ARTICLE

The Rule in *Wilkinson* v *Downton*: Conduct, Intention, and Justifiability

Ying Khai Liew[*]
Faculty of Laws, University College London

Abstract
The decision in *OPO* v *MLA* [2014] EWCA Civ 1277 causes confusion to the rule in *Wilkinson* v *Downton*. A strong line of authorities indicates that the defendant must either have an actual intention to cause physical injury or be reckless as to the causing of such harm, the latter being determined by the likelihood of harm being caused by the defendant's act. 'Imputed intention' does not form a separate category of mental state. There was also a missed opportunity to develop a 'justifiability' criterion, by which policy considerations can be taken into account to preclude an application of the tort. This criterion ought to be developed in a principled manner, in line with the existing jurisprudence concerning human rights and with the policy limitations as developed in the context of other torts.

Keywords: *OPO* v *MLA* [2014] EWCA Civ 1277.*Wilkinson* v *Downton*, Actual intention, Recklessness, Imputed intention, Freedom of expression, Justifiability.

A. Introduction

According to Wright J in *Wilkinson* v *Downton*,[1] a cause of action arises when '[t]he defendant … wilfully [does] an act calculated to cause physical harm to the [claimant] … and has thereby in fact caused physical harm to [the claimant].'[2] This tort was once thought to be of diminishing significance, particularly due to the expansion of the tort of negligence to cover primary victims who suffer nervous shock[3] and the passing of the Protection from Harassment Act 1997.[4] In the recent case of *OPO* v *MLA*,[5] however, the potential relevance of the rule in *Wilkinson* v *Downton* resurfaced in a case where the claimant had a claim under neither the tort of negligence nor the 1997 Act. It is therefore relevant to revisit the question: what are the relevant ingredients of that tort? Courts have confirmed that 'physical harm', which must in fact have been caused to the claimant, includes psychiatric injury but not mere alarm or emotional distress.[6] Three questions remain, however: what must the

[*] I thank Professor Paul Mitchell and an anonymous reviewer for their helpful comments on an earlier draft.
[1] [1897] 2 QB 57.
[2] *ibid* 58–59.
[3] See eg *Page* v *Smith* [1996] 1 AC 155. It is arguable that a 'wilful' act by the defendant could, to the same extent, count as a 'negligent' act for the purposes of a claim in the tort of negligence.
[4] s 7(3) provides a civil remedy where a defendant engages in conduct amounting to 'harassment' 'on at least two occasions' where it relates to a single person, even where the claimant suffers mere anxiety short of physical harm (s 3(2)).
[5] [2014] EWCA Civ 1277.
[6] See eg *Khorasandjian* v *Bush* [1993] QB 727, 736; *Wong* v *Parkside Health NHS Trust* [2001] EWCA Civ 1721 at [11]–[12]; *Wainwright* v *Home Office* [2002] QB 1334 (CA) at [80]; *Mbasogo* v *Logo Ltd* [2007] QB 836 at [98]–[99].

defendant's conduct or 'act' consist of; what does it mean to say that that act was 'wilfully done'; what constitutes an act which is 'calculated to cause physical harm'?

B. *OPO* v *MLA*: Facts and Decision

OPO v *MLA* involved an application for an interim injunction to stop STL, a publisher, from publishing a semi-autobiographical book written by a talented young performing artist, MLA.[7] The book was to be a means by which MLA spoke out in an 'artistic and insightful' way of his past experiences of sexual abuse at school and consequential episodes of severe mental illness and self-harming, and how he coped with the trauma through his art.[8] It 'contains an important message of encouragement to those who have suffered similar abuse to speak about their past.'[9] OPO, MLA's 11-year-old son born of his first marriage, now dissolved, brought proceedings by his litigation friend against MLA and STL to prevent the publication of MLA's book. OPO, who lives with MLA's former wife in another country, 'Ruritania', suffers from attention deficit hyperactivity disorder, Asperger's, Dysgraphia, and Dyspraxia.[10] Expert evidence was adduced to show that OPO would be adversely affected if he read the book: it 'would be likely to exert a catastrophic effect on OPO's self-esteem and to cause him enduring psychological harm'; 'he could self-harm'; '[h]e might attempt to act out some of the descriptions in the Work'; 'he [would] be unable to cope … and become greatly disturbed.'[11]

