofar as he held that there was no duty of care in respect of purely psychiatric harm: see *McLoughlin v O'Brien* [1983] 1 AC 410 at 433. He further submits that the judge was wrong to reject the duty of care by a parent to a child. He submits that there is no blanket rule that a parent does not owe a duty of care to his child because there can be liability for negligent decisions in relation to upbringing outside the margin for parental authority where the child is exposed to unacceptable risk which would happen if the Work is published: see in

particular the last two sentences of *Harris v Perry* [2009] 1 WLR 19 at [34] where Lord Phillips MR, giving the judgment of this court, held:

> "[34] Children play by themselves or with other children in a wide variety of circumstances. There is a dearth of case precedent that deals with the duty of care owed by parents to their own or other children when they are playing together. It is impossible to preclude all risk that, when playing together, children may injure themselves or each other, and minor injuries must be commonplace. It is quite impractical for parents to keep children under constant surveillance or even supervision and it would not be in the public interest for the law to impose a duty upon them to do so. Some circumstances or activities may, however, involve an unacceptable risk to children unless they are subject to supervision, or even constant surveillance. Adults who expose children to such circumstances or activities are likely to be held responsible for ensuring that they are subject to such supervision or surveillance as they know, or ought to know, is necessary to restrict the risk to an acceptable level."

50. On Mr Nicklin's submission, the following factors should lead to the conclusion that there is an unacceptable risk of harm to OPO in this case and thus to the imposition of the duty of care:

- Recital K
- para 49 of MLA's witness statement
- dedication of the Work to the son
- the direction of parts of the Work to the son
- MLA's recognition that at some point the son will read the Work.

51. Another factor that may be relevant is that MLA wrote the previous work pseudonymously. That may have been a concession that the work should not be written under his real name because it might harm OPO.

52. Mr Tomlinson submits that the judge correctly held in [29] of his judgment that there is no authority which holds that a parent owes a duty to protect his children from psychological injury. Thus, in the example deployed by my Lord, Lord Justice Jackson, in argument about the parent who causes psychiatric harm to his child by playing videos of beheadings in Iraq as a bedtime story, there would on Mr Tomlinson's submission be no cause of action in negligence: indeed, some children find some fairy stories disturbing.

53. Mr Tomlinson submits that no reliance can be placed on *Harris v Percy*. In that case, the defendants accepted that there was a duty to supervise, and that the observations of Lord Phillips MR were about the duty to supervise children engaged in potentially

dangerous activities. Lord Phillips was in effect saying that the concession was rightly made. It is not authority that there is a duty where there is unacceptable risk. The law needs to be cautious, as confirmed by the fact that there is no more authority on this point.

54. In my judgment, neither Recital K nor indeed the 2009 emails, in which MLA recognised a responsibility to use his best endeavours to see that his son was not damaged by revelations about MLA's past, can found any duty to OPO. These documents contain no assumption of responsibility in law towards OPO. They were written to his mother. The matters directed to OPO and relied on by Mr Nicklin do not purport to contain any similar indication of responsibility for OPO's welfare.

55. On that basis, the question of the existence of a duty of care falls to be determined by reference to the three-part test laid down in *Caparo Industries plc v Dickman* [1990] 2 AC 605. No difficulty for present purposes arises on the first two parts of the test, namely whether there was a relationship which was sufficiently proximate between MLA and OPO and whether the damage was foreseeable. The critical question is whether it would be fair, just and reasonable to impose a duty of care on a parent towards his child.

56. The last two sentences from the judgment of Phillips MR in *Harris v Perry*, on which Mr Nicklin places particular reliance, in my judgment do not assist: it is impossible to read them as laying down some general proposition that a parent owes a duty of care whenever he causes a child to be exposed to an unacceptable risk.

57. The only citation from the authorities which we have been shown where the court has considered the question of duty of care as between parent and child is that which the judge cited from *Barrett v Enfield LBC* (above). In *Barrett*, this court held that there should be no duty of care. That decision is binding on this court, since part of the reasoning of Lord Woolf, with which the other members of this court agreed, was that if a parent owed no duty of care nor could the local authority, which was the defendant in that case, in respect of the period when the claimant was in local authority care. If the duty on which Mr Nicklin has to rely were to be imposed, it would lead to liability in a large number of cases because any formulation of the proposition for a duty of care in this case would encompass a whole range of commonplace activities in which a parent is involved in caring for his child. I would therefore hold that the judge was right and that the appeal on this issue fails.

Liability for intentional harm under the Wilkinson v Downton principle

58. This is an obscure tort, and in this section of my judgment I have to deal with the following issues: (1) the early development of the tort; (2) whether the tort extends beyond false words to other intentional acts which cause psychiatric harm; (3) whether lack of justification is required to succeed in this tort and if so whether lack of justification is satisfied in this case; and (4) whether the claim in this case would be likely to fail because of MLA's evidence thus far that he believes that he is acting

properly in publishing the Work because Mr Tomlinson submits that OPO would have to show that MLA was subjectively reckless in this case.

