Easter Term
[2015] UKSC 32
On appeal from: [2014] EWCA Civ 1277

JUDGMENT

James Rhodes (Appellant) *v* OPO (by his litigation friend BHM) and another (Respondents)

before

Lord Neuberger, President
Lady Hale, Deputy President
Lord Clarke
Lord Wilson
Lord Toulson

JUDGMENT GIVEN ON

20 May 2015

Heard on 19 and 20 January 2015

Appellant
Hugh Tomlinson QC
Sara Mansoori
Edward Craven
(Instructed by Bindmans LLP)

Respondent (OPO)
Matthew Nicklin QC
Adam Speker

(Instructed by Aslan Charles Kousetta LLP)

Respondent (Canongate Books Ltd)
Antony White QC
Jacob Dean
(Instructed by Simons Muirhead & Burton Solicitors)

Interveners (English PEN, Article 19 and Index on Censorship - Written Submissions Only)
Adrienne Page QC
Can Yeginsu
(Instructed by Olswang LLP)

LADY HALE AND LORD TOULSON: (with whom Lord Clarke and Lord Wilson agree)

1. By these proceedings, a mother seeks to prevent a father from publishing a book about his life containing certain passages which she considers risk causing psychological harm to their son who is now aged 12. Mother and son now live in the United States of America and so the family court in England and Wales has no jurisdiction to grant orders protecting the child's welfare. Instead, these proceedings have been brought in his name, originally by his mother and now by his godfather as his litigation friend, alleging that publication would constitute a tort against him. The tort in question is that recognised in the case of *Wilkinson v Downton* [1897] 2 QB 57 and generally known as intentionally causing physical or psychological harm. What, then, is the proper scope of the tort in the modern law? In particular, can it ever be used to prevent a person from publishing true information about himself?

2. As the object of the proceedings has been to protect the child from harm, all the parties have until now been anonymous, as has the country where the child now lives. This court has decided that the tort does not have the scope contended for on the child's behalf and hence that the book may be published including the specific passages to which objection is taken. This means that the book will inevitably be published in the very near future. In those circumstances there can be no justification for keeping secret the information contained in the book. This includes, obviously, the author's name and also the country where mother and son are now living. The book, however, uses pseudonyms for both the mother and the child and so this judgment will continue to do so. But this court is now able to describe the book and its contents more fully than the lower courts were able to do. In this way, the reasons why both the mother and the father have been motivated to act as they have should become much clearer than perhaps they have been hitherto.

The book

3. The father is James Rhodes, the concert pianist, author and television filmmaker. The book is entitled *Instrumental*. The author believes that "music has, quite literally saved my life and, I believe, the lives of countless others. It has provided company where there is none, understanding where there is confusion, comfort where there is distress, and sheer, unpolluted energy where there is a hollow shell of brokenness and fatigue". He wants to communicate some of what music can do, by providing a sound track to the story of his life. "And woven throughout is going to be my life story. Because it's a story that provides proof that music is the answer to the unanswerable. The basis for my conviction about that is that I would

not exist, let alone exist productively, solidly – and, on occasion, happily – without music." So the book juxtaposes descriptions of particular pieces of music, why he has chosen them, what they mean to him, and the composers who wrote them, with episodes of autobiography. He wants the reader to listen to the 20 music tracks while reading the chapters to which they relate.

4. Thus far, there would be nothing for anyone to worry about. But the author's life has been a shocking one. And this is because, as he explains in the first of the passages to which exception is taken, "I was used, fucked, broken, toyed with and violated from the age of six. Over and over for years and years". In the second of those passages, he explains how he was groomed and abused by Mr Lee, the boxing coach at his first prep school, and how wrong it is to call what happened to him "abuse":

> "Abuse. What a word. Rape is better. Abuse is when you tell a traffic warden to fuck off. It isn't abuse when a 40 year old man forces his cock inside a six-year-old boy's ass. That doesn't even come close to abuse. That is aggressive rape. It leads to multiple surgeries, scars (inside and out), tics, OCD, depression, suicidal ideation, vigorous self-harm, alcoholism, drug addiction, the most fucked-up of sexual hang-ups, gender confusion ('you look like a girl, are you sure you're not a little girl?'), sexuality confusion, paranoia, mistrust, compulsive lying, eating disorders, PTSD, DID (the shinier name for multiple personality disorder) and so on and on and on.
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> I went, literally overnight, from a dancing, spinning, gigglingly alive kid who was enjoying the safety and adventure of a new school, to a walled-off, cement shoed, lights-out automaton. It was immediate and shocking, like happily walking down a sunny path and suddenly having a trapdoor open and dump you into a freezing cold lake.
>
> You want to know how to rip the child out of a child? Fuck him.
>
> Fuck him repeatedly. Hit him. Hold him down and shove things inside him. Tell him things about himself that can only be true in the youngest of minds before logic and reason are fully formed and they will take hold of him and become an integral, unquestioned part of his being."

5. He describes how he learnt to dissociate himself from what was happening, to block it out of his memory, how when he moved to other schools he had learnt to

offer sexual favours to older boys and teachers in return for sweets and other treats. He gives a searing account of the physical harms he suffered as a result of the years of rape and of the psychological effects, which made it hard for him to form relationships and left him with an enduring sense of shame and self-loathing.

6. He recounts the ups and downs of his adult life: a year at Edinburgh University filled with drugs and alcohol, leading to his first admission to a psychiatric hospital; a year working and sobering up in Paris; three years studying psychology at University College London, leading to a highly successful career as a salesman in financial publishing; meeting and marrying the mother, whom he calls Jane, an American novelist then living in London; making a "perfect home" with her. He is kind about his wife – "The poor thing didn't stand a chance" – and hard upon himself:

> "I've honestly no idea what I was thinking, beyond that rather sad hope that if I continued to do what normal people did then I would somehow become normal. But the idea that a man like me could not only get married, but maintain, nurture, commit to a marriage was fucking ridiculous. My whole concept of love was skewed."

7. Then their child, whom he calls Jack, was born: "My son was and is a miracle. There is nothing I will experience in my life that will ever match the incandescent atomic bomb of love which exploded in me when he was born." He wanted to be a perfect father, but "I don't think that I will ever be able to make my peace with the fact that the ripples of my past became tidal waves when he was born". His past had installed "an unshakeable belief that all children suffer through childhood in the most abominable ways and that nothing and no-one can protect them from it". Eventually, he looked for professional help from a charity specialising in helping victims of child sexual abuse and was told that he must tell his wife about the abuse. So he did. Their child was then four years old. "It is, apparently, very common for the world to spin completely off its axis when your child approaches the age you were when the abuse began".

8. Instead of returning to drink and drugs he resorted to self-harm: "That's the thing about cutting – not only do you get high, but you can express your disgust at yourself and the world, control the pain yourself, enjoy the ritual, the endorphins, the seedy, gritty self-violence privately and hurt no-one other than yourself". But his wife found out and he was persuaded to go into hospital again. Among the passages which have not been challenged is a graphic account of the effect of the psychotropic drugs which he was forced to take in hospital. He tried to commit suicide, escaped from the hospital, planned a second attempt at suicide but rang his wife for a last word with his son, and was persuaded to meet her. So he was returned to hospital. He worked hard at being a model patient so that he could be let out. But it was not

a cure. “Even out of hospital, off meds, physically present for my family, I was a ghost.” A friend offered him a life-line, treatment in a hospital in the United States, where he spent two months. “By the end of it I had, miraculously, stopped hating myself quite so much. I’d put on weight, cleared away a lot of the wreckage of the past, repaired some relationships and found a way to live with myself that, most days, left me relatively calm and composed.” There is a moving passage about rebuilding his relationship with his son: “That’s the weird thing about kids – they have a capacity for forgiveness that most adults can only aspire to. He has always loved me – it was inbuilt and immutable – and I him. After a few weeks of playing, singing, hanging out, we felt absolutely connected and back to normal.”

9. But the marriage could not be repaired. Mother and father agreed to a trial separation and he moved out. Things “started to get more and more wobbly”, not helped by his going to the police for the first time in the hope of exorcising some of the past horrors, where he found the process “brutal, shaming, vile”. He began self-harming once more. Eventually, the mother decided to move back to the United States. Once again, he is generous: “She had, understandably and justifiably, had enough. There had been so much destruction, so much uncertainty and pain, and clearly Jane had decided that Jack’s needs had to come first. She was a mother first and foremost and not some patron saint of lost causes.” They got into a routine. He would go over there twice a year, she would bring him over here twice a year, they would Skype twice a week.

10. Interwoven with this painful story is the story of his relationship with music. He discovered music, specifically, Bach’s Chaconne for solo violin in D minor, transcribed for piano by Busoni, while still at the preparatory school where he was being so brutally abused:

> “… that piece became my safe place. Any time I felt anxious (any time I was awake) it was going round in my head. Its rhythms were being tapped out, its voices played again and again, altered, explored, experimented with. I dove inside it as if it were some kind of musical maze and wandered around happily lost. It set me up for life; without it I would have died years ago, I’ve no doubt. But with it, and with all the other music that it led me to discover, it acted like a force field that only the most toxic and brutal pain could penetrate.”

11. At his next preparatory school he largely taught himself to read music and play the piano. At Harrow, he had his first proper teacher, who was “awesome”. He discovered that “literally the only thing in the universe I realised I wanted was to travel the world, alone, playing the piano in concert halls”. Then he gave it up during the ten years of university, building a career and getting married. But after his son was born and the demons returned, “I looked for distractions. I looked for a way out

that didn't involve homicide or suicide". He found it in music. He set about building a business partnership with the agent of "the greatest pianist in the world", but was persuaded instead to train as a pianist himself. He worked hard. And when he had begun to resort to self-harm, he decided to organise his first public concert. He rented a hall on the South Bank, the hall was filled, and the concert went well: "I realise that all those fantasies about giving concerts that I had as a kid, that kept me alive and safe in my head, were accurate. It really is that powerful. And I knew I wanted to do it forever. No matter what".