OPO's *Wilkinson* v *Downton* claim[12] was based on a number of alleged facts. First, the book was dedicated to OPO.[13] Secondly, a number of passages in the book were directed to OPO, for example, a letter addressed to OPO which referred to him by his true name.[14] Thirdly, through an exchange of emails in 2009 between MLA and OPO's mother, as well as a term of their divorce order ('Recital K'), MLA had recognised that OPO should not be exposed to details of MLA's past until he attained an appropriate age, and that he would use his best endeavours to protect OPO from any such detriment-causing information.[15] Fourthly, OPO was 'computer savvy', and although the book was intended for an adult market, he would seek to obtain information about the book from the internet.[16]

At first instance Bean J rejected OPO's claims.[17] In relation to the rule in *Wilkinson* v *Downton*, he held that it did not extend beyond false reports.[18] He reasoned that the modern statutory law of harassment would have been unnecessary if it was a legal wrong for anyone to do *any* deliberate act which was likely to cause psychiatric injury. In particular, he declined to open the floodgates, which would potentially make MLA liable for the psychiatric injury of any vulnerable readers of the book.

In the Court of Appeal, Arden LJ (with whom Jackson and McFarlane LJJ, in their brief judgments, agreed) granted the interim injunction on the basis that OPO had sufficiently favourable prospects at trial of successfully establishing his claim under the rule in *Wilkinson* v *Downton*. It was held that the view likely to be taken at trial was that the tort would extend

[7] The parties' identities and relevant locations were anonymised by order of the court.
[8] n 5 above at [1].
[9] *ibid* at [2].
[10] *ibid* at [3].
[11] *ibid* at [3], [5].
[12] OPO was adjudged to have no cause of action based on the tort of misuse of private information on the basis that the claimant must be the owner of the private information. His argument based on the tort of negligence failed on the basis that, according to *Barrett* v *Enfield LBC* [1998] QB 367, parents were under no general common law duty to protect their children from emotional or psychological injury. The Protection from Harassment Act 1997 would not have applied since MLA's conduct complained of did not arise 'on at least two occasions'.
[13] n 5 above at [2], [78].
[14] *ibid* at [14], [78].
[15] *ibid* at [18], [19], [78].
[16] *ibid* at [3].
[17] [2014] EWHC 2468 (QB), handed down in private.
[18] *ibid* at [35].

beyond false words and threats.[19] There must nevertheless be a lack of justification for the defendant's conduct vis-à-vis the particular claimant; and in the circumstances of the case MLA lacked justification to publish the book.[20] It was also held that intention could be imputed in the absence of actual intention or recklessness as to the causing of harm.[21] Such intention was imputed to MLA taking into account the fact that the book was dedicated to OPO, that some parts of the book were directed to him, and that MLA had through the 2009 emails and Recital K accepted that he should prevent OPO from suffering harm.[22]

C. Conduct Required: The 'Act'

In relation to the conduct required to engage the rule in *Wilkinson* v *Downton*, the Court of Appeal was correct to hold that it extends beyond false words and threats, both as a matter of principle and authority. Indeed, it has never been suggested that the tort is so limited. So, for instance, in *Wilkinson* v *Downton* where the defendant told the claimant as a practical joke that her husband had been injured, Wright J did not find the defendant liable based on the nature of his conduct *itself*, but on the fact that the act was 'calculated to cause physical harm'.[23] Indeed, the utterance of false words may not even be a prima facie 'wrongful' act;[24] and once this point is conceded, it follows that the tort can be engaged based on *any* conduct by the defendant, whether inherently wrongful or otherwise. Thus, Hale LJ observed in *Wong* v *Parkside Health NHS Trust* that digging a pit would suffice too[25] – a point adopted by Arden LJ in *OPO* v *MLA*.[26] Instead, the distinctive feature of the rule in *Wilkinson* v *Downton* is the *indirectness* of the physical harm inflicted,[27] and any conduct may suffice for this purpose.