59. I shall start with the development of the tort. Until *Wilkinson v Downton* [1897] 2 QB 7, the tort of assault provided a remedy for physical injury caused deliberately but only if there was physical injury: purely psychiatric harm would not do (see *Victorian Railway Commissioners v Coultas* (1888) 13 App Cas 222 PC, which concerned a near accident caused to the plaintiff on a level crossing due to the negligent operation of the gates by the defendant). That changed with the decision of Wright J in *Wilkinson v Downton*. In that case, the defendant as a practical joke told the plaintiff that her husband had had a serious accident and broken both his legs, and that she should go to help him to a particular place in Leytonstone, which she did incurring the cost of the carriage journey and nervous shock. She could recover the cost of the carriage fare in deceit. Wright J held that she also had a good cause of action for the nervous shock on the ground that the act was plainly calculated to produce some effect of the kind that was produced that an intention to produce it ought to be imputed to the defendant.

60. In *Janvier v Sweeney* [1919] 2 QB 316 this court approved *Wilkinson v Downton*. In that case, the defendants were two private detectives. One of them wanted to inspect certain letters, to which he believed the plaintiff maid had access. He instructed the other defendant, who was his assistant, to induce the plaintiff to show him the letters, telling him that the plaintiff would be remunerated for this service. The assistant endeavoured to persuade the plaintiff by false statements and threats, as the result of which the plaintiff fell ill from a nervous shock. This court held that the assistant was acting within the scope of his employment and that the two detectives were liable. The headnote states that the proposition decided by this case was that:

> "False words and threats calculated to cause, uttered with the knowledge that they are likely to cause, and actually causing physical injury to the person to whom they are uttered are actionable."

61. There is an issue as whether the tort is restricted to false words and threats. The judge held that the tort was inapplicable in this case because if the wrong extended that far the law of harassment would have been unnecessary. This reason cannot stand: the reason why Parliament had to create a new right was that a remedy was needed for cases of harassment where there is no damage. There are cases in which stalkers do not cause either physical or psychiatric harm.

62. Mr Tomlinson contends that there have to be false statements or threats: the headnote in *Janvier v Sweeney* was approved by Buxton LJ, with whom Mummery LJ agreed, in *Wainwright* as summarising the wrong. Lord Hoffmann in the House of Lords did not deal with that point.

63. Mr Tomlinson submits that in *Wong* Hale LJ accepted that false words or threats were required:

> "For the tort to be committed, as with any other action on the case, there has to be actual damage. The damage is physical harm or recognised psychiatric illness. The defendant must have intended to violate the claimant's interest in his freedom from such harm. The conduct complained of has to be such that that degree of harm is sufficiently likely to result that the defendant cannot be heard to say that he did not 'mean' it to do so. He is taken to have meant it to do so by the combination of the likelihood of such harm being suffered as the result of his behaviour and his deliberately engaging in that behaviour. This view is consistent with that taken by Dillon LJ in *Khorasandjian v Bush* [1993] 3 All ER 669 at 676, [1993] QB 727 at 735–736:
>
> > '…false words or verbal threats calculated to cause, and uttered with the knowledge that they are likely to cause and actually causing physical injury to the person to whom they are uttered are actionable: see the judgment of Wright J in *Wilkinson v Downton* [1897] 2 QB 57 at 59, [1895–9] All ER Rep 267 at 269 cited by Bankes LJ in *Janvier v Sweeney* [1919] 2 KB 316 at 321–322, [1918–19] All ER Rep 1056 at 1059. There was a wilful false statement, or unfounded threat, which was in law malicious, and which was likely to cause and did in fact cause physical injury, viz illness of the nature of nervous shock.'"

64. Moreover there is, on Mr Tomlinson's submission, no case in which the courts have held a party liable on the basis of *Wilkinson v Downton* which did not involve false words or threats.

65. In my judgment, it is likely that the wrong can be committed even though there are no false words. In *Wong*, Hale LJ held that:

> "Although these cases [*Wilkinson v Downton* and *Janvier v Sweeney*] were concerned with words, the same principle would obviously apply to the intentional infliction of physical harm by other indirect means, such as digging a pit into which it is intended that another should fall."

66. *Wong* could have been decided on the basis that the conduct relied on did not consist of false words or threats and therefore the tort established by *Wilkinson v Downton* did not apply. It was, however, decided on the point that the conduct was not such that an intention to injure could be imputed. In those circumstances the passages set out above were part of the ratio of the decision. However that may be, in my judgment it is likely that at trial it would be held that the tort extends beyond conduct consisting of false words or threats. If that were not so, the discrepancy between

remedies at common law for physical injury which is deliberately caused and psychiatric injury which is not so caused would persist for conduct other than false words and threats.

67. Mr Tomlinson submits in the alternative that where the conduct does not consist of false words or threats the action must be unjustifiable. Without such a requirement, entirely lawful conduct would potentially give rise to the liability. The scope of what is unjustifiable is not established but clearly it is not enough that a person conveyed bad news in a way which caused psychiatric harm to another. Mr Tomlinson submits that in this case the publication of the book is a wholly lawful act in both this country and in Ruritania. Moreover, lack of justification cannot consist of the risk of causing harm, so it cannot be the case that there is liability because psychiatric harm will result.