12. Then the suicidal ideas and attempts and hospitalisation took over. But a friend visiting him in hospital brought him an iPod nano loaded with music inside a giant bottle of shampoo (toiletries being the only gifts allowed). Once again music was his salvation. It persuaded him to do what he needed to do to get out. After separating from his wife, he started to get more involved in the piano again. And in a café he met the man who was to become his manager. Together they arranged for him to record his first CD, *Razor Blades, Little Pills and Big Pianos*. He found a sponsor to enable him to concentrate on his music. He did a documentary about Chopin for the BBC. His manager arranged concerts at the Roundhouse and the Queen Elizabeth Hall. Together they devised a new sort of concert, in which the pianist talked about the music, the composer and what it meant to him, in an informal way quite unlike the usual classical music concert. It was a success. Through his manager he met the woman who was to become his second wife.

13. The concerts led to some press interest, including an interview with the Sunday Times in which he mentioned the abuse which had happened at school. This prompted the head of the junior school in his first school, who had known that something was wrong but not what it was, to get in touch and to provide a police statement. Mr Lee was found, still coaching small boys boxing, and prosecuted. But he died before he could stand trial:

> "Maybe one day I will forgive Mr Lee. That's much likelier to happen if I find a way to forgive myself. But the truth, for me at any rate, is that the sexual abuse of children rarely, if ever, ends in forgiveness. It leads only to self-blame, visceral, self-directed rage and shame …
>
> But shining a light on topics like this is hugely important. And getting hundreds of supportive and grateful messages from people who had also gone through similar experiences was an indicator to me that it needs to be talked about even more."

14. From then his career went from strength to strength. There have been many concerts, all over the world. There have been four more albums. There was a

television series for Sky Arts, *Piano Man*. There was even talk, though it came to nothing, of his appearing in the Royal Variety Show. He and his manager had found a new and different way of presenting classical music to the world and it worked.

15. There have been bad times since as well as good times – "Sadly I am only ever two weeks away from a locked ward" – but the overall message is one of hope:

> "I lost my childhood but gained a child. I lost a marriage but gained a soulmate. I lost my way but gained a career and a fourth or fifth chance at a life which is second to none."

These proceedings

16. During their divorce, the mother and father agreed to include the following recital, recital K, in a residence and contact order made in London on 15 June 2009:

> "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 upon the child's well-being"

17. A first draft of the book was sent to the publishers in December 2013. In February 2014 it was leaked to the mother and some changes were made as a result, including the use of pseudonyms for mother and child. The mother did not consider that those changes had gone far enough. In June 2014, she launched these proceedings on behalf of the child, claiming against the father and the publishers an injunction prohibiting publication without the deletion of a large number of passages. The causes of action alleged were misuse of private information, negligence and the intentional infliction of harm. An anonymity order was made at the same time, prohibiting the publication of any information which might lead to the identification of the child as a party to the proceedings or the subject of the information to which the proceedings related. All parties have since filed evidence but there have been no findings on the factual matters in dispute.

18. The mother has filed a report from Dr Christine Tizzard, a consultant child psychologist who interviewed the child in June 2014. Her opinion was that he "is likely to suffer severe emotional distress and psychological harm in the event that he is exposed to the material in the publication". The child has been diagnosed with Asperger's syndrome, attention deficit hyperactivity disorder, dyspraxia and dysgraphia. He qualifies for an Individualised Educational Program in the United States and receives specialist support and counselling. In her view, the information

in the book would be inappropriate for any 11 year old child to read and have access to, but it would be even more devastating for this child, because of his difficulties in processing information: his psychological schemas are not malleable, he receives information in a literal way and is unable to conceptualise it in an alternative way, and he would view himself as responsible for some of his father's distress and an extension of his father. He is already prone to self-harm and emotional outbursts and these would probably increase.

19. Both parties accept that it is most unlikely that the child will come into possession of the book itself. The publishers plan to publish it in hard copy in the UK and much of the rest of the English-speaking world, and to retail it in shops and on-line, but there are no plans at present to publish it in the USA. It will also be available for purchase as an e-book.

20. The father accepts that knowing what happened to him would upset and embarrass the child, but not that it will be harmful if dealt with in the right way and at the right time. The bare bones of his story have already appeared in articles and interviews which are available on-line. The mother is concerned that the child who is proud of his father, has "googled" him in the past. If he did so in future he would be likely to come across reviews and references to the book.

21. The application for an interim injunction came before Bean J in private in July 2014. His judgment has not been published. He dismissed the application and struck the proceedings out on the basis that the child had no cause of action in tort against the father or the publishers. He said that there was no precedent for an order preventing a person from publishing their life story for fear of its causing psychiatric harm to a vulnerable person, nor should there be. He held that a cause of action under *Wilkinson v Downton* did not extend beyond false or threatening words.

22. The child's appeal was heard in August 2014 and judgment given in October: [2014] EWCA Civ 1277. The Court of Appeal held that there was no claim in misuse of private information or in negligence, but that the claim for intentionally causing harm should go for trial. The factual issues would be the father's intention in publishing the book, the level of harm which the child was likely to suffer and the cause of such harm.

23. The leading judgment was given by Arden LJ. She held that the action under *Wilkinson v Downton* was not limited to false or intimidatory statements, but she considered other ways in which the tort might be kept within acceptable limits. She said that it was "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" (para 68). She added (para 69) that it had to be shown that the act was unjustified "in the sense that the defendant was not entitled to do it *vis-à-vis the particular claimant*" (original emphasis). Thus she met the objection that many disturbing publications may foreseeably cause psychiatric harm to someone of sufficient vulnerability by treating the cause of action as confined to the person at whom the act was directed, and therefore the question of justification was similarly confined. Arden LJ had noted at the outset of her judgment that the book was dedicated to the child, and the fact that the father had "accepted a responsibility to use his best endeavours to ensure that OPO is protected from harmful information" was sufficient in her judgment "to mean that there is no justification for his words, if they are likely to produce psychiatric harm".

24. As to the mental element of the tort, Arden LJ held that the necessary intent to cause harm could be imputed to the father, since he was aware of the psychiatric evidence about the harm which his son would be likely suffer if he read some of the contents of the book. She said, correctly, that there was a consistent line of authority from *Wilkinson v Downton* that even if a person did not intend to cause such harm, an intent to do so could be imputed to him if that was the likely consequence.

25. In a short concurring judgment Jackson LJ said that for a statement to give rise to liability under *Wilkinson v Downton* it need not be false. Rather, it must meet the essential characteristics that "the statement is unjustified and that the defendant intends to cause or is reckless about causing physical or psychiatric injury to the claimant". Jackson LJ considered that the following facts were sufficient to establish that the claimant had a good prospect of success for the purposes of granting an interlocutory injunction:

i) The book contained graphic descriptions of the abuse which the appellant had suffered and his incidents of self-harm.

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

iii) On the uncontradicted expert evidence those passages were likely to cause psychological harm to the claimant.

iv) The book was dedicated to the claimant and partly addressed to him.

v) The appellant knew of the risks posed to the claimant because of his vulnerabilities and had for that reason subscribed to Recital K.

McFarlane LJ agreed with both judgments. The form of order was the subject of a supplemental judgment after a further hearing in private.

26. The court granted an interim injunction, restraining the defendants from making "generally available to the public by any means all or any part of the information referred to in Confidential Schedule 2 to this Order ('the information') whether by publishing the particular extracts identified in Confidential Schedule 3 or by publishing any substantially similar words to like effect". Confidential Schedule 2 reads thus:

> "**Information referred to in the Order**
>
> (1) The information or purported information that the respondents intended to publish in a book entitled 'Instrumental' ('the Book') (extracts of which are particularised in Confidential Schedule 3) which give graphic accounts of the First defendant's account of sexual abuse he suffered as a child; his suicidal thoughts and attempts; his history of and treatment for mental illness and incidents of self-harming; his thoughts about killing the appellant; his fears that the appellant would also be a victim of sexual abuse and linking this account to the appellant.
>
> (2) Any information liable to or which might lead to the identification of the appellant (whether directly or indirectly) as the subject of these proceedings or the material referred to above."

27. In the judgment about the form of order Arden LJ emphasised the use of word "graphic" in the order, which she explained as follows:

> "We take the word "graphic" to mean vividly descriptive. In judging what is vividly descriptive, we have borne in mind that the person to be protected is a vulnerable child. In these circumstances, we consider that what should be injuncted is that which we consider to be seriously liable to being understood by a child as vividly descriptive so as to be disturbing."

28. Confidential Schedule 3 contains some 40 extracts from the book. Some fall within the general description in Confidential Schedule 2 as explained by Arden LJ and some do not. By no means all the passages in the book which might be thought to fall within that general description are included. Nowhere in the listed extracts or in the current version of the book is there mention of thoughts about killing the child. Some of the quotations in paras 3 to 15 above are among the 40 extracts listed; many are not.

29. The prohibition does not relate to information contained in the book apart from the Confidential Schedules or contained in the public judgment of the court. Nor does it apply to any material which had been placed in the public domain before 1 September 2014 and either appeared on the internet in the father's name in a form and on a site accessible at 1 September 2014 or was attributed to the father and contained in a national television programme transmitted in England within the previous 12 months.

30. The trial of the action was listed for April 2015. The father and the publishers contend that on the agreed facts the child has no cause of action against them.

Wilkinson v Downton

31. Mr Downton secured a place for himself in legal history by a misconceived practical joke. He thought that it would be a cause of harmless amusement among the clientele of the Albion public house in Limehouse to tell the landlord's wife, Mrs Wilkinson, a false tale that her husband had fractured his legs in an accident while on his way back from a race meeting and that he had sent a message to ask for her help to get him home. It cost her 1 shilling and 10 ½ pence to send her son and another helper on this fools' errand, but a matter of far greater concern was the effect on her health. She suffered severe shock to her nervous system, which manifested itself in vomiting and weeks of physical suffering. Mrs Wilkinson had not shown any previous sign of predisposition to nervous shock. She and her husband sued Mr Downton, and the matter came to trial before Wright J and a jury.