D. Intention to Act: 'Wilfully Done'

It is also not disputed that the defendant must have had an actual intention to act. The original formulation of the tort which requires that the defendant 'wilfully … [does] an act'[28] has been read to mean that he must have deliberately engaged[29] in the conduct complained of, objectively so determined. For example, it would not (and it has never been argued to) be sufficient for the defendant to have uttered false words or threats 'accidentally'; such cases would fall to be considered under the tort of negligence. This issue did not arise in *OPO* v *MLA*: the planned publication of MLA's book was a deliberate, intentional act.

E. Intention to Harm: Acts 'Calculated to Cause Physical Harm'

The requisite mental element required in relation to the consequences of the act is, however, much less clear-cut. What does it mean to say that the defendant's act was 'calculated' to cause harm? The answer, gleaned from a strong and consistent line of authorities, is that the defendant must have either had an actual intention to cause the harm which in fact materialised, or must have been reckless as to whether the harm would be caused.

The clearest case where actual intention was demonstrated is *Janvier* v *Sweeney*,[30] where the defendant, pretending to be employed by Scotland Yard, misrepresented to the claimant that the military authorities wanted her for corresponding with a German spy, in an attempt to persuade her to hand over letters belonging to her employer. Those representations were

[19] n 5 above at [65]–[66].
[20] *ibid* at [69].
[21] *ibid* at [73]–[77].
[22] *ibid* at [78].
[23] n1 above, 58–59.
[24] *Janvier* v *Sweeney* [1919] 2 KB 316, 326.
[25] n6 above at [9].
[26] n5 above at [65].
[27] *ibid* at [7], [9].
[28] n1 above, 58–59.
[29] See eg n 25 above at [12].
[30] n24 above.

clearly threats made with 'an intention to terrify' the claimant,[31] thus making the defendant liable under the rule in *Wilkinson* v *Downton* for the physical injury suffered by the claimant. As Stuart-Smith LJ put it in *Powell* v *Boldaz*, in such a case the defendant's statement is uttered 'with the intention that it should be believed and with the intention of causing injury.'[32]

In relation to recklessness, this element has found four different judicial expressions. The first is in terms of the likelihood of causing harm: the harm must be 'sufficiently likely to result'.[33] The second is in terms of the foreseeability of the harm caused: the claimant must show that 'the damage was the … foreseeable consequence of the defendant's intentional act.'[34] The third is stated from the defendant's point of view: he may not be permitted to 'say that more harm was done than was anticipated'[35] or that 'he did not "mean" [the act] to do so.'[36] The fourth is in terms of imputed intention: where the act is so plainly calculated to harm the claimant, 'an intention to produce it [is] imputed to the defendant.'[37]

The first three expressions are essentially different ways of putting the same thing. The factual likelihood that harm will result from the defendant's act directly correlates to what the legally construed 'reasonable man' foresees as the consequences of such an act, and this determines whether or not a court concludes in a particular case that the defendant is liable for the harm caused despite his claiming not to have intended to cause such harm.

The fourth expression – imputed intention – is, however, potentially ambiguous, and a careful investigation of its true meaning is imperative. In the context of the rule in *Wilkinson* v *Downton*, 'imputing intention' is merely another way of expressing the fact that the defendant was reckless, in view of the fact that his act was likely to (and, to the same extent, would foreseeably) cause harm. This was certainly the way in which Wright J used the expression in *Wilkinson* v *Downton*,[38] and this was subsequently echoed by the Court of Appeal in *Powell* v *Boldaz*,[39] *Wong* v *Parkside Health NHS Trust*[40] and *Wainwright* v *Home Office*.[41] Furthermore, these authorities also confine the language of imputation to the context of recklessness, and for good reason. In contrast to liability based on actual intention, where the focus is on the defendant's deliberate will in adopting the plan to harm the claimant, recklessness concerns the attribution of (fictional) intention to the defendant on the basis that the defendant was wrong to have accepted the (highly likely) harm as a side effect of what the defendant did intend through his acts.[42] 'Imputation' describes this attribution of fictional intention where the likelihood of harm criterion is satisfied.