68. I am content for the purposes of this appeal to proceed on the basis that lack of justification is required in this case. It is inconceivable that the law would render all intentional statements which cause psychiatric harm actionable in damages. In some cases, a person may have to tell bad news which is liable to cause psychiatric harm. But there may be many ways in which the court could draw the line between acceptable intentional statements or acts which cause psychiatric harm, and those which are actionable under this head. There may be other restrictions on liability, such as a restriction that the person at whom the act was directed should be, as it sometimes put, a person of "ordinary phlegm". I do not consider that would be an appropriate restriction here where the respondents know of OPO's vulnerabilities. Another restriction would be that the act be sufficiently outrageous.

69. In the present case, the answer to the point that OPO has to show that MLA's threat to publish the Work lacks justification is that the act need only be unjustified in the sense that that the defendant was not entitled to do it *vis-a vis the particular claimant*. The defendant may be perfectly entitled to dig holes in his garden in any location he chooses to dig them in but not (at least without warning) if they fall within the area he has already agreed to allow the claimant to walk across to take a short cut. Here MLA has accepted a responsibility to use his best endeavours to ensure that OPO is protected from harmful information. That in my judgment is sufficient to mean that there is no justification for his words, if they are likely to produce psychiatric harm. For the purposes of showing that MLA's actions would lack justification in this context, it is not necessary to show that OPO would have a right of action based on Recital K, any more than the claimant in *Wilkinson v Downton* had to show that the practical joke gave her a right to bring proceedings.

70. That leads to the question of the intent required for this tort. On Mr Tomlinson's submission, there was clearly no intent to cause OPO harm and so there must be a desire to cause harm in the sense of subjective recklessness. Mr Tomlinson submits that it is not enough that the alleged wrongdoer must have intended harm of the relevant kind. It must also be shown that he subjectively intended harm or was reckless as to whether the harm would occur, that is that he knew that the words were likely to case psychiatric illness. That is important in this case because MLA

considers that publication is a responsible act, that the best way of approaching the matter is through the family court and that the Work will not in any event get into OPO's hands.

71. There is no finding as to MLA's belief. That could only be found at trial. That is also true of other issues, such as the level of harm which OPO is likely to suffer and the cause of such harm.

72. Mr Tomlinson's submission is based on the following passage from the judgment of Buxton LJ in *Wainwright v Home Office*:

> "[78] The learned editor of the Law Reports report of *Janvier v Sweeney* synthesised the effect of the judgments thus:
>
> > "False words and threats calculated to cause, ***uttered with the knowledge*** that they are likely to cause, and actually causing physical injury to the person to whom they are uttered are actionable."
>
> This statement is important, because in *Khorasandjian v Bush* [1993] QB 727, [1993] 3 All ER 669, at p 735G of the former report the majority in this court accepted it as a correct expression of the doctrine of *Wilkinson v Downton* and *Janvier v Sweeney*; and would have granted *quia timet* relief against such words that could be expected, if continued, to result in a recognisable psychiatric illness: which is how the majority, at p 376C, considered that "nervous shock" should now be understood. These observations were obiter, in view of the majority's placing of liability on the basis of private nuisance; but they were fully considered and, because of their obiter nature have, as Mr Wilby QC urged upon us, escaped the condemnation by the House of Lords in *Hunter v Canary Wharf* [1997] AC 655, [1997] 2 All ER 426 of the nuisance aspects of *Khorasandjian*.
>
> [79] I respectfully consider that the headnote in *Janvier v Sweeney*, adopted in *Khorasandjian*, comes as close as it is possible to do to a general statement of the rule in *Wilkinson v Downton*. If that is not correct, then the rule must be limited to the statement in the latter part of Wright J's observations cited in para 13 above, that the defendant's act was so clearly likely to produce a result of the kind that occurred that an intention to produce it should be imputed to him: that is to say, objective recklessness….

> [80] It follows that I cannot agree with the formulation adopted in *Salmond & Heuston on Torts* (21st edition, 1996), at p 215 from para 46 of the *Restatement, Torts, 2d*, that
>
> "one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is liable for such emotional distress, provided that bodily harm results from it"
>
> No doubt the outrageous nature of the defendant's conduct was not far from the minds of the judges in *Wilkinson v Downton* and, in particular, *Janvier v Sweeney*. However, moral condemnation is not enough. What is required by the *Khorasandjian* formulation is knowledge that the words are likely to cause, that is to say subjective recklessness as to the causation of, physical injury in the sense of recognisable psychiatric illness. Intention or recklessness merely as to severe emotional distress, from which bodily harm happens in fact to result, is not enough." (emphasis added)

73. I do not accept this submission. There is a consistent line of authority that liability is incurred if the defendant wilfully does an act calculated to cause psychiatric harm, and causes that harm, intent is imputed: see per Wright J in *Wilkinson v Downton* and per Bankes LJ in *Janvier v Sweeney*, with whom the other members of this court agreed. Buxton LJ recognised that this was an alternative explanation of the case law: see [79] above. When the case reached the House of Lords, Lord Hoffmann approved another passage from the judgment of Buxton LJ but not this one.

