O (a child) v Rhodes
[2016] AC 219, [2015] UKSC 32

Summary

James Rhodes, the well-known concert pianist, wrote his autobiography, which detailed – among other things – the trauma he had suffered as a result of being sexually abused at school. Rhodes' ex-wife – who was living in the United States with their child, aged 11 and suffering psychological problems of his own – learned of Rhodes' plans to publish his autobiography and objected to his doing so on the grounds that publishing the book (which Rhodes wanted to dedicate to their son) might cause psychological harm to their son. She sought to obtain an injunction, claiming that Rhodes would commit a tort (either the tort of negligence, or the tort in *Wilkinson* v *Downton*) by publishing the book without substantially editing the sections dealing with his history of sexual abuse. The application for an injunction was struck out at first instance, but was reinstated in the Court of Appeal, which rejected the claim in negligence but held that it was arguable that the claim under the tort in *Wilkinson* v *Downton* could succeed. The UKSC overturned the Court of Appeal's decision, holding that Rhodes would not commit the tort in *Wilkinson* v *Downton* if he published his book in its unexpurgated form.

Baroness Hale and Lord Toulson gave the leading judgment (with which Lord Clarke and Lord Wilson agreed). Hale/Toulson held:

(1) The tort in *Wilkinson* v *Downton* has 'a conduct element, a mental element, and a consequence element' ([73]). 'The conduct element requires words or conduct directed towards the claimant, for which there is no justification or reasonable excuse' ([74]). The 'necessary mental element is intention to cause physical harm or severe mental or emotional distress' ([87]). The consequence element requires that the claimant have suffered 'physical harm or [a] recognised psychiatric illness' ([73]).

(2) The conduct element was not made out in this case as there was 'every justification for the publication' ([75]). The Court of Appeal had 'erred' ([74]) in thinking that 'there could be no justification for the publication if it was likely to cause psychiatric illness to' ([75]) Rhodes' son. Rather, Rhodes had the right to tell the world about the harm he had suffered, and 'there is a corresponding public interest in others being able to listen to his life story in all its searing detail' ([76]). More generally, it was 'difficult to envisage any circumstances in which speech which is not deceptive, threatening or possibly abusive, could give rise to liability in tort' ([77]). Moreover, Rhodes had to be allowed the liberty to choose how he would tell his story, and the Court of Appeal was wrong to attempt to take 'editorial control over the manner in which [Rhodes'] story is expressed' ([78]).

(3) While the finding on the conduct element was enough to dispose of the case, there was also no basis for finding that the mental element in *Wilkinson* v *Downton* was made out here: in publishing his story, Rhodes had no intention to cause his son to suffer psychiatric illness or emotional distress ([89]).

(4) Lord Hoffmann's rationalisation (in *Wainwright* v *Home Office* [2004] 2 AC 406) of the decision in *Wilkinson* v *Downton* as being intended to get round a limit that then existed on liability in negligence – that a claimant could not sue in negligence for physical injuries caused by a defendant's causing the claimant to be upset – and as therefore having been made redundant by the removal of that limit in *Dulieu* v *White & Sons* [1901] 2 KB 669, was an 'interesting reconstruction [which] 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' ([62]). It was therefore wrong to think that the law could ever have 'comfortably accommodated the facts of *Wilkinson* v *Downton* within the law of

nervous shock caused by negligence' [63] or that it would be desirable to do so: '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' ([63]).

Lord Neuberger delivered his own judgment (with which Lord Wilson also agreed):

(5) He expressed himself 'unenthusiastic' about allowing the outcome of the case in *Rhodes* to turn (as Hale/Toulson seemed to allow it to turn in point (2), above) on an 'assessment of the importance of the publication to the public or even to the writer' ([96]). He thought that it would make no difference in this case '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' ([96]). Rather, the courts had no power to restrain publication of a book – the contents of which were otherwise unobjectionable, only referred in very general terms to the claimant, and were neither intended nor expected to harm the claimant – just because the claimant might suffer psychological harm if he might read the book ([97]).

(6) While Hale/Toulson did not address the issue of whether the tort in *Wilkinson* v *Downton* could extend to a case where a defendant caused a claimant to suffer pure distress (that is, distress not consequent on physical injury and not amounting to a recognised psychiatric illness) on the ground that 'no one in this case has suggested that it [does]' ([73]), Lord Neuberger expressed himself cautiously open-minded on the issue ([103]-[104]), saying that 'there is much to be said' [116] and that 'there is plainly a powerful case' [119] that mere distress should be actionable under the tort in *Wilkinson* v *Downton*, provided that the other elements of liability (including, especially, that the defendant intended [112] to cause the claimant to suffer a significant [114] degree of distress) are made out.

(7) So far as the conduct element of the tort in *Wilkinson* v *Downton* is concerned, Lord Neuberger thought that: (i) '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' ([107]); (ii) 'an untruthful statement, threat or insult' ([110]) could not give rise to liability under *Wilkinson* v *Downton* unless it was 'gratuitous' ([106], [110]) – though Lord Neuberger expressed himself unhappy with that way of putting it (as 'virtually every threat, untruth or insult can be said to be unjustified, inexcusable and gratuitous' ([110]) and thought that there 'may be something to be said for the adjectives "outrageous", "flagrant" or "extreme"' ([110]) to describe the sort of iniquitous conduct to which liability under *Wilkinson* v *Downton* attaches. In describing why the claim for an injunction in *Rhodes* had to fail, as well as observing that 'the contents of the defendant's book are not untrue, threatening or insulting, [and] they are not gratuitous or unjustified', Lord Neuberger also stressed that the contents of the book 'are not directed at the claimant' ([122]), thus supporting this as a third conduct element for the tort in *Wilkinson* v *Downton* to be committed.