32. Recovery of the transport costs incurred in response to Mr Wilkinson's supposed request for help presented no legal difficulty. Such costs were recoverable as damages for deceit. The jury assessed damages for the illness caused to Mrs Wilkinson by her nervous shock (together with her husband's claim for the resulting loss of her services) at £100, but the legal basis for making such an award was problematic.

33. Wright J rejected the argument that damages for deceit could include an award for Mrs Wilkinson's suffering, because the essence of liability for deceit was that a maker of a false representation, intended to be acted upon, was liable to make good any loss naturally resulting from the representee acting on it, but the illness suffered by Mrs Wilkinson was not a consequence of her acting on what she was told. It was simply a consequence of the shock brought about by the news reported to her.

34. Wright J held, at pp 58-59, that a cause of action could be stated in law where a defendant has

> "wilfully done an act calculated to cause physical harm to the plaintiff – that is to say, to infringe her legal right to personal safety, and has in fact thereby caused physical harm to her."

He continued

> "That proposition without more appears to me to state a good cause of action, there being no justification alleged for the act. This wilful injuria is in law malicious, although no malicious purpose to cause the harm which was caused nor any motive of spite is imputed to the defendant."

35. This compact statement of law contained a number of key features. First, he identified the plaintiff's protected interest as her "legal right to personal safety". Secondly, he identified the defendant's act as wilful. Thirdly, he described the act as "calculated" to cause physical harm to the plaintiff. Fourthly, he noted the absence of any alleged justification. Fifthly, he characterised the "wilful injuria" as "in law malicious" despite the absence of any purpose (ie desire) to cause the harm which was caused. Having stated the law in that way, Wright J then considered whether it covered Mrs Wilkinson's claim. He held that it did. He said:

> "One question is whether the defendant's act was so plainly calculated to produce some effect of the kind which was produced that an intention to produce it ought to be imputed to the defendant, regard being had to the fact that the effect was produced on a person proved to be in an ordinary state of health and mind. I think that it was. It is difficult to imagine that such a statement, made suddenly and with apparent seriousness, could fail to produce grave effects under the circumstances upon any but an exceptionally indifferent person, and therefore an intention to produce such an effect must be imputed …"

36. This passage removes any doubt that Wright J was using the word "calculated" in the sense of likely to have an effect of the kind which was produced, and that the result was taken in law to be intended by a process of imputation.

37. The work of modern scholars is helpful to understanding Wright J's judgment by placing it in its historical context. The latter part of the 19th century was a formative period in the law of tort, as in other areas of the common law. There was a movement towards general principles of liability for intentional or "malicious" torts, as there was also for negligence. (See Professor Oliphant's chapter, *The Structure of the Intentional Torts*, in *Emerging Issues in Tort Law*, 2007, edited by Professor Neyers and others.) The first edition of *Pollock on Torts* was published in 1887. In it he began his discussion of principles by stating it as "a general proposition of English law that it is a wrong to do wilful harm to one's neighbour without lawful justification" (p 21). He acknowledged that this was a modern principle for which there was no express authority, but he reasoned that as the modern law of negligence enforced the duty of fellow-citizens to observe in varying circumstances an appropriate measure of prudence to avoid causing harm to one another, "much more must there exist, whether it be so expressed in the books or not, the negative duty of not doing wilful harm; subject, as all general duties must be subject, to the necessary exceptions" (p 22). In later editions he cited an obiter dictum of Bowen LJ in *Skinner & Co v Shew & Co* [1893] 1 Ch 413, 422 that at common law there was a cause of action "whenever one person did damage to another wilfully and intentionally, and without just cause or excuse". Wright J was familiar with *Pollock on Torts* and he referred to the 4th edition in *Wilkinson v Downton* at p 60.

38. The word "maliciously" was much used both in the law of tort and in criminal law. In the famous case of *Mogul Steamship Co Ltd v McGregor, Gow & Co* (in which the plaintiffs complained about being kept out of the conference of shipowners trading between China and London) Bowen LJ said that the word had an "accurate meaning, well known to the law" as well as a "popular and less precise signification". As a legal term it meant "an intention to do an act which is wrongful, to the detriment of another": (1889) 23 QBD 598, 612. He continued, at p 613:

> "Now, intentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that other person's property or trade, is actionable if done without just cause or excuse. Such intentional action when done without just cause or excuse is what the law calls a malicious wrong (see *Bromage v Prosser* (1825) 4 B & C 247; *Capital and Counties Bank v Henty* (1882) 7 App Cas 741, 772, per Lord Blackburn)."

In *Bromage v Prosser* Bayley J distinguished "malice in law", inferred from the defendant's intentional interference with the plaintiff's rights, from "malice in fact" (p 255). In the *Mogul Steamship* case Bowen LJ held that the defendants had just cause to act as they did, because they were free to carry on their trade freely to their best advantage, and the House of Lords agreed [1892] AC 25.

39. Just as absence of actual ill-will was not a defence if the defendant's act wilfully interfered with an interest of the plaintiff which carried a right to legal protection, conversely the existence of ill-will was held not to be enough to create a cause of action in the absence of such a right. This was the ratio decidendi in the celebrated case of *Mayor of Bradford v Pickles* [1895] AC 587, from which it followed that insofar as Bowen LJ suggested that any act of interference with another's trade was *prima facie* unlawful his dictum was too wide. The chief source of water supplied for the citizens of Bradford was a collection of springs on land owned by the corporation at the foot of a hillside on the outskirts of the city. Above that land was a tract owned by Mr Pickles, and the springs were fed by water flowing underground from Mr Pickles's land. Mr Pickles embarked on the work of sinking a shaft on his land which had the effect of altering the flow of water and reducing the volume which fed the springs. The corporation brought proceedings for an injunction to restrain him from doing the work. The pleader alleged that he was acting "maliciously". It was argued that he was not acting for the improvement of his own land, but that he simply intended to deprive the corporation of water which it would otherwise have received, with the motive of forcing it to buy him out at a price satisfactory to himself. The corporation was granted an interim injunction at first instance, but the injunction was set aside by the Court of Appeal (Lord Herschell, LC, and Lindley and AL Smith LJJ, [1895] 1 Ch 145) and the Court of Appeal's judgment was upheld by the House of Lords. It was held that Mr Pickles had acted throughout in accordance with his legal rights. The corporation had no legal right to the flow of water from his land and, that being so, his motives were irrelevant. Lord Halsbury LC said at p 594:

> "This is not a case in which the state of mind of the person doing the act can affect the right to do it. If it was a lawful act, however ill the motive might be, he had a right to do it. If it was an unlawful act, however good his motive might be, he would have no right to do it. Motives and intentions in such a question as is now before your Lordships seem to me to be absolutely irrelevant."

40. All this would have been familiar to Wright J. Shortly before he gave judgment in *Wilkinson v Downton* he had been summoned with other judges to give his opinion to the House of Lords in the famous case of *Allen v Flood* [1898] AC 1. He delivered his judgment in *Wilkinson v Downton* on 8 May 1897 and his opinion in *Allen v Flood* on 3 June 1897. In his opinion in *Allen v Flood*, at [1898] AC 63, he said that in circumstances where:

> "there was not otherwise any wrong or injuria, it follows that there could not be malice in the ordinary legal sense of that term, as compendiously stating the wilful infringement of a legal right or breach of a legal duty without matter of legal justification or excuse: upon which may be cited *Bromage v Prosser* [and other authorities].
>
> These and other authorities show that in general wherever the term 'malice' or 'maliciously' forms part of a statement of a cause of action or of a crime, it imports not an inference of motive to be found by the jury, but a conclusion of law which follows on a finding that the defendant has violated a right and has done so knowingly, unless he shows some overriding justification."

41. Lord Herschell said in his judgment in *Allen v Flood* at p 124:

> "More than one of the learned judges who were summoned refers with approval to the definition of malice by Bayley J in the case of *Bromage v Prosser*: 'Malice in common acceptation of the term means ill-will against a person, but in its legal sense it means a wrongful act done intentionally without just cause or excuse.' It will be observed that this definition eliminates motive altogether."

42. It is interesting to compare and contrast Wright J's opinion in *Allen v Flood* with his judgment in *Wilkinson v Downton*. In his opinion in *Allen v Flood* Wright J made the point (as the House of Lords had held in *Mayor of Bradford v Pickles*) that if the defendant's conduct did not interfere with any right of the plaintiff, malice in its popular meaning would not be enough to create a wrong or injuria. But in *Wilkinson v Downton* he treated the defendant's wilfulness in telling a deliberate falsehood as an element of the injuria. The two approaches were not incompatible, for it is perfectly possible for the law to recognise an interest deserving some form of legal protection, but to require an appropriate degree of fault for an interference with it to constitute a legal injuria; the appropriate fault element may vary, typically between negligence and intention (although they are not the only possibilities); and the measure of protection provided by the law may vary as between different types of interest (be it a person's property, trade or personal safety). In *Wilkinson v Downton* Wright J identified the plaintiff's protected interest as her right to personal safety. There may be good reasons of social policy for the law to treat a person who deliberately does something which causes another to suffer physical or psychological injury or illness by telling them a false story (*Wilkinson v Downton*) more harshly than one who carelessly passes on false information.