74. In *Wong*, Hale LJ, giving the judgment of this court, held that it was sufficient if intent can be attributed to the defendant who deliberately proceeds with a course of action which is likely to cause harm. It was not necessary to show that the defendant wanted to produce the harm that resulted.

75. In *Wainwright*, Lord Woolf MR also clearly considered that either intention or recklessness would suffice. Moreover, he held that intention could be imputed (see [44], [49]). The third member of this Court, Mummery LJ agreed with both judgments. When the case reached the House of Lords, Lord Hoffmann, with whom the other members of the House agreed, mooted the idea that, to create a principled basis for permitting recovery for psychiatric injury, imputed intention ought not to be sufficient:

> "44 I do not resile from the proposition that the policy considerations which limit the heads of recoverable damage in negligence do not apply equally to torts of intention. If someone actually intends to cause harm by a wrongful act and does so, there is ordinarily no reason why he should not have to pay compensation. But I think that if you adopt such a

> principle, you have to be very careful about what you mean by intend. In *Wilkinson v Downton* Wright J wanted to water down the concept of intention as much as possible. He clearly thought, as the Court of Appeal did afterwards in *Janvier v Sweeney* [1919] 2 KB 316, that the plaintiff should succeed whether the conduct of the defendant was intentional or negligent. But the *Victorian Railway Comrs case* 13 App Cas 222 prevented him from saying so. So he devised a concept of imputed intention which sailed as close to negligence as he felt he could go.
>
> 45 If, on the other hand, one is going to draw a principled distinction which justifies abandoning the rule that damages for mere distress are not recoverable, imputed intention will not do. The defendant must actually have acted in a way which he knew to be unjustifiable and either intended to cause harm or at least acted without caring whether he caused harm or not. Lord Woolf CJ, as I read his judgment [2002] QB 1334, 1350, paras 50-51, might have been inclined to accept such a principle…"

76. However, I do not consider that Lord Hoffmann was actually deciding what the law should be in these passages since it was unnecessary to do so. On the facts of *Wainwright*, there was no finding of intention or recklessness. I therefore do not read Lord Hoffmann's speech as detracting from the authorities which had dealt with this matter. Furthermore, in the light of Lord Woolf's acceptance that intention could be imputed and his adoption of the passage referred to above from *Wong*, it is difficult to see why he might have been inclined to accept that intention could not be imputed, as stated by Lord Hoffmann in *Wainwright*.

77. In my judgment it is clear that intention can be imputed. It may be that in some cases, recklessness would suffice instead of intention but we do not have to consider that issue. The point is that, even if MLA does not intend to cause harm and is not reckless, the necessary intent can be imputed to him.

78. MLA cannot be heard to say that he did not intend the Work to reach OPO: it is after all dedicated to OPO, and some parts of it are directed to him. Nor on the present state of the authorities can he be heard to say that he did not intend to cause harm if, at trial, harm is shown to be likely to result and he still wishes to proceed to publish. He has recognised in the past through the 2009 emails and Recital K that he accepts the principle that he should endeavour not to reveal his past if it would cause harm to his son. Writing the Work and seeking to publish it are inconsistent with that endeavour if harm is shown. Para 49 of his witness statement is a recognition that professional advice is needed and there may need to be special strategies to avoid harm to OPO. Yet, as things stand, he is proposing to publish the Work without that professional advice. Contrary to a point made by the judge, OPO stands in a different position from that of other vulnerable persons who read the Work and suffer harm as a result.

79. Mr Tomlinson further submits that harm must be caused by the act of the defendant or, where an interim injunction is sought, it must be shown that psychological harm must be likely to be caused by the defendant's act. Mere risk of harm is not enough. I will deal with the question of harm under the next heading.

Section 12 of the HRA and other limits on the grant of any injunction

80. Section 12 of the HRA provides:

> "(1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.
>
> (2) If the person against whom the application for relief is made ("the respondent") is neither present nor represented, no such relief is to be granted unless the court is satisfied—
>
> (a) that the applicant has taken all practicable steps to notify the respondent; or
>
> (b) that there are compelling reasons why the respondent should not be notified.
>
> (3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.
>
> (4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to—
>
> (a) the extent to which—
>
> (i) the material has, or is about to, become available to the public; or
>
> (ii) it is, or would be, in the public interest for the material to be published;
>
> (b) any relevant privacy code….

81. A number of issues have been raised under this head, which I shall take in turn, namely (1) the standard which the court must apply if it is to be satisfied that OPO is "likely" to establish that publication should not be allowed; (2) the extent to which it

would be in the public interest for the Work to be published and (3) the impact of any injunction.

Is it "likely" that OPO would establish that publication should not be allowed (section 12(3) question)?

82. The meaning of section 12(3) was considered by the House of Lords in *Cream Holdings v Banerjee* [2005] 1 AC 253. The House held that Parliament must be taken to have intended that the word "likely" in section 12(3) should have an extended meaning. That meaning sets, as a normal prerequisite to the grant of an injunction before trial in cases where the injunction might affect a person's right to freedom of expression, a likelihood of success at the trial higher than the usual *American Cyanamid* standard of "real prospect" of success. However the word "likely" also permits the court to dispense with this higher standard where particular circumstances make this necessary.

