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## Father's book shelved to protect son

31/10/2014

**IP & IT analysis: Discussing the Court of Appeal's decision in *OPO v MLA*, Julian Santos, a barrister at 5RB, explains that the severity of the potential consequences of publication for the son, given his particular vulnerability, were clearly an extremely significant factor in the court's reasoning.**

### Original news

*OPO v MLA and another* [2014] EWCA Civ 1277, [2014] All ER (D) 117 (Oct)

*The claimant son of a recording artist sought an injunction to stop publication of a semi-autobiographical book, written by his father. A judge dismissed the claim on various grounds. The claimant appealed. The Court of Appeal, Civil Division dismissed the appeal on the questions whether the claimant had a cause of action for misuse of private information or negligence. However, it held that the claimant had sufficiently favourable prospects on the facts of the case of establishing at trial his claim that the publication by the defendants of the work in its present form would constitute intentional conduct causing him psychiatric harm to justify an injunction restraining publication of parts of the work pending trial.*

### What were the central issues in this case?

The claimant (through his mother as his litigation friend) sought to stop publication of a book which, according to expert evidence adduced by the claimant, is likely to cause him psychological harm. The first defendant, the claimant's father (MLA), wrote the semi-autobiographical book, and the second defendant was a commercial publisher which was due to publish the book shortly. The claimant applied for an interim injunction preventing publication of the book until trial. The central issues to be determined by the court were as follows:

- o Did the claimant have a viable cause of action:
  - o --in misuse of private information
  - o -- in negligence, or
  - o -- under the 'well-known but seldom used' principle in *Wilkinson v Downton* [1897] 2 QB 57, [1895-9] All ER Rep 267?
- o Should English law or the law of the country where the claimant lived apply?
- o Should an injunction be granted, applying the Human Rights Act 1998, s 12?

The Court of Appeal, reversing the decision of the Bean J at first instance, decided that:

- o the claimant had a viable cause of action under the principle in *Wilkinson v Downton*
- o the applicable law was English law, and
- o an injunction should be granted

## How does this fit in with previous case law around *Wilkinson v Downton*?

The Court of Appeal considered the previous authorities carefully in defining the limits of the tort. The judgment determines various matters which remained unclear from the previous authorities, such as that the tort extends beyond false words to other intentional acts which cause the requisite harm. It also proceeds on the basis that lack of justification for the relevant act is necessary (because, for example, a person may have to tell bad news which is liable to cause psychiatric harm). As to the state of mind of the defendant which the claimant had to establish, the court followed the line of authority which states that intention can be imputed if the defendant wilfully does an act calculated to cause psychiatric harm, and causes such harm. However, all of these matters would fall to be considered in greater detail should the case proceed to trial.

## What protection can be awarded under the *Wilkinson v Downton* principle?

In deciding whether to grant an interim injunction the court had to consider whether or not the claimant was likely to establish that publication of the book should not be allowed--ie, was the claimant likely to obtain a permanent injunction at trial? The court therefore examined the likelihood of a permanent injunction (on a *quia timet* basis) being awarded. It is therefore clear that a claimant who is successful at trial may be awarded a permanent injunction and/or damages (as were awarded in *Wilkinson v Downton* itself).

## Are you aware of other cases where publication has been restricted on similar grounds?

Although there are some relatively recent cases in which claimants have sought to rely on the *Wilkinson v Downton* principle (see, for example, the successful claim in *C v D* [2006] EWHC 166 (QB), [2006] All ER (D) 329 (Feb)), I have not come across any previous example of publication being restrained on this basis. The authorities considered by the Court of Appeal were all claims for damages following a harmful event, as opposed to applications for injunctive relief. This case was unique among claims in this cause of action in that the claimant sought interim relief which would affect the defendants' exercise of their rights under the European Convention on Human Rights, art 10. The court therefore had to apply the Human Rights Act 1998, s 12 (HRA 1998) when considering whether to grant an injunction, something which it does not appear to have done before in this context.