43. In the passage cited above from his opinion in *Allen v Flood*, Wright J referred to cases where "malice … forms part of a statement of a cause of action or of a crime". In relation to the criminal law, Professor Mark Lunney has drawn attention in an illuminating article, *Practical joking and its penalty: Wilkinson v Downton in context* (2002) 10 Tort Law Review 168, 178, to the decision of the Court of Crown Cases Reserved in *R v Martin* (1881) 8 QBD 54. The defendant caused panic in a theatre by barricading an exit door and extinguishing the gas lighting. In the resulting confusion several people were seriously injured. His conduct was intended as a prank, but any sane person would have realised that it was dangerous. The court upheld his conviction for unlawfully and maliciously inflicting grievous bodily harm, contrary to section 20 of the Offences Against the Person Act 1861. Lord Coleridge CJ said (at p 58):

> "The prisoner must be taken to have intended the natural consequences of that which he did. He acted 'unlawfully and maliciously', not that he had any personal malice against the particular individuals injured, but in the sense of doing an unlawful act calculated to injure …"

Stephen J said (also at p 58) that:

> "if the prisoner did that which he did as a mere piece of foolish mischief unlawfully and without excuse, he did it 'wilfully', that is, 'maliciously', within the meaning of the statute."

44. There is a striking parallel between the language and reasoning in *R v Martin* and in *Wilkinson v Downton*. Wright J's proposition that the "injuria" was "in law malicious", despite the absence of any "malicious purpose" or "motive of spite" contained a clear echo of the criminal law.

45. Historically the doctrine of imputed intention, that is to say that a person is to be taken as a matter of law to intend the natural and probable consequences of his acts, survived in the criminal law as late as the decision of the House of Lords in *DPP v Smith* [1961] AC 290. The decision surprised most criminal lawyers and was described by Professor Glanville Williams in his *Textbook of the Criminal Law*, (1st ed) (1978), p 61, as "the most criticised judgment ever to be delivered by an English court". The doctrine was abolished by section 8 of the Criminal Justice Act 1967. This states:

> "A court or jury, in determining whether a person has committed an offence, -

> (a) shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of those actions; but
>
> (b) shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances."

46. The final matter which Wright J addressed in his judgment in *Wilkinson v Downton* was whether the effect on Mrs Wilkinson of the report about her husband "was, to use the ordinary phrase, too remote to be regarded in law as a consequence for which the defendant is answerable". Having expressed the view that it was difficult to imagine that such a report could fail to produce grave effects, unsurprisingly he said that apart from authority he would hold that it was not too remote. He then considered two authorities advanced for the proposition that "illness through mental shock is a too remote or unnatural consequence of an injuria to entitle the plaintiff to recover in a case where damage is a necessary part of the cause of action": *Victorian Railways Commissioners v Coultas* (1888) 13 App Cas 222 and *Allsop v Allsop* (1860) 5 H & N 534, approved by the House of Lords in *Lynch v Knight* (1861) 9 HL Cas 577.

47. In *Victorian Railways Commissioners v Coultas* the plaintiff narrowly escaped serious injury at a level crossing. She was a passenger in a buggy driven by her brother. The gate keeper negligently opened the gates for them to cross when a train was approaching. There was no collision, but the plaintiff was found by a jury to have suffered illness as a result of the shock of seeing the train approaching and thinking that they were going to be killed. The Privy Council held that mere sudden terror unaccompanied by actual physical injury could not in such circumstances be considered a consequence which in the ordinary course would flow from the negligence of the gate keeper.

48. Wright J declined to follow that authority. He observed that it had been doubted by the Court of Appeal (*Pugh v London, Brighton and South Coast Railway Co* [1896] 2 QB 248, 250, per Lord Esher MR) and had been rejected in Ireland (*Bell v Great Northern Railway Co of Ireland* (1890) 26 LR Ir 428, per Palles CB) and by the Supreme Court of New York (*Mitchell v Rochester Railway Co* (1896) 151 NY Rep 107, cited by Pollock). He did not go further and express the view that it was wrong, but it was unnecessary for him to do so, for he also described the case as not in point since "there was not in that case any element of wilful wrong".

49. *Allsop v Allsop* was a case of illness allegedly caused by a slanderous imputation of unchastity to a married woman. The woman heard the slander at third

hand. It was held that the woman could not claim special damages for her illness in an action for slander against the originator of the slander. Wright J took a narrow view of the case as an authority on the type of damages recoverable in an action for slander. He said that to adopt it as a rule of general application that illness resulting from a false statement could never give rise to a claim for damages would be difficult or impossible to defend.

50. Wright J's essential reasoning is clear, once the terms that he used are properly understood. He did not attempt to define physical harm of a psychiatric nature, but on the facts it was unnecessary for him to say more than he did. We have analysed his reasoning at some length because of the uncertainty to which it has given rise.

Subsequent case law

51. *Wilkinson v Downton* has been a source of much discussion and debate in legal textbooks and academic articles but seldom invoked in practice. This may be due to the development of the law of negligence in the area of recognised illness resulting from nervous shock. But a distinctive feature of the present case is that the courts below have held that there is no arguable case against the father in negligence (applying *Barrett v Enfield London Borough Council* [2001] 2 AC 550), and the claimant has therefore been constrained to rely on *Wilkinson v Downton*.

52. *Wilkinson v Downton* was considered by the Divisional Court (Kennedy and Phillimore JJ) in *Dulieu v White & Sons* [1901] 2 KB 669. The plaintiff was working behind the bar at the Bonner Arms in Bethnal Green when an employee of the defendant negligently drove a horse drawn van into the room where she was. She was pregnant at the time and claimed damages for illness allegedly resulting from her severe shock. The defendant pleaded that the damages claimed were too remote. The issue came before the Divisional Court on a demurrer. The court rejected the defence and declined to follow *Victorian Railways Commissioners v Coultas*. The judges observed that the decision of the Privy Council was entitled to great respect but was no more binding on the court than it was on the Exchequer Division in Ireland. Kennedy J put to one side cases of wilful wrong-doing, such as *Wilkinson v Downton*, as perhaps involving special considerations. In cases of negligence, he said that he was inclined to limit liability to injury from shock arising from a reasonable fear of immediate personal injury to oneself. Phillimore J, at p 683, said that he agreed with the decision of Wright J in *Wilkinson v Downton* "that everyone has a right to his personal safety, and that it is a tort to destroy this safety by wilfully false statements and thereby to cause a physical injury to the sufferer". From that and other authorities he drew the principle that "terror wrongfully induced and inducing physical mischief gives a cause of action".

53. *Wilkinson v Downton* was approved by the Court of Appeal in *Janvier v Sweeney* [1919] 2 KB 316. The plaintiff was a French woman engaged to a German who was interned in the Isle of Man during World War 1. She lived as the paid companion of another woman who had a house in Mayfair. The defendants were an ex-police officer who ran a private detective agency and his assistant. The first defendant wanted to inspect surreptitiously some letters written to the plaintiff's employer. In July 1917 he sent his assistant to see the plaintiff and trick her into cooperating by pretending that he was a police officer and that she was suspected of corresponding with a German spy. She claimed that this caused her to suffer severe shock resulting in a period of nervous illness. She sued for damages and won.

54. On the appeal it was conceded that the threatening conduct found by the jury would amount to an actionable wrong if damage which the law recognised could be shown to have flowed directly from it. But it was argued that the plaintiff's illness was too remote in law and that *Wilkinson v Downton* was wrongly decided. The court approved the reasoning of Wright J and the statement of Phillimore J in *Dulieu v White* that "terror wrongfully induced and inducing physical mischief gives a cause of action". Duke LJ described *Janvier v Sweeney* as a stronger case than *Wilkinson v Downton* because there was an intention to terrify the plaintiff for the purpose of attaining an unlawful object.

55. There appear to have been no reported cases in this country on *Wilkinson v Downton* for the next 70 years or so. In the last 25 years it has had a modest resurgence in the context of harassment: *Khorasandjian v Bush* [1993] QB 727; *Wong v Parkside Health NHS Trust* [2001] EWCA Civ 1721, [2003] 3 All ER 932; *Wainwright v Home Office* [2001] EWCA Civ 2081, [2002] QB 1334 (CA), [2003] UKHL 53, [2004] 2 AC 406 (HL).

56. In *Khorasandjian v Bush* the plaintiff obtained an injunction, in reliance on *Wilkinson v Downton* and *Janvier v Sweeney*, to prevent a former partner from making threatening phone calls. Dillon LJ (with whom Rose LJ agreed) described those authorities as establishing that "false words or verbal 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" (p 735). (This was a direct quotation from the headnote in *Janvier v Sweeney*.) Dillon LJ interpreted injury in the sense of "recognisable psychiatric illness with or without psychosomatic symptoms", as distinct from "mere emotional distress" (p 736).

57. In *Wong v Parkside Health NHS Trust* the claimant sued her former employer for post-traumatic stress resulting from alleged harassment at her place of work. Hale LJ, giving the judgment of the court, said that it followed from Wright J's formulation in *Wilkinson v Downton* that although the tort is commonly labelled "intentional infliction of harm", it was not necessary to prove actual (subjective)

intention to injure; it was sufficient to prove that the conduct was "calculated" to do so in the sense of being deliberate conduct which was likely in the nature of things to cause injury (para 10). As explained above, Hale LJ was correct that this was indeed the effect of Wright J's formulation, which the Court of Appeal endorsed in *Janvier v Sweeney*. Whether it should be endorsed by this court is a different question. Hale LJ also confirmed the view expressed in *Khorasandjian v Bush* that for liability to arise under *Wilkinson v Downton* there must be "physical harm or recognised psychiatric illness". The interesting question is whether it should be sufficient to establish conduct intended to cause severe alarm or distress falling short of a recognised psychiatric illness but in fact causing the latter. This question was touched on in *Wainwright v Home Office*.

58. In *Wainwright v Home Office* a young adult who suffered from cerebral palsy and severe arrested social and intellectual development was wrongly subjected by prison officers to a strip search, which was carried out in a particularly humiliating fashion. He was greatly distressed by the episode and was subsequently diagnosed as suffering post-traumatic stress disorder. He claimed damages under *Wilkinson v Downton*. It was argued on his behalf that the ambit of harm covered by the tort should extend beyond cases of recognised physical or psychiatric injury and should include distress of the kind which was the natural consequence of the prison officers' treatment of him.