Comments

This decision of the UKSC (plainly correct in its outcome) rescues the tort in *Wilkinson* v *Downton* from the grave in which Lord Hoffmann sought to bury it in *Wainwright* v *Home Office*, when he argued that the tort had been overtaken by developments in the law of negligence so that every case where one might conceivably want to bring a claim under the tort in *Wilkinson* v *Downton* could be litigated as a case in negligence instead. Academics will be pleased: simplification of the law is not in their interests (it gives them less to talk about) and, in any case, nobody wants to throw out hard-won knowledge on the basis that it is

now practically irrelevant. But what should the rest of us think? There are three reasons why one might want to see the tort in *Wilkinson* v *Downton* as being distinct from the tort of negligence.

(1) The torts grouped under the name 'trespass to the person' owe their continued vitality to the fact that they are *not* subject to a very important limit on liability in negligence, namely, that you cannot be sued in negligence for acting reasonably, all things considered. This is not true of battery or assault or false imprisonment (nor is it true of trespass to land). You cannot escape being held liable for hitting someone else, or threatening to hit them, or locking someone up by arguing 'But I was acting reasonably in the circumstances'. The reasonableness of your conduct is not relevant, unless you are trying to make out a more specific justification for your conduct (such as that the law gave you the power to arrest the claimant), in which case the reasonableness of your conduct may be relevant to whether or not you can make out that specific justification. So one reason for wanting to see the tort in *Wilkinson* v *Downton* as being distinct from the tort of negligence might be to allow claimants to sue defendants even if the defendants were acting reasonably in all the circumstances. This is probably why counsel for the claimant in *Rhodes* pleaded *Wilkinson* v *Downton* in the first place: in case the claim in negligence was thrown out (as it was) on the basis that Rhodes was acting reasonably in seeking to tell his story, the claimant would have *Wilkinson* v *Downton* as a back-stop – a way of arguing that 'Even if, all things considered, publishing this book is a reasonable thing to do, the effect of publication on the claimant will be such that the book should still not be published.' However, the strict limits that the UKSC placed on when someone can be said to have committed the tort in *Wilkinson* v *Downton* destroy this rationale for distinguishing between the tort in *Wilkinson* v *Downton* and the tort in negligence: no one who ends up being held liable under *Wilkinson* v *Downton* could be said to have been acting reasonably, all things considered.

(2) Were liability under the tort in *Wilkinson* v *Downton* to extend to cases where a defendant causes a claimant to suffer pure distress, there would be a good case for treating *Wilkinson* v *Downton* as distinct from the tort of negligence as it is extraordinarily difficult to sue a defendant in negligence for causing you to suffer pure distress. (As the law stands at the moment, the only circumstances in which you can do so is when you have a concurrent claim in contract against the defendant for causing you to suffer pure distress because the defendant contractually undertook to take care in dealing with some matter and part of the object of his making that undertaking was to save you from distress.) However, only Lord Neuberger (with the agreement of Lord Wilson) was willing to contemplate that liability under *Wilkinson* v *Downton* might extend to pure distress cases. And the concerns that he expressed about the importance of: (i) not allowing the tort to undermine freedom of expression ([104] and [111]), and (ii) defining the tort clearly ([104]) and (iii) not allowing the tort to 'be used to extend or supplement the law of defamation' ([111]) all serve to weaken the otherwise 'powerful case' ([119]) that Lord Neuberger thought could be made for allowing the tort to extend to pure distress cases.

(3) The law sometimes attaches special consequences to cases where a defendant has intentionally caused the claimant harm, as opposed to cases where a defendant has carelessly caused the claimant harm. For example, awards of aggravated damages or exemplary damages tend only to be made in the first kind of case and not the second. Given this, it might be thought important to mark out cases where a defendant has intentionally caused the claimant to suffer physical harm or psychiatric illness from cases where a defendant has done so carelessly. However, there is no reason why this cannot be done *within* the law of negligence, so that a defendant who breaches a duty of care by intentionally doing something that foreseeably would cause the claimant to suffer physical injury or psychiatric illness is treated differently in terms of the remedies that are available against him from someone who

non-intentionally breaches the same duty of care. There is no reason why we need to say that the first kind of defendant has committed a different kind of tort from the second kind of defendant. (One reason might be that, thanks to a really bad decision of Woolf J in Kralj v McGrath [1986] 1 All ER 54, aggravated damages cannot be awarded in negligence cases – but that decision should be overturned by the Court of Appeal at the first opportunity.)

Given this, it is puzzling why Baroness Hale and Lord Toulson should have wanted to revive the tort in *Wilkinson* v *Downton* – and it's even more puzzling why they should have felt themselves entitled to refer to Lord Hoffmann's judgment in *Wainwright*, which sought to consign *Wilkinson* v *Downton* to history, in such patronisingly insulting terms. But we are where we are: *Wilkinson* v *Downton* rides again and will be treated accordingly in the next edition of McBride & Bagshaw.

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