

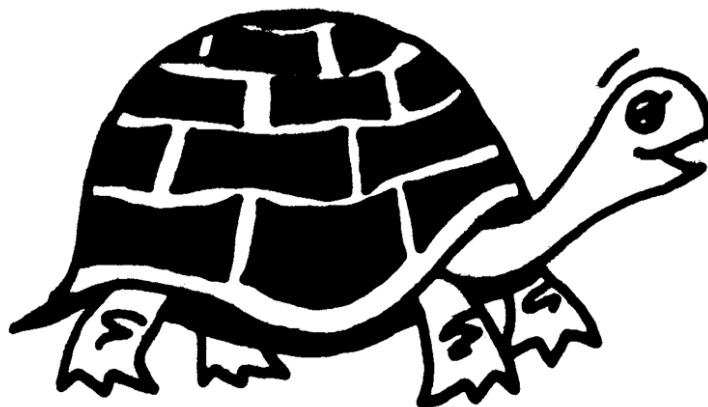
THE RISE AND FALL, AND
RISE, (AND FALL?) OF
WILKINSON V DOWNTON

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Learned Friends Conference
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The Rise of Wilkinson v Downton

[1897] 2 QB 57 (High Court UK)

Facts: Def told PI (Mrs W) that H seriously injured – practical joke – travel expenses - ‘serious & permanent physical consequences ... threatening her reason’

PI's case:

1. deceit
2. Def had ‘falsely, fraudulently and maliciously spoken the words ... with intent to aggrieve, injure, and annoy ... [PI] had thereby been caused to suffer mental anguish and resulting illness’

Held

- H's claim for deceit allowed re travel expenses
- W's illness not compensable in deceit, but...

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‘ The 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... there being no justification... for the act...

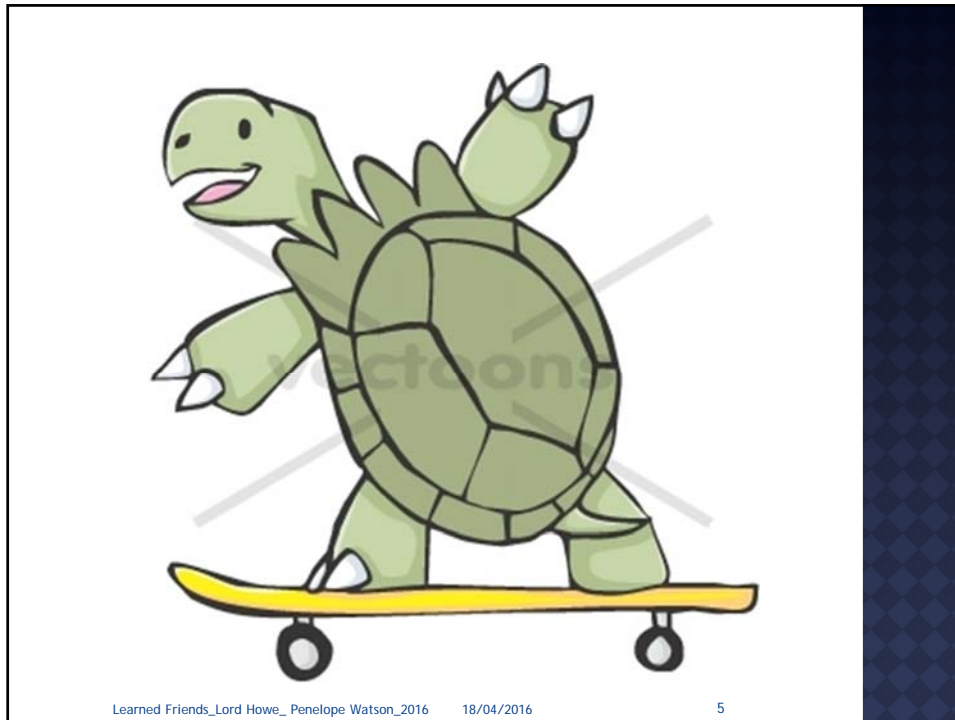
...This wilful injuria is in law malicious, although no malicious purpose to cause the harm which was caused nor any motive of spite is imputed to the defendant.’

