Harassment by publication *by Nicole Moreham*

The Protection from Harassment Act 1997 (PHA) is becoming an increasingly important tool for those seeking to protect their privacy against intrusion by the media and private individuals. The Act was introduced to combat stalking, racial harassment, and disruption from neighbours, but 'harassment' is not defined in the Act and its reach is therefore in fact much wider. It has the potential to catch a range of media news-gathering activities including persistent photography, trailing, and door-stepping.

Significantly for the media, 'conduct' under the Act also includes speech, and in *Thomas v News Group Newspapers Ltd* [2001] EWCA Civ 1233, the Court of Appeal held that the publication of articles in the press was capable of amounting to harassment for that purpose. It therefore declined to strike out the claimant's claim that the defendant newspaper had harassed her by publishing three articles referring to her as, among other things, a 'black clerk'. The Court recognised the importance of the defendant's freedom of expression and said that, even if it has foreseeably caused distress, '[i]n general, press criticism, even if robust, does not constitute unreasonable conduct and does not fall within the natural meaning of harassment'. Before press articles can be held to constitute harassment 'they must be attended by some exceptional circumstance which justifies sanctions and the restriction on the freedom of expression that they involve'. Lord Phillips MR held that the test for whether the articles amount to harassment requires the publisher to consider:

> . . . whether a proposed series of articles, which is likely to cause distress to an individual, will constitute an abuse of the freedom of press which the pressing social needs of a democratic society require should be curbed.

Circumstances in which newspaper publications will amount to harassment will be rare but both parties accepted that publication of articles calculated to incite racial hatred of an individual could amount to harassment under the PHA, recognising, said the Court, that 'the

Convention right of freedom of expression does not extend to protect remarks directly against the Convention's underlying values'.

The decision had a significant impact on the scope of the media's potential liability under the PHA, but since *Thomas*, however, there is no case in which a harassment claim against a newspaper has been successfully established: see *King v Sunday Newspapers Ltd* [2011] NICA 8 and *Trimingham v Associated Newspapers Ltd* [2012] EWHC 1296 (QB) for two such cases which failed.

Meanwhile, campaigns of vilification involving the publication of defamatory allegations, indecent images, or private or personal information are increasingly the subject of interim injunctions for harassment. Such claims are often brought alongside claims for misuse of private information or defamation.

Unsurprisingly, many vilification cases involve publications on the internet. For example, in *R v Debnath* [2005] EWCA Crim 3472, a woman's obsessive email and internet campaign against a man with whom she had a casual sexual encounter (and his fiancée) was held to amount to harassment. In *Brand v Berki* [2014] EWHC 2979 (QB), a masseuse was held to have harassed celebrity couple, Russell Brand and Jemima Khan, by accusing them of serious criminal offending in the media, in emails to numerous people, and in an online petition. Harassment was also found when a defendant published a website containing false allegations of wrongdoing against solicitors (*Law Society v Kordowski* [2011] EWHC 3185 (QB)); a defendant disclosed on the internet (or threatened to disclose) allegations about the private life of a woman connected to a powerful ruling family who owed him money (*WXY v Gewanter* [2012] EWHC 496 (QB)); and a defendant published on the internet (and in leaflets, banners, and emails) allegations of murder against NHS doctors of a baby who died of natural causes (*Petros v Chaudhari* [2004] EWCA Civ 458).

Nonetheless, a court will only grant an injunction restraining a campaign of vilification if it is satisfied that the claimant is not attempting to use the law of harassment to circumvent the law on freedom of speech. As Laing J observed in *Merlin v Cave* [2014] EWHC 3036 (QB):

> There is no express indication in the PHA that Parliament intended the provisions of the PHA to abrogate the rights conferred by Article 10, or to change the law of defamation, which is, by necessary implication, involved in any consideration of the scope of the legitimate restrictions which may be placed by a contracting state on the rights conferred by Article 10. Nothing in the PHA indicates that Parliament intended to encroach on the rule in *Bonnard v Perryman*.

However, the rule in *Bonnard v Perryman* is not necessarily a complete answer to an application for an interim injunction in the harassment context: there may be cases where an injunction is appropriate even though the harassment consisted of statements which the defendant claims are justified. This will be the case where:

> . . . such statements are part of the harassment which is relied on, but where that harassment has additional elements of oppression, persistence or unpleasantness, which are distinct from the content of the statements. An example might be a defendant who pursues an admitted adulterer through the streets for a lengthy period, shouting 'You are an adulterer' through a megaphone. The fact that the statement is true, and could and would be justified at trial, would not necessarily prevent the conduct from being harassment, or prevent a court from restraining it at an interlocutory stage. (*Merlin v Cave*, at [40])

However, courts must scrutinise very carefully claims that the defendant's conduct is sufficiently oppressive, persistent, or unpleasant to cross the line from acceptable conduct into harassment and must ensure that any relief sought, while restraining objectionable conduct, goes no further than is absolutely necessary in interfering with article 10 rights.

Laing J therefore held, in *Merlin*, that the defendant's freedom to raise his concerns about safety at the claimant's theme parks outweighed the claimant's interest in stopping his internet and mass email campaigns against it. In reaching that decision, she stressed the public interest in the safety of theme parks and that the officers of a public listed company are not immune from criticism, even if it is misguided and intemperate. If such criticism is defamatory, she said, the remedy is a claim in defamation.

This is the second in a series of three abridged extracts from the 3rd edition of The Law of Privacy and the Media *(OUP), the leading reference work on the subject. The 3rd edition, edited by Sir Mark Warby and Dr Nicole Moreham, brings the work up to date, addressing developments in privacy and other related areas of law over the last five years, and incorporates substantial new material. For further information and to order, please visit the OUP website.*