59. In the Court of Appeal Lord Woolf CJ said that he had no difficulty with the statement in *Salmond & Heuston on Torts,* (21st ed) (1996), p 215, 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": [2002] QB 1334, para 49. (This statement was taken from the *American Law Institute, Restatement of the Law, Torts,* (2nd ed) (1965), section 46.) But the trial judge had not made any finding that there was such intention or recklessness, and for that reason Lord Woolf held that the claim failed.

60. Buxton LJ agreed that the claim failed on the facts, but he disagreed with the formulation in *Salmond & Heuston*. He considered that the headnote in *Janvier v Sweeney*, adopted by Dillon LJ in *Khorasandjian v Bush*, came "as close as it is possible to do to a general statement of the rule in *Wilkinson v Downton*" (para 79). But if that was not correct, he held that the rule must be limited to Wright J's statement that the defendant's act was so clearly likely to produce an effect of the kind that occurred that an intention to produce it should be imputed to him (objective recklessness). The reformulation in *Khorasandjian v Bush* required subjective recklessness as to the causation of physical injury in the sense of recognisable psychiatric distress. Intention or recklessness merely as to severe emotional distress, from which bodily harm happened to result, was not enough. Buxton LJ regarded the court in *Wong's* case as treating the two formulations as equivalent in their effect.

61. In the House of Lords the principal judgment was given by Lord Hoffmann. His analysis of *Wilkinson v Downton* was that Wright J was prevented by the decision of the Privy Council in *Victorian Railway Commissioners v Coultas* from finding in negligence, and Wright J devised a concept of imputed intention which sailed as close to negligence as he felt that he could; that it was not entirely clear what he meant by finding that the defendant intended to cause injury; but that by the time of *Janvier v Sweeney* the law was able comfortably to accommodate the facts of *Wilkinson v Downton*, since the court in *Dulieu v White* had declined to follow *Victorian Railway Commissioners v Coultas*. (See paras 44, 37 and 39 to 40.)

62. This interesting reconstruction shows the pitfalls of interpreting a decision more than a century earlier without a full understanding of jurisprudence and common legal terminology of the earlier period. The concept of imputed intention was certainly not a novel concept devised by Wright J to get around a perceived stumbling block in the law of negligence. The concept was in the mainstream of legal thinking at that time. Moreover there is no reason for supposing that Wright J would have felt obliged to follow the decision of the Privy Council unless he could find a means of distinguishing it. He pointed out that it had been doubted by the Court of Appeal, was inconsistent with a decision of the Court of Appeal in Ireland and had been criticised in the USA and by Pollock. Just as Kennedy and Phillimore JJ said in *Dulieu v White* that they were not bound by the decision of the Privy Council, Wright J would have known that he was not bound to follow it as a matter of precedent (and respect for it would have been reduced by the comments of the eminent judges, Lord Esher and Palles, CB, who had either doubted it or judged it to be wrong). There is no reason to suppose that Wright J was being artful when he described the Privy Council's decision as not in point because it did not involve wilful wrongdoing. His reasoning may seem unclear to modern readers, but it would not have been unclear to those familiar at the time with his use of the terms "malicious", "calculated" and "imputed".

63. It is also incorrect to suggest that after *Dulieu v White* the law would have comfortably accommodated the facts of *Wilkinson v Downton* within the law of nervous shock caused by negligence. Kennedy J's judgment in *Dulieu v White* would have limited a cause of action in negligence for damages for nervous shock to cases in which the nervous shock resulted from fear for the plaintiff's own personal safety, which would not have included Mrs Wilkinson's case, since her fear was for her husband. This limitation was disapproved by a majority of the Court of Appeal in *Hambrook v Stokes Brothers* [1925] 1 KB 141 (Sargant LJ dissenting) and was finally put to rest in *McLoughlin v O'Brian* [1983] 1 AC 410. In any event negligence and intent are very different fault elements and there are principled reasons for differentiating between the bases (and possible extent) of liability for causing personal injury in either case.

64. Lord Hoffmann rejected the argument on behalf of Mr Wainwright that there should be liability under *Wilkinson v Downton* for distress, not amounting to recognised psychiatric injury, on the basis of imputed intent. He said at para 45:

> "If … 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."

65. Lord Hoffmann said that he read Lord Woolf's judgment as suggesting a willingness to accept such a principle, but that the facts did not support it. As we read Lord Woolf's judgment, the proposition from *Salmond & Heuston* which he was willing to accept was slightly different. It was that damages should be recoverable only in cases where the claimant suffered recognised bodily or psychiatric injury (and not mere emotional distress), but that in order to be entitled to damages for such injury it should be sufficient to show that the injury resulted from severe emotional distress which was intentionally or recklessly caused by the defendant's outrageous conduct.

66. Lord Hoffmann was open to the idea that compensation should be available in cases where there was a genuine intention to cause distress, but he added a strong note of caution. He observed that in institutions and workplaces all over the country, people constantly say and do things with the intention of causing distress and humiliation to others. "This", he said at para 46, "shows lack of consideration and appalling manners but I am not sure that the right way to deal with it is always by litigation". He referred also to the Protection from Harassment Act 1997, which provides a remedy in damages for a course of conduct amounting to harassment. He observed that the requirement of a course of conduct showed that Parliament was conscious that it might not be in the public interest to allow the law to be set in motion for one "boorish" incident, and that it might be that any development of the common law should show similar caution (para 46).

67. Lord Hoffmann concluded that *Wilkinson v Downton* as an authority did not provide a remedy for distress falling short of recognised psychiatric injury, and that in so far as there might be a remedy for distress (without psychiatric injury) intentionally caused, the necessary intention was not established (para 47).

Other common law jurisdictions

68. Most common law jurisdictions have adopted *Wilkinson v Downton*. In Australia it was cited with approval by the High Court in *Bunyan v Jordan* (1937) 57 CLR 1. Despite some later cases in which the courts have tended to treat it as subsumed within the law of negligence, Spigelman CJ in the New South Wales Court of Appeal treated it as an intentional tort in *Nationwide News Pty Ltd v Naidu* [2007] NSWCA 377, paras 71-72. It has also been followed in New Zealand (*Stevenson v Basham* [1922] NZLR 225; *Bradley v Wingnut Films Ltd* [1993] 1 NZLR 415), Ireland (*Sullivan v Boylan* [2013] IEHC 104) and Hong Kong (*Wong Kwai Fun v Li Fung* [1994] 1 HKC 549). In the USA and Canada there has been significant further development.

69. The American Law Institute's *Restatement of the Law: Torts* (2nd ed) (1965), section 46(1) stated:

> "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm."

45 states accepted this definition and others adopted a modified version of it. (See R Fraker, "*Reformulating Outrage: a critical analysis of the problematic tort of IEED*" (2008) 61 Vand L Rev 983.) In the *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* (2012) the wording of section 46 is marginally different but the meaning is unchanged:

> "An actor who by extreme and outrageous conduct intentionally or recklessly causes severe emotional harm to another is subject to liability for that emotional harm and, if the emotional harm causes bodily harm, also for the bodily harm."

The commentary to the current version states:

> "The outrage tort originated as a catchall to permit recovery in the narrow instance when an actor's conduct exceeded all permissible bounds of a civilized society but an existing tort claim was unavailable. This tort potentially encompasses a broad swath of behaviour and can easily, but often inappropriately, be added as a supplement to a suit in which the gravamen is another tort or a statutory violation. The intent requirement is satisfied when an actor

> knows that conduct is substantially certain to cause harm. Because emotional harm is often a predictable outcome of otherwise legitimate conduct, such as terminating an employee, liability for this tort could be expansive. Courts have played an especially critical role in cabining this tort by requiring 'extreme and outrageous' conduct and "severe" emotional harm. A great deal of conduct may cause emotional harm, but the requisite conduct for this claim – extreme and outrageous – describes a very small slice of human behaviour. The requirement that the resulting harm be severe further limits claims. These limits are essential in preventing this tort from being so broad as to intrude on important countervailing policies, while permitting its judicious use for the occasions when it is appropriate."

70. In Canada it is settled law that "The tort of intentional infliction of mental distress or shock has three elements: (1) an act or statement … that is extreme, flagrant or outrageous; (2) the act or statement is calculated to produce harm; and (3) the act or statement causes harm" (*High Parklane Consulting Inc v Lewis* (2007) Can LII 410, para 31, per Perell J). This three-limbed test is derived from a line of earlier authorities including particularly the decision of McLachlin J, sitting as she then was in the British Columbia Supreme Court, in *Rahemtulla v Vanfed Credit Union* [1984] 3 WWR 296. In that case the plaintiff was harassed at work, falsely accused of theft in threatening circumstances and summarily dismissed without proper cause in a humiliating fashion. The defendant submitted that to be liable for wilful infliction of nervous shock its conduct must be outrageous. McLachlin J said, at para 52:

> "This submission appears to be founded on the distinction drawn in American cases between mere insult, which is not actionable, and 'extreme and outrageous conduct' which is: *Linden: Canadian Tort Law* (3rd ed) (1982), p 48. While this distinction appears not to have been expressly adopted in the Canadian and Commonwealth cases, the conduct considered in the leading authorities such as *Wilkinson v Downton*, and *Janvier v Sweeney*, was in fact flagrant and extreme. Moreover, it is difficult to accept that the courts should protect persons from every practical joke or unkind comment."

71. McLachlin J said that "assuming" that only flagrant and extreme conduct inflicting mental suffering was actionable, the defendant's conduct could be so described. She identified the two further ingredients of the tort as being: that the conduct was "plainly calculated to produce some effect of the kind which was produced" (quoting from Wright J's judgment in *Wilkinson v Downton*), and that the conduct produced provable illness. She found that the conduct was "plainly calculated" to cause profound distress because it was clearly foreseeable. Since that decision the courts have followed the approach of imputing the necessary intention

where severe emotional distress was foreseeable (see Professor Denise Réaume's chapter, *The Role of Intention in the Tort in Wilkinson v Downton*, in *Emerging Issues in Tort Law*).