W v Downton (1897), Wright J

- Finding for PI

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Early cases W v D

- ◉ *A v B's Trustees* - 1906 Scotland (lodger suicide)
- ◉ ***Janvier v Sweeney* - 1919 UK (German spy)

- ◉ *Stevenson v Basham* - 1922 NZ (landlord threat - miscarriage)
- ◉ *Bielitski v Obadiak* - 1922 Canada (false reports of hanging)

- ◉ *Bunyan v Jordan* - 1937 HCA Aust (threat + shot fired)
- ◉ *Barnes v Cwlth of Aust* - 1937 NSW (H in mental hospital)

How to classify Wilkinson?

- trespass?
- Negligence?
- Action on the case?
- Not trespass – direct (speech) + intent but requirement of harm
- Not negligence – intentional + *Victorian Railways v Coultas* (P/C 1888) + *Allsop v Allsop* (1860)
- Wright J in *W v D* distinguished *Coultas and Allsop* because ‘there was not...any element of wilful wrong’
- Action on the case? For physical injury? For nervous shock? Extension as in *Bird v Holbrook?* (spring gun)

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USA: Intentional Infliction of Emotional Distress

- ‘The rule seems to be well established where the act is wilful or malicious, as distinguished from being merely negligent, that recovery may be had for mental pain, though no physical injury results’: *Barnett v Collection Service Co* (1932) 242 N.W. 25 (Ia)
- ‘the interest in freedom from severe emotional distress is regarded as of sufficient importance to require others to refrain from conduct intended to invade it’: *State Rubbish Association v Siliznoff* (1952) 240 P 2d 282, 285

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USA: 'extreme and outrageous conduct' –

Restatement (2nd) of Torts (1965)

(applic from 1948)

s 46

(1)'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 results from it, for such bodily harm.'
(adopted 45 states, modified in others)

... *And Fall of Wilkinson v Downton*

- No cases outside Nth America for 50 years (1937- 1986/1993)
- why???

And Rise of Wilkinson : an Emerging Tort of Harassment?

- UK Court of Appeal - *W v D* & domestic violence/ harassment + injunction cases:
 - *Burnett v George*)
 - *Pidduck v Malloy*) 1980s
 - *Burris v Azadani*)
 - **Khorasandjian v Bush* UK CA [1993] QB 727
 - **Wong v Parkside Health NHS Trust* [2001] EWCA Civ 1721
 - **Wainwright v Home Office* [2001] EWCA Civ 2081; also [2003] UKHL 53.

NB Khorasandjian: HL overruled nuisance, no effect *W v D*

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- verbal threats actionable if cause illness
- Illness in *Wilkinson & Janvier* 'nervous shock' ie now recognisable psych illness +/- physical
- Not 'mere emotional distress'
- But no physical or psych illness proved in *Khorasandjian* - court avoided by using nuisance
- 'Obvious risk' of future illness sufficient. 'The law expects the ordinary person to bear the mishaps of life with fortitude...but it does not expect ordinary young women to bear indefinitely such a campaign of persecution...court is entitled to look at the defendant's conduct as a whole and restrain those aspects on a quia timet basis also... which cannot strictly be classified as threats.' *Khorasandjian* per Dillon LJ

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Wong v Parkside Health NHS Trust & Another

[2001] EWCA Civ 1721

Facts – Harassment/ workplace bullying – female e/ee by other female e/ees – obstructive, critical, rude, threats of violence - PI ill - sued e/er & e/ees – *W v D*

Issues

- scope of *W v D*?
- whether separate tort of harassment prior to *Protection from Harassment Act 1997* (UK)?