Unfortunately, 'imputation' is liable to mislead in two different ways. First, it may be taken to underpin *any* finding of the defendant's state of mind, whether of actual intention or recklessness. This appears to be the analysis adopted by Field J in *C* v *D.*[43] He held that 'there are three bases of imputation.' The first is where the defendant's acts are '*calculated*

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[31] *ibid* 326.
[32] (1997) 39 BMLR 35, 47 (overruled *sub nom Customs and Excise Commissioners* v *Total Network SL* [2008] 1 AC 1174 on different grounds).
[33] n25 above at [12]. See also *Khorasandjian* v *Bush*, n 6 above, 736: 'likely to cause'; *Wainwright* v *Home Office*, n 6 above at [44]: 'circumstances where it was so likely that the harm would be incurred'.
[34] *Austen* v *University of Wolverhampton* [2005] EWHC 1635 (QB) at [10]. See also *Powell* v *Boldaz*, n 32 above, 47: the defendant is one 'who foresees the consequences of his act'; *Wong* v *Parkside Health NHS Trust*, n 6 above at [11].
[35] n1 above, 59.
[36] *Wong* v *Parkside Health NHS Trust*, n 6 above at [12].
[37] n1 above, 59. See also *Powell* v *Boldaz*, n 32 above, 47;*Wainwright* v *Home Office*, n 6 above at [44].
[38] n1 above, 59.
[39] n32 above, 47.
[40] n6 above, when paragraphs [10], [12] and [17] of Hale LJ's judgment are read together.
[41] n6 above at [43]–[44] (*per* Lord Woolf CJ) and at [76] (*per* Buxton LJ).
[42] J. Finnis, 'Intention in Tort Law' in J. Finnis, *Intention & Identity: Collected Essays Volume II* (Oxford: Oxford University Press, 2011) 212–213.
[43] [2006] EWHC 166 (QB) at [99].

to cause psychiatric harm and are done with the knowledge that they are likely to cause such harm'; the second is that 'psychiatric injury is sufficiently likely to result from the [defendant's] conduct'; the third is where 'the defendant was reckless as to whether he caused psychiatric harm.'[44] On the facts before him, where the claimant suffered psychiatric harm from the defendant head teacher's acts of pulling down his trousers and underpants and staring at his genitals, the defendant was held not to be liable under the first two bases of imputation, but liability was found on the third.[45]The judge's reasoning is both inaccurate by way of authority and unhelpful in principle. On point of authority, a defendant could not be held to be reckless apart from a consideration of the likelihood of his act causing the harm. As Hale LJ observed in the Court of Appeal in *Wong*, '[the defendant] is taken to have meant [his act] to [cause harm] by the combination of the likelihood of such harm being suffered as the result of his behaviour and his deliberately engaging in that behaviour.'[46]On point of principle, the language of imputation adds nothing to our understanding of the tort if it does not help us to distinguish recklessness from actual intention on the one hand, and any lesser state of mind which does not engage the tort on the other hand.[47]

Secondly, 'imputation' may be taken to be an *alternative* ground for finding liability, distinct from actual intention and recklessness. This analysis is reflected in the judgment in *OPO* v *MLA*. Counsel for MLA had submitted that nothing less than subjective recklessness would do for the purposes of the rule in *Wilkinson* v *Downton*.[48] This submission was based on an *obiter* distinction Buxton LJ drew in *Wainwright*[49] between a defendant acting 'with the knowledge that [his acts] are likely to cause [harm]' (so-called subjective recklessness) and one acting without such knowledge although the harm was so likely to occur that he could be held to be objectively reckless. In rejecting this submission, Arden LJ held that 'even if MLA does not intend to cause harm and is not reckless, the necessary intent can be imputed to him'.[50]