Analysis

72. The order made by the Court of Appeal was novel in two respects. The material which the appellant was banned from publishing was not deceptive or intimidatory but autobiographical; and the ban was principally directed, not to the substance of the autobiographical material, but to the vivid form of language used to communicate it. The appeal therefore raises important questions about freedom of speech and about the nature and limits of liability under *Wilkinson v Downton*.

73. In *Wilkinson v Downton* Wright J recognised that wilful infringement of the right to personal safety was a tort. It has three elements: a conduct element, a mental element and a consequence element. The issues in this case relate to the first and second elements. It is common ground that the consequence required for liability is physical harm or recognised psychiatric illness. In *Wainwright v Home Office* Lord Hoffmann discussed and left open (with expressions of caution) the question whether intentional causation of severe distress might be actionable, but no one in this case has suggested that it is.

74. The conduct element requires words or conduct directed towards the claimant for which there is no justification or reasonable excuse, and the burden of proof is on the claimant. We are concerned in this case with the curtailment of freedom of speech, which gives rise to its own particular considerations. We agree with the approach of the Court of Appeal in regarding the tort as confined to those towards whom the relevant words or conduct were directed, but they may be a group. A person who shouts "fire" in a cinema, when there is no fire, is addressing himself to the audience. In the present case the Court of Appeal treated the publication of the book as conduct directed towards the claimant and considered that the question of justification had therefore to be judged vis-à-vis him. In this respect we consider that they erred.

75. The book is for a wide audience and the question of justification has to be considered accordingly, not in relation to the claimant in isolation. In point of fact, the father's case is that although the book is dedicated to the claimant, he would not expect him to see it until he is much older. Arden LJ said that the father could not be heard to say that he did not intend the book to reach the child, since it was dedicated to him and some parts of it are addressed to him. We have only found one passage addressed to him, which is in the acknowledgments, but more fundamentally we do not understand why the appellant may not be heard to say that

the book is not intended for his eyes at this stage of his life. Arden LJ also held that there could be no justification for the publication if it was likely to cause psychiatric harm to him. That approach excluded consideration of the wider question of justification based on the legitimate interest of the defendant in telling his story to the world at large in the way in which he wishes to tell it, and the corresponding interest of the public in hearing his story.

76. When those factors are taken into account, as they must be, the only proper conclusion is that there is every justification for the publication. A person who has suffered in the way that the appellant has suffered, and has struggled to cope with the consequences of his suffering in the way that he has struggled, has the right to tell the world about it. And there is a corresponding public interest in others being able to listen to his life story in all its searing detail. Of course vulnerable children need to be protected as far as reasonably practicable from exposure to material which would harm them, but the right way of doing so is not to expand *Wilkinson v Downton* to ban the publication of a work of general interest. But in pointing out the general interest attaching to this publication, we do not mean to suggest that there needs to be some identifiable general interest in the subject matter of a publication for it to be justified within the meaning of *Wilkinson v Downton*.

77. Freedom to report the truth is a basic right to which the law gives a very high level of protection. (See, for example, *Napier v Pressdram Ltd* [2009] EWCA Civ 443, [2010] 1 WLR 934, para 42.) It is difficult to envisage any circumstances in which speech which is not deceptive, threatening or possibly abusive, could give rise to liability in tort for wilful infringement of another's right to personal safety. The right to report the truth is justification in itself. That is not to say that the right of disclosure is absolute, for a person may owe a duty to treat information as private or confidential. But there is no general law prohibiting the publication of facts which will cause distress to another, even if that is the person's intention. The question whether (and, if so, in what circumstances) liability under *Wilkinson v Downton* might arise from words which are not deceptive or threatening, but are abusive, has not so far arisen and does not arise for consideration in this case.

78. The Court of Appeal recognised that the appellant had a right to tell his story, but they held for the purposes of an interlocutory injunction that it was arguably unjustifiable for him to do so in graphic language. The injunction permits publication of the book only in a bowdlerised version. This presents problems both as a matter of principle and in the form of the injunction. As to the former, the book's revelation of what it meant to the appellant to undergo his experience of abuse as a child, and how it has continued to affect him throughout his life, is communicated through the brutal language which he uses. His writing contains dark descriptions of emotional hell, self-hatred and rage, as can be seen in the extracts which we have set out. The reader gains an insight into his pain but also his resilience and achievements. To lighten the darkness would reduce its effect. The court has taken

editorial control over the manner in which the appellant's story is expressed. A right to convey information to the public carries with it a right to choose the language in which it is expressed in order to convey the information most effectively. (See *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457, para 59, and *In re Guardian News and Media Ltd* [2010] UKSC 1, [2010] 2 AC 697, para 63)

79. The problem with the form of the injunction is that Schedule 2 defines the information which it is forbidden to publish not only by reference to its substantive content, but also by the descriptive quality of being "graphic". What is sufficiently "graphic" to fall within the ban is a matter of impression. The amplification of "graphic" in the court's supplementary judgment as meaning "seriously liable to being understood by a child as vividly descriptive so as to be disturbing" similarly lacks the clarity and certainty which an injunction properly requires. Any injunction must be framed in terms sufficiently specific to leave no uncertainty about what the affected person is or is not allowed to do. The principle has been stated in many cases and nowhere more clearly than by Lord Nicholls in *Attorney General v Punch Ltd* [2002] UKHL 50, [2003] 1 AC 1046 at para 35:

> "An interlocutory injunction, like any other injunction, must be expressed in terms which are clear and certain. The injunction must define precisely what acts are prohibited. The court must ensure that the language of its order makes plain what is permitted and what is prohibited. This is a well established, soundly-based principle. A person should not be put at risk of being in contempt of court by an ambiguous prohibition, or a prohibition the scope of which is obviously open to dispute."

80. Our conclusion that the publication of the appellant's book is not within the scope of the conduct element of the tort is enough to decide this case. However, the issue of the mental element required for the tort has been argued before us and it is right that we should address it. The Court of Appeal found that the necessary intention could be imputed to the appellant. The court cannot be criticised for doing so, since it was bound by previous decisions of the court which upheld that approach (in particular, *Janvier v Sweeney* and *Wong v Parkside Health NHS Trust*).

81. There is a critical difference, not always recognised in the authorities, between imputing the existence of an intention as a matter of law and inferring the existence of an intention as a matter of fact. Imputation of an intention by operation of a rule of law is a vestige of a previous age and has no proper role in the modern law of tort. It is unsound in principle. It was abolished in the criminal law nearly 50 years ago and its continued survival in the tort of wilful infringement of the right to personal safety is unjustifiable. It required the intervention of Parliament to expunge it from the criminal law, but that was only because of the retrograde decision in *DPP*

v Smith. The doctrine was created by the courts and it is high time now for this court to declare its demise.

82. The abolition of imputed intent clears the way to proper consideration of two important questions about the mental element of this particular tort.

83. First, where a recognised psychiatric illness is the product of severe mental or emotional distress, a) is it necessary that the defendant should have intended to cause illness or b) is it sufficient that he intended to cause severe distress which in fact results in recognisable illness? Option b) is close to the version stated by *Salmond & Heuston* which attracted Lord Woolf in *Wainwright v Home Office*.

84. Secondly, is recklessness sufficient and, if so, how is recklessness to be defined for this purpose? Recklessness is a word capable of different shades of meaning. In everyday usage it may include thoughtlessness about the likely consequences in circumstances where there is an obvious high risk, or in other words gross negligence. In *R v G* [2003] UKHL 50, [2004] 1 AC 1034, the House of Lords construed "recklessly" in the Criminal Damage Act 1971 as meaning that "A person acts recklessly … with respect to … a result when he is aware of a risk that it will occur; and it is, in the circumstances known to him, unreasonable to take the risk". The House of Lords based its interpretation on the definition proposed by the Law Commission in clause 18(c) of the Criminal Code Bill annexed to its Report on Criminal Law: A Criminal Code for England and Wales and Draft Criminal Code Bill, Vol 1 (Law Com No 177, 1989). A similar definition of recklessness was included in a draft Bill for reforming the law of offences against the person, which the Government published in 1998 but did not take forward. The Law Commission has repeated its proposal in a scoping consultation paper on Reform of Offences against the Person (LCCP 217, 2015). The exact wording of its proposed definition is:

> "A person acts recklessly with respect to a result if he is aware of a risk that it will occur and it is unreasonable to take that risk having regard to the circumstances as he knows or believes them to be."

85. In thinking about these questions it is pertinent to consider the practical implications. Suppose that a hostage taker demands money from the family of the hostage (H) for his safe release, or that a blackmailer threatens harm to a person unless the family of the victim (V) meets his demands. The wife or parent of H or V suffers severe distress causing them to develop a recognised psychiatric illness. We doubt that anyone would dispute that in those circumstances the hostage taker or blackmailer ought to be held liable for the consequences of his evil conduct. There would be no difficulty in inferring as a matter of fact that he intended to cause severe

distress to the claimant; it was the means of trying to achieve his demand. But the wrongdoer may not have had the intention to cause psychiatric illness, and he may well have given no thought to its likelihood.

86. Compare that scenario with an example at the other end of the spectrum. The defendant has a dispute with his neighbour. Tempers become flared and he makes a deliberately insulting remark. He intends it to be upsetting, but he does not anticipate or intend that the neighbour will suffer severe emotional distress. Unfortunately the episode and in particular the insult have that effect, and the distress leads to a recognised form of psychiatric illness. It would be disproportionate to hold the defendant liable when he never intended to cause the neighbour to be seriously upset.