Held Hale LJ for whole court (endorsed *Wainwright*):

- separate tort of ‘intentional infliction of harm’ exists, diff from trespass & negligence

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‘For the [intentional infliction of harm] tort to be committed, as with any other action on the case there has to be actual damage. The damage is physical harm or recognised psychiatric illness’

‘The defendant must have intended to violate the claimant’s interest in his freedom from such harm. The conduct complained of has to be such that the degree of harm is sufficiently likely to result that the defendant cannot be heard to say that he did not ‘mean’ it to do so’

‘He is taken to have meant it to do so by the combination of the likelihood of such harm being suffered as a result of his behaviour and his deliberately engaging in that behaviour’ (Hale LJ)

- PI lost on causation

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Home Office v Wainwright

[2001] EWCA Civ 2081

Facts- Strip search of mother & mentally impaired adult son on prison visit – mother in front of window - son PTSD - mother distress but no psych illness

At trial – per Mc Gonnigall J

- both Pls won, based on *W v D, Janvier, Burnett v George*
- ‘trespass to person’
- Touching son = battery
- + words ‘calculated’ to cause physical harm includes psychiatric harm

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- Issue re mother: - [no physical illness] ‘raised the question whether this particular form of trespass to the person should be limited to protecting the victim’s right to personal safety or whether it should be extended to other rights, including a right to privacy’
- Trespass to person covers infringements of privacy
- Illogical to deny remedy to mother where avail to son
- Tort should remedy any kind of distress caused by infringement of privacy right – Art. 8 *European Convention for Protection of Human Rights and Fundamental Freedoms*
- Both Pls compensatory + aggravated D

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Court of Appeal

- Disagreed with trial judge re extension of trespass to person
- Judgments for Pls set aside except battery
- Pls lost on facts – no finding of recklessness or intention to harm
- Re quote Hale LJ, *Wong v Parkside*:

“ I happily adopt this definition of the ‘tort’ though I am not sure I would regard it as an action on the case...I accept that an actual recognised psychiatric illness or bodily injury is required... emotional distress by itself does not suffice...We are here concerned with an intentional tort and intended harm...I consider that *W v D* should be so limited” per Lord Woolf CJ

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House of Lords

Pls argued:

1. internat obligations under *European Convention for Protection of Human Rights and Fundamental Freedoms*

- always a tort of privacy – searches of Pls actionable – D for emotional distress

2. if general tort of privacy too wide, then comply with Convention by extending *W v D* on these facts

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Lord Hoffman (main judgment)

- re *W v D* – pars [36]- [47]
- *W v D* not trespass to person
- ‘by the time of *Janvier* [1919]...the law was able comfortably to accommodate the facts of *W v D* in the law of nervous shock caused by negligence. It was unnecessary to fashion a tort of intention...’ [40]
- endorses *Wong* re *W v D* - there is ‘no tort of intentional harassment which gives a remedy for anything less than physical or psychiatric injury. That leaves *W v D* with no leading role in the modern law” par [41]
- But...

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But...

- ‘I see no reason why a tort of intention should be subject to the rule which excludes compensation for mere distress, inconvenience or discomfort in actions based on negligence ...The policy considerations are quite different’
- imputed intention not sufficient
- does not want to decide
- ‘it may be that any development of the common law should show similar caution’

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USA: 'extreme and outrageous conduct'

Restatement (3rd) of Torts: Liability for Physical and Emotional Harm (2012)

s 46

(1) '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.'