Taking the rejection of counsel's submission first, this is consistent with the authorities. A survey of the cases prior to *C* v *D* reveals that courts never take into account the defendant's knowledge in determining whether he was reckless; an assessment is undertaken purely on the basis of the likelihood of the defendant's act causing the claimant's harm.[51] The strength of the authorities on this point is recognised by Arden LJ in her judgment.[52] The irrelevance of the defendant's knowledge in assessing recklessness is also consistent in principle. There are two possible ways of understanding what Buxton LJ labelled 'subjective recklessness'. If by acting 'with the knowledge that [the defendant's acts] are likely to cause [harm]' is meant that he merely takes the risk of the harm *not* happening – that is, that the result is 'likely' instead of 'certain' due merely to the inherent inevitability of consequences – then the harm is not merely a side effect of the defendant's act, and the defendant therefore has an *actual intention* to bring the harm about.[53] On the other hand, a defendant may choose a course of action, knowing full well and foreseeing that harm to the claimant would be a side effect of his act, but not actually intending such harm to be caused.[54] Since in this case liability is not based on the defendant's will but on the basis of the wrongful acceptance of the outcome of harm as an incident of his act,[55] the focus ought rightly to be on the likelihood of such harm

[44]*ibid* at [99].
[45]*ibid* at [100].
[46]n6 above at [12].
[47] It is notable that Field J's analysis was observed as a 'footnote' by the Court of Appeal in *A* v *Hoare* [2006] 1 WLR 2320 at [133]–[136], but no comment was made about its accuracy.
[48]n5 above at [70], [72].
[49]n6 above at [78]–[80] (*per* Buxton LJ), cited in n 5 above at [72].
[50]n5 above at [73], [77].
[51]See especially cases cited at nn38–41 above.
[52]n5 above at [73].
[53]Finnis, n 42 above, 206.
[54]*ibid* 208.
[55]*ibid* 213.

being caused by the defendant's act instead of on the defendant's knowledge. It follows that the defendant should not be absolved from liability where the harm is (on an objective assessment) a likely consequence of his act but he acts without such knowledge.[56]

However, a misanalysis occurs when Arden LJ gives 'subjective recklessness' the label 'recklessness', and 'objective recklessness' the label 'imputation'.[57] Divorcing 'imputation' from 'recklessness' overlooks the crucial fact that 'recklessness' has always been concerned with an assessment of the likelihood of the defendant's act causing the claimant's harm – precisely what Buxton LJ called 'objective recklessness'. It also leads to a deeper problem by suggesting, contrary to the authorities, that the likelihood of harm test is relevant only to 'subjective recklessness' and that it is open to the courts to 'impute' intention on the basis of other factors.This was unfortunately the way in which Arden LJ proceeded to decide the case before the court.

F. 'Unjustifiability' of the Conduct

Since an intention can be imputed (whatever that may mean) apart from a consideration of the likelihood of harm criterion, the question arises: on what legal (as opposed to moral) basis is intention imputed? The answer given by the Court of Appeal was that to engage the rule in *Wilkinson* v *Downton* the defendant's conduct must lack justification: [58] the 'unjustifiability' of his acts (whatever it may be) would warrant the imputation of intention. Divorced from 'likelihood of harm', this 'unjustifiability' criterion was taken to be a freestanding requirement.[59]

Arden LJ suggested that 'there may be many ways in which the court could draw the line between acceptable … statements, and those which are actionable under this head'.[60] She proceeded to suggest that liability might be restricted by demanding that the claimant should be a person of 'ordinary phlegm', although it would not be appropriate where the defendant knew of the claimant's vulnerabilities; alternatively the tort might be restricted to acts which are 'sufficiently outrageous'.[61] She did not, however, commit to any particular method for determining the 'unjustifiability' of the defendant's conduct. Instead, the only guidance given was that this should be judged '*vis-à-vis the particular claimant*'[62] – a point which merely confirms the *status quo* that the rule in *Wilkinson* v *Downton* gives a cause of action '*to the person* to whom [false words or verbal threats] are uttered'.[63] She continued: 'The defendant may be perfectly entitled to dig holes in his garden in any location he chooses to dig them in but not … if they fall within the area he has already agreed to allow the claimant to walk across to take a short cut.'[64] On the basis of the 2009 emails and Recital K, she found that MLA 'has accepted a responsibility to use his best endeavours to ensure that OPO is protected from harmful information'; therefore 'there is no justification for his words, if they are likely to produce psychiatric harm'.[65] She also justified the imputation of intention on the basis that MLA's book was 'dedicated to OPO, and some parts of it are directed to him.'[66]