83. Mr Tomlinson submits that section 12(3) of the HRA requires the court to make a guestimate as to how the trial might turn out where Article 10 rights are in issue. He submits that the court cannot be satisfied to the right level about the prospects of success at trial in this case:

i) As to Recital K, this is about not talking to the child, or exposing the child's name, but that does not mean that neither parent will publish his or her own past. His mother does not make any contractual claim. Mr Tomlinson submits that Recital K is not a clear waiver of MLA's Article 10 right, as required by Strasbourg case law.

ii) As to the 2009 emails, the parents talked about keeping the son's name out of the publication. OPO's name is not now in the Work as a pseudonym is used. The Work is really directed at MLA's own background.

iii) The previous pseudonymous publication is neither here nor there. It did not deal with redemption because it does not deal with MLA's musical career. MLA is prepared to speak out about his past.

iv) It would be difficult for MLA to show that there is not a grave risk of harm. He submits that the appellant must demonstrate:

a) That he is more likely than not to have a cause of action.

b) That it is more likely than not some or all of the information comes to OPO's child's attention. The judge found that the son is not likely to get hold of the Work (judgment, [12]).

c) That it is more likely than not that whatever information comes to him will be damaging. The mere possibility of harm is not enough. Nor is speculative risk. He may only become aware of

certain parts of the Work. OPO would need a credit card to buy it himself online. He also makes the point that the Work is an adult work and is unlikely to come to the child's attention. Certainly the mother does not intend to give it to him.

d) Mr Tomlinson is critical of the quality of the evidence. He also submits that there is no expert evidence as to what will happen if OPO reads the Work in its present form which is different from that when the first expert saw it. There is no expert evidence as to what would happen if OPO saw parts only of the Work.

e) That it is more likely than not that the trial court would exercise its discretion in favour of a permanent injunction. The court has to consider whether there is sufficient reason to grant an injunction. Mr Tomlinson emphasises that there is no intention to publish in Ruritania.

84. He submits that the test of 'more likely than not' applies here but, if some lesser standard applies, the court must still look at all the circumstances and must assess the circumstances. It is not sufficient for the court to say that it is arguable that there is a duty of care: it must be more likely than not it will succeed. The court must take into account the wide terms of the order sought and the possible effect on third parties.

85. On behalf of the publisher, Mr Dean repeats some of the points which Mr Tomlinson makes and makes the following submissions:

i) To be actionable on the *Wilkinson v Downton* principle, the interference must be unjustified in some objective sense. It is not enough that there is damage. Given the value of public debate, it cannot be said that there was such unjustified conduct here.

ii) The allegedly harmful material must be kept in proportion. It forms a small part of the Work, which is about redemption. It is no more graphic than other works on this nature. Mr Dean submits that there will not be a focus on the language in reviews. The Work is not targeted at children. Its purpose is to give a voice to the sexually abused, many of whom are too ashamed to come forward. If pseudonymous, the Work is deprived of all the purpose and power.

iii) He also relies on the financial information as to likely losses given in the publisher's evidence.

iv) With any commercial publication, restrictions should be imposed very carefully. Business moves on. Publication is thrown into doubt, though it is not said that it will not be published.

v) Other members of the public also have Article 10 rights.

vi) Mr Dean takes no point on the cross-undertaking in damages which has been offered.

86. I have explained above why in my judgment it is likely that OPO will establish the legal ingredients of liability under *Wilkinson v Downton*. There is no doubt about what the respondents now intend to publish. The main factual issue that remains is as to the harm OPO might suffer from publication.

87. Is it likely that harm would be established? The expert evidence is in my judgment sufficient to show that, if OPO sees any material part of the Work, he is likely to want to know more, and to suffer grave harm. Moreover, while OPO is unlikely to obtain the Work as such, OPO might well see extracts or quotations from it on the internet. It seems to me that that is almost inevitable over time. It does not matter whether he sees it now or in a few years' time. He will still be a vulnerable person for many years to come and once the material is on the internet it cannot be recovered. Reviewers are likely to quote from or describe the graphic passages from the Work, and those passages may appear in some form in serialised versions of the Work. In addition, the Work is likely to be referenced to in MLA's Wikipedia entry to which OPO currently has access or to which he may well obtain access at school or elsewhere.

88. The important point is that, if publication is not restrained, then it will be impossible "to put the genie back in the bottle" if OPO succeeds in showing that there are parts of the Work that are seriously damaging to him. So this is a case in which the court is justified in applying a lower standard than more likely than not (this point is made in *Cream Holdings* at [19]).

89. For all the reasons given when discussing the claim under *Wilkinson v Downton*, OPO's case is clearly not simply one which raises a serious issue to be tried on the *American Cyanamid* test. Mr Nicklin relies on (among other matters) Recital K and the email exchange in 2009. Although Mr Nicklin suggests that these show that MLA's right to freedom of expression has been curtailed, and Mr Tomlinson submits that the conditions for a waiver of a Convention rights are not satisfied, the real point is that these documents show that MLA accepted some measure of responsibility to protect OPO.