- Slight differs from s 46 *Restatement (2nd) of Torts* (1965) – (here emotional harm not emotional distress) but same meaning

Canada

- *Rahemtulla v Vanfed Credit Union* [1984] 3 WWR 296
- *High Parklane Consulting Inc v Lewis* (2007) Can LII 410, [31], Perell J:
- ... well settled law that 'The tort of intentional infliction of mental distress or shock has 3 elements:

- (1) act or statement ... that is extreme, flagrant or outrageous
- (2) ... calculated to produce harm
- (3) and... causes harm

Australia & NZ

- *Northern Territory of Australia v Mengel* 1995 HCA
- *Moran v Moran* - NSW S/C 2000 (settled)
- **Carrier v Bonham* - Qld C/A 2002
- *Grosse v Purvis* – Qld D/C

- *Tucker v News Media Ownership Ltd* - NZ H/C 1986

Australia

NT v Mengel - *W v D* unanimously affirmed as cause of action HCA 1995

Moran v Moran

Facts - Prominent Sydney family – *Comp to Rel's* claim by widow & kids v H's family – argued delib campaign of physical & emotional persecution caused H's suicide - 38 days of hearing – settled (P Semmler QC for PI)

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Carrier v Bonham

[2002] 1 Qd R 474

Facts - Mentally ill patient B escaped from Qld state hospital - suicide attempt – threw self in front of bus – driver C emotional injury & adjustment disorder – unable to work – econ loss – sued B & state - *W v D*

At trial

- B liable for intentional act calculated to cause PI's harm – *W v D*
- State not vicariously liable

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Court of Appeal (Qld)

McMurdo P

- 'calculated' means 'objectively likely to happen' not 'subjectively contemplated & intended'
- B's act 'calculated' because shown to be 'likely to have that effect' of causing harm to PI
- *W v D* now but part of 'a single tort of failing to use reasonable care to avoid damage however caused' - ???
- PI awarded damages against B
- NB all other successful cases injunction

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New Zealand

Tucker v News Media Ownership Ltd

[1986] 2 NZLR 716

Facts - Threat by reporter to publish PI's criminal past – PI trying to raise public funds for heart transplant - *W v D*

- 'the gravamen of the action is unwarranted publication of intimate details of PI's private life' - injunction granted – IIED

Bradley v Wingnut Films Ltd

[1993] 1 NZLR 415

Facts – splatter film –shot in cemetery - brief glimpse of PI's burial plot in background – emotional distress – failed

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Wilkinson : summary so far

- Must be physical harm or psychiatric injury: *Wong, Wainwright*
- Parallels nervous shock – recognisable psych injury
- ‘Obvious risk’ of future illness - injunction: *Khorasandjian*
- a tort of intentional infliction of pure mental distress for Aust/ UK?

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And Fall of Wilkinson?

- ◉ *Subsumed into negligence?*
- ◉ *An extended form of trespass?*
- ◉ *Separate tort in own right?*
 - *Carrier v Bonham* [2002] 1 Qd R 474
 - *Tame v NSW* (2002) 211 CLR 317
 - *Magill v Magill* (2006) HCA 51

But... *Nationwide News v Naidu* (2007) NSWCA 377

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Tame v NSW (2002) 211 CLR 317

Facts - nervous shock case - police error in recording blood alcohol after MVA - PI lost

[179] '*...Wilkinson v Downton ... permitted recovery in respect of nervous shock deliberately inflicted by a false statement made with intent that it be believed. The subsequent development of the modern tort of negligence saw the extraction of this rule from what today would be identified as a species of malicious falsehood and its application by incremental steps to the field of non-intentional harm*'

Magill v Magill (2006) 231 ALR 277

Facts - false representations made by W that H father of children - sought damages in deceit for financial & emotional injury

Gummow, Kirby, Crennan JJ

[117] Referring to *Janvier v Sweeney, W v D*:

'Subsequent developments in Anglo-Australian law recognise these developments as nervous shock, by reference to an imputed intention to cause physical harm, a cause of action later subsumed under the unintentional tort of negligence' See also [121]

But...

Nationwide News v Naidu (2007) NSWCA 377 -

- ◉ NSW CA has no problem with *W v D*
- ◉ serious & protracted workplace bullying
- ◉ PI awarded almost \$2m

Some say *W v D* can be analysed as an extended form of trespass...