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[56] If, however, the harm is not a likely consequence of his act but he acts on the basis of a mistaken assumption that it is, then he would be liable on the basis of having an actual intention to harm the claimant.
[57] The error begins at [75].
[58] n5 above at [69].
[59] Although Jackson LJ purported to agree with Arden LJ's reasoning (*ibid* at [116]), his Lordship in fact says something different. According to Jackson LJ, the defendant must have 'intend[ed] to cause or [be] reckless about causing' the harm to the claimant, but the defendant's act must *in addition* be 'unjustified': *ibid* at [119]. This likewise creates a freestanding 'unjustifiability' requirement for the rule in *Wilkinson* v *Downton*.
[60] *ibid* at [68].
[61] *ibid* at [68].
[62] *ibid* at [69].
[63] *Khorasandjian* v *Bush*, n 6 above, 735 (emphasis added).
[64] n5 above at [69].
[65] *ibid* at [69], [78].
[66] *ibid* at [78].

This reasoning is highly suspect. Earlier in the judgment, Arden LJ had dealt with OPO's negligence claim and had held that, consistent with the binding authority of *Barrett* v *Enfield LBC*,[67] parents do not owe a common law duty of care to their children. In rejecting this claim, Arden LJ considered whether the 2009 emails and Recital K would nevertheless impose a duty of care on MLA towards OPO, and came to the conclusion that '[t]hese documents contained *no assumption of responsibility in law* towards OPO. They were written to his mother.'[68] Yet, curiously, Arden LJ found it possible to find MLA liable under the rule in *Wilkinson* v *Downton* based on the 2009 emails and Recital K without any further elaboration. This leads one to wonder whether there was really any legal, as opposed to moral, unjustifiability in MLA's publishing of his book.

Criticisms can also be levied against the other facts Arden LJ relied upon. Dedicating the book to OPO certainly does not mean that MLA 'intend[ed] the Work to reach OPO':[69] highly technical legal textbooks which are dedicated to the authors' young children and works which are dedicated to deceased individuals expose the absurdity of this conclusion. And in relation to the parts of the book which were allegedly directed to OPO, Arden LJ had earlier observed that MLA 'has agreed to alter the Work to remove passages that might cause harm to OPO, removing for example a letter in it addressed to [OPO].'[70] The case nevertheless came before the Court of Appeal because, *despite* MLA having made those changes, '[OPO's] mother does not consider that the changes to the Work have gone far enough.'[71] Since the book was not 'directed' or uttered[72] *to* OPO, it is difficult to see why it was unjustifiable for MLA to publish his book.

On a proper analysis, different weight would have been attached to the evidence, which may have resulted in an opposite outcome. The question that the Court of Appeal ought to have asked itself was as follows: is OPO likely to establish at trial that MLA's proposed publication of the book would be likely to cause OPO physical injury so that MLA would be held to be reckless as to the causing of harm for the purposes of the rule in *Wilkinson* v *Downton*? It would have closely examined the possibility of OPO gaining access to MLA's book. The fact that OPO was 'computer savvy'[73] would count in his favour. However, this ought to have been balanced against MLA's efforts to prevent OPO from reading the book, thus reducing the likelihood of causing him harm. More weight would have been given to the fact that the book was to be directed only at an adult market, which, as Arden LJ observed, would 'normally mean that children would not obtain it'.[74] MLA had, in fact, 'been the subject of several television documentaries with substantial viewing figures' which 'had no impact on [OPO]';[75] and since MLA's book was not to be distributed in Ruritania where OPO lived,[76] this would suggest that harm was unlikely to be caused.