90. Changes have been made but graphic passages remain which on the expert evidence are likely seriously to affect OPO. The objections to that evidence by the respondents do not carry much weight given that the respondents have filed none of their own. There must be sufficiently favourable prospects of showing that OPO will suffer serious harm as a result.

91. I accept that the Work is literary material and that there is a public interest in its being published. On Mr Dean's submission, if an interim injunction is granted, there is a risk that the Work may not be published. But, if the respondents succeed at trial,

there is no restriction on its publication at that stage. So the rights of those who wish to receive the information in the Work (and therefore also have Article 10 rights) are not destroyed. It will not have ceased to be a useful Work. The only reason why it is said to be time-critical is that the publisher has notified book wholesalers that it will be available on a specific date and has started some publicity work surrounding it. However the publisher did this at a time when either OPO's mother had not been consulted or she was objecting to publication. Fragments of the Work are already in the public domain but not in the more permanent and collated state envisaged by the Work.

92. The position of the publisher is different because its interest is commercial (only). It would be protected by a cross-undertaking in damages. That cross-undertaking will be secured by a third party indemnity up to a specified amount. The publisher is satisfied with the security offered, at least for the time being.

93. The order must place no more restrictions on the respondents than necessary, but the court can deal separately with the form of order following submissions.

94. I conclude that, subject to the choice of law issue which I will deal with next, section 12 is satisfied in this case.

Choice of law - Rome II Regulation

95. There is an issue about which law applies to the alleged wrong by the respondents. The choice is between Ruritanian law and the law of England and Wales. Unless OPO can show that the proposed publication of the Work is likely to be wrongful as a matter of the applicable law, then he will fail to satisfy the requirements of section 12. In the light of my conclusions thus far, I need only consider the submissions made as to the proper law of any wrong for the purposes of *Wilkinson v Downton*. There is no evidence as to whether the intentional infliction of emotional harm in circumstances such as are alleged in this case leads to liability under the law of Ruritania. In any event, it is quite possible that no answer can be given to that issue without findings of fact. Therefore the Court cannot make any assumption either way about what Ruritanian law provides.

96. It is common ground that the choice must be determined in accordance with the Rome II Regulation, and in particular Article 4(1) and (3) of that Regulation. Article 4(1) and (3) provide as follows:

> "1. Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur….

> 3. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question."

97. Applying Article 4(1), the proper law in this case is that of the country in which the damage occurs, which in this case would be Ruritanian law. However, by Article 4(3), where it is clear from all the circumstances of the case that the tort is manifestly more connected with a country other than the one in which the damage occurs, the law of that other country shall apply. In particular, a manifestly closer connection may be based on a pre-existing relationship between the parties which is closely connected with the tort in question.

98. One of the principal purposes of the Regulation is to improve the compatibility of conflict of law rules between member states of the EU. Recital (14) to the Regulation states that Article 4(3) is an "escape clause". So does Recital (18). However, that expression is not defined. Recital (14) states that the choice of law rules in Article 4 are to be a "flexible framework" (again not defined).

99. Mr Jacob Dean, for the publisher, has four points, which I shall next desribe.

100. First, he submits that the primary rule in Article 4 (1) applies as any damage will be suffered in Ruritania. There is no evidence that the wrong would be actionable in Ruritania, so this court cannot grant relief unless Article 4(3) applies. Mr Dean relies on the fact that a foreign lawyer instructed on behalf of OPO states no remedy would be available in the Ruritanian courts for the alleged wrong in publishing the Work.

101. Second, Mr Dean submits that the absence of evidence as to the law of Ruritania is fatal to this case. Mr Dean submits, in reliance on observations of Gray J in *Al-Misnad v Azzaman* [2003] EWHC 1783 at [37] and Simon J in *Belhaj v Straw* [2013] EWHC 2672 (QB) at [140], that, where Article 4 applies, a party must bring forward evidence on foreign law and cannot simply rely on a presumption that in the absence of evidence foreign law should be assumed to be the same as English law. Therefore the requirements of section 12 of the HRA are not satisfied and no injunction should be granted.

102. Third, on the footing that OPO has a cause of action if English law applies but not that of Ruritania, Mr Dean submits that this court should treat as factors which militate against displacement of the primary rule in Article 4(1):

    i) the fact that this is a case of "forum shopping" (that is, choosing a jurisdiction not because it is the closest but on account of some

advantage it offers) because the Ruritanian court refused to restrain the publication of the Work; and

ii) the fact that the parents agreed that issues about OPO's upbringing would be dealt with in Ruritania.

Furthermore, on Mr Dean's submission, the advantage of using English law is a juridical advantage which is not relevant for Article 4(3) purposes since it does not demonstrate the relevant connection of the wrong to the jurisdiction.