87. Our answer to the first question is that of option (b) (para 83 above). Our answer to the second question is not to include recklessness in the definition of the mental element. To hold that the necessary mental element is intention to cause physical harm or severe mental or emotional distress strikes a just balance. It would lead to liability in the examples in para 85 but not in the example in para 86. It means that a person who actually intends to cause another to suffer severe mental or emotional distress (which should not be understated) bears the risk of legal liability if the deliberately inflicted severe distress causes the other to suffer a recognised psychiatric illness. A loose analogy may be drawn with the "egg shell skull" doctrine, which has an established place in the law of tort. This formulation of the mental element is preferable to including recklessness as an alternative to intention. Recklessness was not a term used in *Wilkinson v Downton* or *Janvier v Sweeney* and it presents problems of definition. The Law Commission's definition would be clear, but it would not cover the example of the hostage taker or the blackmailer, because it would require proof of actual foresight of the risk of the claimant suffering psychiatric illness.

88. It would be possible to limit liability for the tort to cases in which the defendant's conduct was "extreme, flagrant or outrageous", as in Canada. But this argument has not so far been advanced in this country, and, although Arden LJ adverted to it as a possibility, the appellant has not sought to pursue it. We are inclined to the view, which is necessarily obiter, that the tort is sufficiently contained by the combination of a) the conduct element requiring words or conduct directed at the claimant for which there is no justification or excuse, b) the mental element requiring an intention to cause at least severe mental or emotional distress, and c) the consequence element requiring physical harm or recognised psychiatric illness.

89. In the present case there is no basis for supposing that the appellant has an actual intention to cause psychiatric harm or severe mental or emotional distress to the claimant.

90. We conclude that there is no arguable case that the publication of the book would constitute the requisite conduct element of the tort or that the appellant has the requisite mental element. On both grounds the appeal must be allowed and the order of Bean J restored.

LORD NEUBERGER: (with whom Lord Wilson agrees)

91. I agree that this appeal should be allowed for the reasons given by Lady Hale and Lord Toulson. Because the issue involved is of importance and could raise some points of difficulty in other cases, I add some remarks of my own.

92. There are various familiar circumstances in which a defendant can be liable to a claimant as a result of a statement made by the defendant. Examples include a statement which is unlawful statutorily, a breach of contract, defamatory, a breach of duty because of a pre-existing relationship, and a statement which amounts to misuse of information or a breach of the claimant's confidence, copyright, or right to privacy. This appeal concerns the circumstances in which a claimant has a cause of action for distress or psychiatric illness which he suffers as a result of a statement made by the defendant, where the statement would not otherwise give rise to a claim. It is a fundamental issue, and, particularly given the importance attached to both freedom of expression and human dignity, it can raise questions which are difficult to resolve. Having said that, the answer to the question whether there is a valid claim in the present case appears to me to be quite plain.

93. The facts of this case are fully set out by Lady Hale and Lord Toulson in paras 1-30 above. I agree that the interlocutory injunction granted by the Court of Appeal was flawed for two reasons. First, there should have been no injunction at all, because the claimant's claim to restrain publication of the defendant's book had no prospects of success. Secondly, the terms of the injunction were flawed both conceptually and procedurally.

94. The claimant's claim had no prospects of success because publication of the defendant's book would plainly not have given rise to a cause of action in his favour. It is true that the claimant is the defendant's son and is psychologically vulnerable, and it was argued in the Court of Appeal that this relationship gave rise to a duty of care on the part of the defendant which publication of the book would breach. However, as the Court of Appeal rightly held, that argument cannot assist the claimant in this case – see the reasoning of Arden LJ at [2014] EWCA Civ 1277, paras 48-57, upholding the conclusion of Bean J at first instance on this aspect. There is, rightly, no appeal on that ground.

95. Once that ground is disposed of, it appears to me that the book's contents simply have nothing to do with the claimant, at least from a legal perspective. The book describes the defendant's searing experiences of sexual abuse as a boy and its consequential effects. It is true, that the book is dedicated to the claimant and it expresses fears about the claimant being at risk of abuse as a child, but the furthest that that point could go would be to negative the idea that the defendant could have been unaware of the fact that the contents of the book would come to the claimant's attention at some point (which was unsurprisingly not in issue anyway).

96. While I agree that many people would regard the book as being in some respects in the public interest, it is not necessary to decide this appeal on that ground. Unless it is necessary to do so, I am unenthusiastic about deciding whether a book, or any other work, should be published by reference to a judge's assessment of the importance of the publication to the public or even to the writer. In the present case, I do not consider that it would make any difference if the experiences which the defendant describes could be shown to have been invented, or if the book had been written as a novel by someone who had not been sexually abused. It is true that the book contained material which some people might find offensive, in terms of what was described and how it was expressed, but "free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative provided it does not tend to provoke violence" – see *Redmond-Bate v Director of Public Prosecutions* (1999) 7 BHRC 375, para 20, per Sedley LJ. As he memorably added, "[f]reedom only to speak inoffensively is not worth having".

97. Quite apart from this, it would, I think, be an inappropriate restriction on freedom of expression, an unacceptable form of judicial censorship, if a court could restrain publication of a book written by a defendant, whose contents could otherwise be freely promulgated, only refer in general and unobjectionable terms to the claimant, and are neither intended nor expected by the defendant to harm the claimant, simply because the claimant might suffer psychological harm if he got to read it (or extracts from it). Whatever the nature and ingredients of the tort whose origin can be traced to *Wilkinson v Downton* [1897] 2 QB 57, it therefore cannot possibly apply in this case. And that, at least in a narrow sense, is in my view the beginning and the end of this case.

98. As to the terms of the injunction, the Court of Appeal accepted that the defendant should be entitled to describe the ordeals which he had undergone. However, they decided that he could not publish certain specified passages in his book or any other accounts of his ordeals in so far as those accounts were "graphic", a description which was explained by Arden LJ as meaning "seriously liable to being understood by a child as vividly descriptive so as to be disturbing".

99. There are two problems with such a form of injunction. First, it treats the terms in which events are described in the book as detachable from the inclusion of the events themselves. Freedom of expression extends not merely to what is said but also to how it is said. Whether a communication is made orally or in writing, the manner or style in which it is expressed can have a very substantial effect on what is actually conveyed to the listener or reader. One cannot realistically detach style from content in law any more than one can do so in literature or linguistic philosophy. I agree with what is said in para 78 above in this connection.

100. The second problem with the form of injunction granted by the Court of Appeal is that it is insufficiently specific, and in that connection there is nothing which I wish to add to what is said in para 79 above.

101. It would not, however, be right to leave matters there, in the light of the decision in *Wilkinson* (on which the Court of Appeal relied) and the subsequent cases in this and other common law jurisdictions, discussed by Lady Hale and Lord Toulson in paras 51-71 above. In *Wilkinson*, the defendant was held liable to a plaintiff for severe mental distress caused to her by an untrue statement, which was misconceivedly intended as a cruel joke, namely that her husband had suffered serious injuries in an accident. The way in which the trial judge, Wright J, expressed himself in his judgment must, like all statements, be seen in its context, and that context is illuminatingly explained in paras 34-50 above. Given that there was a valid claim in that case and there is none in this case, it raises the question as to the characterisation of the tort in question, which could perhaps be characterised as the tort of making distressing statements.

102. The tort has been identified as "terror wrongfully induced and inducing physical mischief" (see *Dulieu v White & Sons* [1901] 2 KB 669, 683 and *Janvier v Sweeney* [1919] 2 KB 316, 322). However, I am not happy with that characterisation, as it lumps together physical actions and statements, it begs the question by the use of the word "wrongful", and it is limited to "terror", and, as explained below, I would leave open whether "physical mischief" is a necessary ingredient.

103. While I would certainly accept that an action not otherwise tortious which causes a claimant distress could give rise to a cause of action, I would be reluctant to decide definitively that liability for distressing actions and distressing words should be subject to the same rules, at this stage at any rate. There is of course a substantial overlap between words and actions: after all, words can threaten or promise actions, and freedom of expression can in some respects extend to actions as well as words. And, in the light of what I say below, it might be the case that the tort of making distressing statements is to be limited to statements which are the verbal equivalent of physical assaults. However, there are relevant differences between words and actions. The reasons for a difference in legal treatment between

liability for actions and liability for words were identified by Lord Reid, Lord Devlin and Lord Pearce in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, 482-483, 516-519 and 534 respectively.

104. In order to decide when a statement, which is not otherwise tortious, and which causes a claimant distress, should be capable of founding a cause of action, it is necessary to bear in mind five points, some of which are in tension. First, that there must be circumstances in which such a cause of action should exist: the facts of *Wilkinson* and *Janvier* make that point good. Secondly, given the importance of freedom of expression, which includes the need to avoid constraining ordinary (even much offensive) discourse, it is vital that the boundaries of the cause of action are relatively narrow. Thirdly, because of the importance of legal certainty, particularly in the area of what people can say, the tort should be defined as clearly as possible. Fourthly, in the light of the almost literally infinite permutations of possible human interactions, it is realistic to proceed on the basis that it may well be that no set of parameters can be devised which would cater for absolutely every possibility. Fifthly, given all these factors, there will almost inevitably be aspects of the parameters on which it would be wrong to express a concluded view, and to let the law develop in a characteristic common law way, namely on a case by case basis.

105. In other words, the tort exists, and should be defined narrowly and as clearly as possible, but it would be dangerous to say categorically that each ingredient of the tort must always be present. Nonetheless, it seems to me that it is worth identifying what are, at least normally, and hopefully almost always, the essential ingredients of the tort.

106. *Wilkinson* and *Janvier* were cases where the statement made by the defendant was untrue, gratuitous, intended to distress the plaintiff, directed at the plaintiff, and caused the plaintiff serious distress amounting to psychiatric illness. Clearly, where all these ingredients are present, the tort would be established, but the question is whether they are all strictly required.

107. First, if it is possible at all, it will be a very rare case where a statement which is not untrue could give rise to a claim, save, perhaps where the statement was a threat or (possibly) an insult.