Scott Wotherspoon, 'Resuscitating the Wilkinson v Downton Tort in Australia' (2011) 85 ALJ 37-50

And what about intentional negligence?

Peter Handford, 'Intentional Negligence: A contradiction in terms?' (2010) 32(1) Sydney Law Review 29

Gray v MAC (1998) 196 CLR 1 - issue: exemplary D
 'there can be cases, framed in negligence, in which the defendant can be shown to have acted consciously in contemptuous disregard of the rights of the plaintiff'

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The Lazarus Effect: Definitely Risen from the Grave in UK

Rhodes v OPO & Anor [2015] UKSC 32

Facts – mother (in child's name) seeking injunction v father & publishers via W v D to restrain publication of famous father's autobiography
Instrumental – incl terrible history of sex abuse from early age- risk of psych harm to parties' 12 y/o child

Issue – proper scope of mod W v D?
- specifically, can it be used to prevent publication of true info about self by self?

Held - no

'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.'

(*Instrumental*, quoted in judgment, Lady Hale, Lord Toulson)

UK Supreme Court

Lady Hale & Lord Toulson (Lord Clarke and Lord Wilson agreeing)

- Case brought in misuse of private info, negligence, and intentionally causing harm (W v D)
- Lost at trial – no cause of action in tort
- C/A held no claim privacy or neglig but should go to trial on W v D – interim injunction granted
- Supreme Court v thorough analysis of W v D and contemp authorities & meaning of intent and malice

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- [36] ‘... 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’.
- Paucity of *W v D* cases may be due to development of N/S in neglig – but neglig not open here (held:C/A)
- Re Lord Hoffman in *Wainwright* – incorrect to suggest that after *Dulieu v White* (N/S case 1901) facts of W v D could be accommodated within neglig:
- [63] ‘neglig and intent are v different fault elements and there are principled reasons for differentiating betw the bases (and possible extent) of liability for causing personal injury in either case.’

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- Present case raises impt Qs re freedom of speech & nature & limits of W v D
- W v D as per Wright J has 3 elements – conduct, mental element, & consequences – 1 & 2 relevant here
- C/A erred in treating conduct (publication) as directed at child and judging justification vis-à-vis him – justification has to be considered from point of view of wide audience
- [76] ‘only proper conclusion is that there is every justification for publication’
- [77] ‘difficult to envisage any circs 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’.

Re mental element / intent:

- [81] ‘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... abolished in criminal law nearly 50 years ago and its continued survival in the tort of wilful infringement of the right to personal safety is unjustifiable...The doctrine was created by courts and it is high time now for this court to declare its demise.’
1. Where recognised psych illness is product of severe mental/emotional distress,
 - (a) must def have intended to cause illness?
 - Or (b) is it sufficient that only severe distress intended but recognisable psych illness results?
 2. Is recklessness sufficient?

Answer to 1:

(b) - sufficient that only intended to cause severe distress, but actual recog psych illness results

Answer to 2:

- Recklessness not to be included in definition of mental element
- [87] 'To hold that the necessary mental element is intention to cause physical harm or severe mental or emotional distress strikes a just balance'...
- [87] 'preferable to including recklessness as an alternative to intention.'

- [88] [obiter] ' the tort is sufficiently contained by the combination of:

(a) conduct element requiring words or conduct directed at claimant for which ...no justification or excuse, and

(b) mental element requiring an intention to cause at least severe mental or emotional distress, and

(c) consequence element requiring physical harm or recognised psych illness

- See also *ABC v West Heath 2000 Ltd & Whillock* [2015] EWHC 2687 (QB) (4 months after *Rhodes*)
- Facts - Protracted sexual grooming and abuse of disturbed 16 y/o female pupil by 55 y/o male deputy principal in school
- W v D
- Applied *Rhodes v OPO*
- PI won - All elements of W v D claim estab

Future for Australia? ...

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