## What are the difficulties for the claimant in pursuing this challenge to publication?

The two most difficult issues which the claimant had to succeed on (and which it will have to establish on a balance of probabilities at trial) in order to establish that it had a viable cause of action were:

- o that publication of the book was likely to cause the claimant psychiatric/psychological harm,
- and
- o that the first defendant had the relevant state of mind

These issues will rarely, if ever, be easy to establish. In order to do so the claimant adduced expert evidence which set out the potential harm to the claimant, particularly given the claimant's disabilities. In persuading the Court of Appeal to impute the necessary intention on the part of the first defendant, the claimant also relied on the fact that the book was dedicated to and partly directed at the claimant, and the first defendant's previous recognition that he should endeavour not to reveal his past if it would cause harm to his son.

The claimant's task was made all the more challenging by the added layer of protection afforded to the defendants by HRA 1998, s 12. HRA 1998, s 12 requires a stricter test than the normal *American Cyanamid* test to be applied when an injunction will have an effect on a defendant's exercise of his art 10 right to freedom of expression (*American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504). However, as stated by the House of Lords in *Cream Holdings Ltd v Banerjee* [2004] UKHL 44, [2004] 4 All ER 617, the HRA 1998, s 12 test is flexible in terms of its application, and the court was persuaded that this was a case where the possible consequences to the claimant were so severe that it was appropriate to apply a lower standard than the 'more likely than not' test. However, the claimant will have to overcome these significant hurdles on a balance of probabilities should the matter proceed to trial.

### **How did the court deal with the parties' respective ECHR rights?**

The court found that there was no viable cause of action in misuse of private information, and therefore did not embark upon a 'balancing exercise', as it would do in such cases. In any case, the court accepted counsel for the first defendant's submission that ECHR, art 8 did not apply in this case because the claimant was not in the jurisdiction of any contracting party to the ECHR. The court did, however, recognise the considerable interference with the defendants' ECHR, art 10 rights that granting the relief sought by the claimant would involve, and therefore considered HRA 1998, s 12 as set out above.

### **How might the local law in 'Ruritania' affect the court's decision-making?**

The court also had to grapple with the issue as to whether the applicable law was English law or the law of 'Ruritania' (the unnamed country where the claimant resides). The court determined this issue in accordance with the Rome II Regulation (EC) 864/2007. The defendants relied on Rome II, art 4(1), which states that the applicable law is the law of the country in which the damage occurs. However, the claimant submitted that the exception under Rome II, art 4(3) was applicable in the present case as the claim arose from the intentional publication of material calculated to cause harm to the claimant. The intention was formed, the book was written and the book would be published in England. Further, no damage had occurred yet, and it was by no means certain that any damage would occur in Ruritania. The court agreed that the most solid and manifest connections were with this jurisdiction and therefore applied English law.

In the circumstances, the local law in 'Ruritania' had little, if any, effect upon the court's decision-making. This can be contrasted with the court's approach to claims in misuse of private information, where the local law may be a relevant factor in both stages of the two-stage test (see, for example, *Weller and others v Associated Newspapers Ltd* [2014] EWHC 1163 (QB), [2014] All ER (D) 142 (Apr) and *Douglas v Hello! Ltd (No 3)* [2005] EWCA Civ 595, [2005] All ER (D) 280 (May))

### **What precedent could this case set in terms of restricting publication on grounds of emotional distress?**

The court followed the previous authorities in emphasising the need for evidence of psychological/psychiatric injury, as opposed to emotional distress, in order for there to be a cause of action under the *Wilkinson v Downton* principle. However, as the Court of Appeal pointed out, the Protection of Harassment Act 1997 provides for cases of harassment where there is no such harm--such as where stalkers do not cause either physical or psychological harm.

### **Any final observations you wish to add?**

It should be noted that the Court of Appeal's judgment was made in the context of an exceptional factual background. The severity of the potential consequences of publication for the claimant, given his particular vulnerability, were clearly an extremely significant factor in the court's reasoning, and resulted in a lowering of the test to be applied at the interim stage under HRA 1998, s 12. Further, the judgment refers on more than one occasion to the fact that the expert evidence as to harm was not contradicted, and the defendant had recognised the potential harm to his son in the past.

*Interviewed by Kate Beaumont.*

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