108. Sometimes, a threat will be unlawful anyway: for instance a threat of immediate assault or a blackmail. In some cases there is statutory liability for an offensive statement. Thus, a statement may be covered by the Protection from Harassment Act 1997 (as amended) which provides for both civil remedies (section 3) and criminal liability (sections 2, 2A, 4, 4A). Similarly Part IV of the Family Law Act 1996 (as amended) allows a court to make an order to protect an individual from

molestation, and provides that the breach of such an order is a criminal offence. Harassment requires a course of action, so I do not think that a one-off statement could be caught by the 1997 Act. Section 4A of the Public Order Act 1986 (added by the Public Order Act 1994) provides that it is an offence to use "threatening, abusive or insulting words or behaviour" which causes "harassment, alarm or distress" and which is intended to have that effect. However, section 4A only creates a criminal offence, and it does not apply where the words are used "by a person inside a dwelling and the person who is harassed, alarmed or distressed is also inside that or another dwelling". Further, section 1 of the Malicious Communications Act 1988 criminalises communications which are "grossly offensive", "a threat" or "known … to be false" if at least one of the purposes is to "cause distress or anxiety", unless the sender had "reasonable grounds", but it does not appear to give rise to civil liability. And section 127 of the Communications Act 2003 criminalises electronic sending of "grossly offensive" or "menacing" messages, or "false" messages "for the purpose of causing annoyance, inconvenience or needless anxiety to another", but it is limited to electronic communications and appears to give rise to no civil liability.

109. I do not consider that this is a case where it can be said that Parliament has intervened in such terms that the common law should, as it were, keep out. After all, Parliament has not legislated so as to cover, or to suggest disapproval of, claims in tort based on "one-off" distressing statements as in *Wilkinson* and *Janvier*. On the contrary, the last 20 years have seen legislation which actually suggests that the legislature considers it appropriate for the courts to be involved, albeit in relatively limited and extreme cases, where words are used offensively.

110. This does not, of course, mean that every untruthful statement, threat or insult could give rise to a claim. Because of the importance of freedom of expression and of the law not impeding ordinary discourse, there must be a second and demanding requirement which has to be satisfied before liability can attach to an untruth, an insult or a threat which was intended to, and did, cause distress, but would not otherwise be civilly actionable. Lady Hale and Lord Toulson have suggested a test of "justification or reasonable excuse" in paras 74-76 above, and I have used the adjective "gratuitous" in para 106 above. Neither description is ideal as it can be said to be question-begging (virtually every threat, untruth or insult can be said to be unjustified, inexcusable and gratuitous), and it involves a subjective assessment. There may be something to be said for the adjectives "outrageous", "flagrant" or "extreme", which seem to have been applied by the US and Canadian courts (discussed in paras 69-71 above). Of course, even with a test of outrageousness a subjective judgment will be involved to some extent, but that cannot be avoided.

111. As mentioned, it seems to me to be vital that the tort does not interfere with the give and take of ordinary human discourse (including unpleasant, heated arguments, whether in domestic, social, business or other contexts, sometimes

involving the trading of insults or threats), or with normal, including trenchant, journalism and other writing. Inevitably, whether a particular statement is gratuitous must depend on the context. An unprompted statement made simply because the defendant wanted to say it or because he was inspired by malice, as in *Janvier*, or something very close to malice, as in *Wilkinson*, may be different from the same statement made in the course of a heated argument, especially if provoked by a series of wounding statements by the defendant. Similarly, it would be wrong for this tort to be invoked to justify relief against a polemic op-ed newspaper article or a strongly worded and antipathetic biography, save in the most unusual circumstances. The tort should not somehow be used to extend or supplement the law of defamation.

112. Thirdly, I consider that there must be an intention on the part of the defendant to cause the claimant distress. This requirement might seem at first sight to be too narrow, not least because it might appear that it would not have caught the defendant in *Wilkinson*: he merely intended his cruel statement as a joke. However, the fact that a statement is intended to be a joke is not inconsistent with the notion that it was intended to upset. How, it might be asked rhetorically, could Mr Downton not have intended to cause the apparently happily married Mrs Wilkinson significant distress by falsely telling her that her husband had been very seriously injured? That was the very purpose of the so-called joke. There are statements (and indeed actions) whose consequences or potential consequences are so obvious that the perpetrator cannot realistically say that those consequences were unintended.

113. Intentionality may seem to be a fairly strict requirement, as it excludes not merely negligently harmful statements, but also recklessly harmful statements. However, in agreement with Lady Hale and Lord Toulson, I consider that recklessness is not enough. In truth, I doubt it would add much. Further, in practice, recklessness is a somewhat tricky concept. Quite apart from this, bearing in mind the importance of freedom of expression and of the law not sticking its nose into human discourse except where necessary, it appears to me that the line should be drawn at intentionality.

114. I am inclined to think that distressing the claimant has to be the primary purpose, but I do not consider that it need be the sole purpose. The degree of distress which is actually intended must be significant, and not trivial, and it can amount to feelings such as despair, misery, terror, fear or even serious worry. But it plainly does not have to amount to a recognised psychiatric disease (even if such disease is an essential ingredient, as to which see below). It is, I think, hard to be more specific than that.

115. Fourthly, the statement must, I think, be directed at the claimant in order to be tortious. In most cases this will add nothing to the requirements already mentioned. However, I would have thought that a statement which is aimed at

upsetting a large group of addressees, without any particular individual (or relatively small group of individuals) in mind, should not be caught.

116. Then there is the question as to whether a claimant can only bring an action if he suffers distress to a sufficient degree to amount to a recognised illness or condition (whether psychological or physiological - assuming that the distinction is a valid one). Like Lord Hoffmann in *Wainwright v Home Office* [2003] UKHL 53, [2004] 2 AC 406, I consider that there is much to be said for the view that the class of potential claimants should not be limited to those who can establish that they suffered from a recognised psychiatric illness as a result of the actionable statement of the defendant.

117. Such a limitation seems to have been imposed by Kennedy J at pp 672-673 in *Dulieu*, when he referred to "terror" which "operates through parts of the physical organism to produce bodily illness". However, that was a case involving a negligent act, and, as already explained, I am unconvinced that it involved the same tort as *Wilkinson*, although it was relied on by Kennedy J. It would seem that the reasoning in *Dulieu* was consistent with the principle that damages for distress in negligence are only recoverable for a "recognisable psychiatric illness" and not merely for "grief and sorrow", as Lord Denning MR put it in *Hinz v Berry* [1970] 2 QB 40, 42-43, an approach which was followed by Lord Bridge of Harwich in *McLoughlin v O'Brian* [1983] 1 AC 410, 437.

118. This limitation appears to have been imposed in cases of negligence as a matter of policy, and it has been justified in a number of cases on the ground that grief and distress are part of normal life, whereas psychiatric illness is not – see eg *McLoughlin* at p 431 per Lord Bridge and *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455, 465 per Lord Griffiths. The Australian High Court has justified the rule by reference to the undesirability of encouraging litigation – see *Tame v New South Wales* (2002) 211 CLR 317, para 194 per Gummow and Kirby JJ. However, in some negligence cases, it appears that damages for distress falling short of psychiatric illness may be recoverable – see the observations of Brooke LJ in *Robinson v St Helens Metropolitan Borough Council* [2002] EWCA Civ 1099, paras 36-37. And, as is pointed out in *McGregor on Damages* (19th ed) (2014), paras 5-012 and 5-013, injury to feelings is taken into account when assessing general damages in claims, by way of example, for assault, invasion of privacy, malicious prosecution and defamation.

119. As I see it, therefore, there is plainly a powerful case for saying that, in relation to the instant tort, liability for distressing statements, where intent to cause distress is an essential ingredient, it should be enough for the claimant to establish that he suffered significant distress as a result of the defendant's statement. It is not entirely easy to see why, if an intention to cause the claimant significant distress is

an ingredient of the tort and is enough to establish the tort in principle, the claimant should have to establish that he suffered something more serious than significant distress before he can recover any compensation. Further, the narrow restrictions on the tort should ensure that it is rarely invoked anyway.

120. In the light of article 10 of the European Convention on Human Rights, it is appropriate to consider the jurisprudence of the Strasbourg court. This is a case which involves a purely common law issue, but the common law should be generally consistent with the Convention and it would be arrogant to assume that there may be no assistance to be gained from the Strasbourg jurisprudence – see Lord Reed's illuminating analysis in R (*Osborn) v Parole Board* [2013] UKSC 61, [2014] AC 1115, paras 56-63. In that connection, there have been a number of cases where the Strasbourg court has been called on to rule on the compatibility of a ruling of a national court or tribunal that an offensive statement was unlawful. A number of those decisions were summarised in *R (Gaunt) v Office of Communications* [2011] EWCA Civ 692, [2011] 1 WLR 2355, paras 25-30. They all involved statements made in public, but some of them involved statements which had been held unlawful because they were personally insulting. I do not think that these cases take matters much further for present purposes, other than to confirm the vital nature of freedom of expression, the consequent requirement to "establish" that there is a cause of action "convincingly", the importance of taking into account the context, and the need for proportionality both in deciding whether there is a cause of action and in determining the sanction.

121. The final point I should make is that this case has been argued in this court on the basis that the issue between the parties has to be resolved according to English law, rather than the law of the US, where the claimant resides. It may well be that that is right (as the Court of Appeal held), or that, even if United States law is in fact applicable, it is the same as our law.

122. In all these circumstances, it seems to me clear, even at this interlocutory stage, that the claimant's case plainly fails all but one of the requirements of the tort on which it is said to be based. While there is some (disputed) evidence that they could cause the claimant serious distress, the contents of the defendant's book are not untrue, threatening or insulting, they are not gratuitous or unjustified, let alone outrageous, they are not directed at the claimant, and they are not intended to distress the claimant. Accordingly, I have no hesitation in agreeing that the appeal should be allowed, and the order of Bean J striking out the claim restored.