103. Fourth, Mr Dean submits that the court cannot conclude that Article 4(3) applies. This he submits is not open to the court:

i) The fact that the Work is published here does not mean manifestly closer connection with here. It is proposed to publish the Work in every continent of the world. There will be foreign language editions. In any event, because of the internet, the contents of the Work would be published by the internet anywhere in the world.

ii) It is not enough that both defendants are here or that decisions about publication are here.

iii) There is no contract here between either of the respondents and the appellant

104. By contrast Mr Nicklin submits that the primary rule should be displaced and that Article 4(3) applies. Mr Nicklin submits that there is nothing wrong with the presumption that foreign law is the same as English law if used properly: see Dicey, Morris and Collins on *The Conflict of Laws* (15th ed. 2012, paragraph 9 -25). He relies on the failure of the respondents to provide evidence that their actions would not be tortious in Ruritania. His case is that the Ruritanian court would not entertain an application in this case because it is not part of the jurisdiction of the family court to grant relief from the commission of a tort in these circumstances. This is not a matter which relates to his upbringing.

105. In support of his argument that Article 4(3) applies, Mr Nicklin relies on the family relationship, which began in England, and Recital K, which originated in an order of the English court.

106. I accept that this court cannot make any final decision as to the connection of the tort to the jurisdiction for the purposes of Article 4(3) because it is not making any findings of fact (see *VTB Capital v Nutritrek* [2013] UKSC 5 at [199] where Lord Clarke made this point in relation to section 11(2)(c) of the Private International Law Act (Miscellaneous Provisions) Act 1995 ("the 1995 Act"), which applies a qualitative test similar to Article 4(3) to torts outside the Regulation).

107. I also accept that the court must be satisfied either that Article 4(1) is satisfied or that it is likely to be disapplied under Article 4(3) (see section 12 of the HRA).

108. The first question is the effect of Article 4(1) in this case. I do not accept the submission that, even though there is no evidence as to Ruritanian law, the presumption that foreign law is the same as English law does not apply. That is a rule of evidence applied by the English courts. As such it is not affected by the Regulation. The choice of law rules laid down by Article 4 apply for the purposes set out in Article 15 of the Regulation, which does not extend to rules of evidence. Article 22 of the Regulation deals with the burden of proof but only in relation to the constituents of the tort in question. The Law Commission's *Report on Private International Law: Choice of law in Tort and Delict* (Law Com No 193 and Scot Law Com 129)(1990), which led to the 1995 Act, recommended that the choice of law rules which it recommended should not apply to rules of evidence or procedure. This is reflected in section 14(3)(b) of the 1995 Act which states that the relevant provisions do not affect any rule of evidence. It also provides for the procedural rules of the forum to continue to apply. I note the observations of Gray J in *Al-Misnad*, on which Mr Dean relies, but in that case Gray J simply said that he would be reluctant to dispose summarily of defamation proceedings (which are governed by common law choice of law rules as neither the 1995 Act nor the Regulation applies) solely on the basis of the presumption. He clearly accepted the applicability of the presumption in the context of choice of law rules.

109. In *Belhaj v Straw*, the second case on which Mr Dean relies, the observations of Simon J were obiter since he went on to find that the causes of action were non-justiciable. The passage in question reads:

> "(c) It is not consonant with the overriding objective of the Civil Procedure Rules, in a case where the 1995 Act applies, for a party either to decline to plead the relevant provisions of the applicable law or to rely on a presumption that a foreign law is the same as English law. Such an approach is evasive. There may of course be an issue as to which particular law applies, but that is a different matter. The 'parochial' approach, which 'presupposes that it is inherently just for the rules of the English domestic law of tort to be indiscriminately applied regardless of the foreign character of the circumstances and the parties', is precisely the mischief which the Law Commission sought to remedy, and which was remedied by the 1995 Act, see per Brooke LJ (with whom May and Rix LJJ agreed) in *R (Al-Jedda) v Secretary of State of Defence* [2007] QB 621 at [103], in a judgment which was upheld by the House of Lords ([2008] 1 AC 332)."

110. A number of points can be made. First, the mischief to which Brooke LJ referred was one caused by the English choice of law rules, not one caused by the presumption that in the absence of evidence as to foreign law it should be treated as if it were the same as English law. Second, the overriding objective of the CPR does not require a party to plead a case on which he does not rely. Third, it is not clear what sanction would be available if it was a breach of the CPR to fail to plead the proper law on which a

party did not rely. Fourth, this paragraph has to be read in the light of sub-paragraph (a) of the same paragraph of the judgment of Simon J:

> "(a) Although it is open to criticism and subject to exceptions, a court of first instance cannot ignore the rule that, in the absence of evidence, foreign law is presumed to be the same as English law. "

111. There is no discussion in the judgment of Simon J, or the Law Commissions' report, of the important restriction on the presumption which would result if that were the effect of (in the case of the former) the Regulation or (in the case of the latter) what is now the 1995 Act. Nor is there any indication in the 1995 Act or the Regulation themselves as to what the court must do if there is no evidence as to foreign law. In my judgment, it is clearly a matter which has been left to be resolved in accordance with the rules of the forum. I note that the leading work on the subject, Dicey, Morris and Collins, *The Conflict of Laws*, (15th ed. 2012) previously took the contrary view, but no longer does so (see paragraph 35-122 of the main work and see paragraph 35-122 of the First Supplement published in January 2014 which merely notes the views of Simon J in *Belhaj* without expressing a view on this question). Accordingly I do not consider that the observations of Simon J should be taken as supporting the proposition for which Mr Dean has cited them.

112. The second question is whether Article 4(1) would be disapplied under Article 4(3). The court must have regard to all the relevant circumstances. In my judgment, Mr Nicklin is correct to say that it is "likely", within the meaning given to that word in section 12(3) of the HRA by *Cream Holdings,* that, in this case English law applies by virtue of Article 4(3). I appreciate that the rule in Article 4(1) is the general rule and should not generally be disapplied, and I accept that it should not be disapplied to gain a juridical advantage. But here the claim arises from the intentional publication of material calculated to cause harm to OPO. That intention was formed within this jurisdiction and the Work was written here and will be published here. Those steps have already been taken. Nothing has happened outside this jurisdiction. The threat to cause harm emanated from this jurisdiction. Moreover the claim is based on harm which has yet to occur. Harm need not occur in Ruritania nor can it only occur in Ruritania. OPO might be in any part of the world when he comes across the material in the Work. He might be having staying contact in London when he comes across the material. The strongest connections of an anticipated wrong to a place are likely to be those which relate to the acts which have already occurred. They provide the most solid and manifest connections with a jurisdiction. Those acts took place in this jurisdiction.

Miscellaneous points

113. The judge took the view, as does MLA, that the issues in this action ought to be dealt with by the family court but the family court in England and Wales has no jurisdiction over OPO and the Ruritanian court will not grant any relief in respect of

the Work. With respect to the judge, in those circumstances, it cannot be an objection to these proceedings that such issues might have been dealt with by a family court.

114. Finally, Mr Tomlinson submits that Article 8 does not apply in this case because OPO is not in the jurisdiction of any contracting party to the Convention for the purposes of Article 1 of the Convention. I accept that submission. I record that no reliance is placed on Article 3 of the Convention, which might have raised other considerations.

Conclusions

115. I would dismiss the appeal on the questions whether OPO has a cause of action for MPI or negligence, but would hold for the reasons given above that OPO has sufficiently favourable prospects on the facts of this case of establishing at trial his claim under *Wilkinson v Downton* that the publication by the respondents of the Work in its present form will constitute intentional conduct causing him psychiatric harm to justify an injunction restraining publication of parts of the Work pending trial.

Lord Justice Jackson :

116. I agree that this appeal should be allowed for the reasons stated by Lady Justice Arden.

117. The most important question of law arising in this litigation, but not for final decision at this stage, is whether the claimant would have a *Wilkinson v Downton* claim against his father if (a) the father publishes the proposed book, (b) the claimant becomes aware of the contents and (c) that material causes psychiatric injury to the claimant by reason of his Aspergers Syndrome and other vulnerabilities.

118. In *Wilkinson v Downton* [1897] 2 QB 57 the defendant (D) made a false statement to the plaintiff (P). The shock caused P to suffer both physical and psychiatric injury. Wright J held that P had a cause of action, noting that D had "wilfully done an act calculated to cause physical harm to the plaintiff" (58-59). In *Janvier v Sweeney* [1919] 2 KB 319 D2, acting on behalf of D1, was seeking to obtain information from P. He attended her house and said, untruthfully, "I am a detective inspector from Scotland Yard, and represent the military authorities. You are the woman we want as you have been corresponding with a German spy." Those statements caused physical and psychiatric injury to P, which Ds knew was a likely consequence. P succeeded in her claim for damages. The Court of Appeal held that the case fell within the *Wilkinson* principle. The courts have subsequently applied the *Wilkinson* principle in a variety of situations, but limited its scope. See *Wong v Parkside NHS Trust* [2003] EWCA Civ 1721; [2003] 3 All ER 932; *Wainwright v Home Office* [2003] UKHL 53; [2004] 2 AC 406, in particular at [44]-[45].

119. For a statement to give rise to *Wilkinson* liability, it is not necessary that the statement be false. The essential characteristics include that the statement is unjustified and that

the defendant intends to cause or is reckless about causing physical or psychiatric injury to the claimant.

120. An interlocutory application for an injunction is not the occasion for a definitive decision on the scope of the *Wilkinson* principle. In my view, however, the following facts of the present case are sufficient to establish that the claimant has a good prospect of success in a claim based on *Wilkinson v Downton*:

i) The book contains graphic descriptions of the abuse which the father has suffered and his incidents of self-harm.

ii) Those passages are likely to be quoted by reviewers or newspapers who serialise the book.

iii) On the uncontradicted expert evidence those passages are likely to cause enduring psychological harm to the claimant by reason of his Aspergers syndrome and other vulnerabilities.

iv) The book is dedicated to the claimant and is in part specifically addressed to him: see page 258.

v) The father has full knowledge of the risks posed to the claimant. Indeed because of the claimant's vulnerabilities, the father has previously subscribed to Recital K to the order setting out the arrangements for the claimant's care:

> "K and upon the parties agreeing to use their best endeavours to protect the child from any information concerning the past previous history of either parent which would have a detrimental affect on the child's wellbeing."

Lord Justice McFarlane

121. I agree that the appeal should be allowed on the limited basis described by my lady and my lord for the reasons that they have each given.