Similarly, the fact that MLA had removed passages directed to OPO which might cause him harm would have borne more weight.[77] This is a particularly important point, since the Court of Appeal held that 'OPO [was] unlikely to obtain the Work as such [although] OPO might well see extracts or quotations from it on the internet'.[78] As for the 2009 emails and Recital K, these would have indicated that MLA had recognised the possibility of harm eventuating *if* OPO read the book; the documents would certainly not have made MLA liable simply

[67] n12 above.
[68] n5 above at [54] (emphasis added).
[69] *ibid* at [78].
[70] *ibid* at [14].
[71] *ibid* at [14].
[72] *Khorasandjian* v *Bush*, n 6 above, 735.
[73] n5 above at [3].
[74] *ibid* at [25].
[75] *ibid* at [15].
[76] *ibid* at [13].
[77] *ibid* at [14].
[78] *ibid* at [87].

because he had 'assumed responsibility' for OPO. All things considered, it is doubtful whether the likelihood of harm criterion would have been satisfied.

G. An Underlying Concern: 'Justifiability'

The misanalysis inherent in the 'unjustifiability' criterion notwithstanding, a sympathetic view might be taken. Perhaps there was a wider underlying concern which, although not fully enunciated in any way by the Court of Appeal, may have played on the minds of the judges: *viz* the rule in *Wilkinson* v *Downton* does not allow judges to take into account the full range of potentially relevant policy considerations. It is important to consider whether there is any substance to this underlying concern.

In cases such as *OPO* v *MLA*, the likelihood of harm criterion goes a long way to ensuring responsibility in the publication of an author's (or filmmaker's, or artiste's) work via the media to the public. In particular, when dealing with works containing highly offensive elements, such authors etc. would escape being found reckless – it is unlikely that physical harm will be caused – only if they market their works through the correct channels or warn the public of its potentially offensive elements.

Nevertheless, there is a wholly separate consideration of an author's freedom of expression. It is true that in *OPO* v *MLA* the Court of Appeal was not dealing with the trial of the action, and thus made no findings of fact;[79] it only had to determine whether OPO was 'likely to establish that publication should not be allowed' by virtue of section 12(3) of the Humans Rights Act 1998.[80] In holding that section 12(3) was satisfied, Arden LJ pointed to 'all the reasons given when discussing the claim under *Wilkinson* v *Downton*', in particular the fact that 'MLA accepted some measure of responsibility to protect OPO' through Recital K and the 2009 emails.[81] However, throughout her earlier discussion of OPO's *Wilkinson* v *Downton* claim, no effort whatsoever was made to take into account MLA's freedom of expression and whether this would affect his liability under the tort. Yet, courts are bound to 'have particular regard to the importance of the Convention right to freedom of expression' by virtue of section 12(4) of the 1998 Act, and the rule in *Wilkinson* v *Downton* surely must be read in the light of this human right. In particular, it is regrettable that no attempt was made to analyse Recital K and the 2009 emails in a way that balanced OPO's right to respect for his private and family life[82] against MLA's right to freedom of expression.[83] This is all the more surprising given that Arden LJ did recognise the importance of such a balancing act early on in her judgment,[84] but perceived its relevance to extend only to OPO's claim under the tort of misuse of private information.[85]

But perhaps the source of the problem lies with the existing structure of the rule in *Wilkinson* v *Downton*. Even if the Court of Appeal had properly analysed the case before it consistent with the existing authorities, there would still have been no analytical room for taking into consideration MLA's freedom of expression, since assessing the likelihood of harm criterion involves considering merely the probability of harm being the causal effect of the defendant's act, no more and no less.

It is submitted that the best way forward would have been to develop a control mechanism based on the freestanding criterion of 'justifiability'. Such a criterion would have been different from the 'lack of justification' approach taken by the Court of Appeal: it would not serve as a test to determine *liability* – this would be based on the defendant's actual

[79] *ibid* at [9].
[80] *ibid* at [11], [80].
[81] *ibid* at [11], [89].
[82] European Convention of Human Rights, Art 8.
[83] European Convention of Human Rights, Art 10. See *Von Hannover* v *Germany* (2005) 40 EHRR 1at [58].
[84] n5 above at [11].
[85] *ibid* at [47].

intention or recklessness as measured by the likelihood of harm criterion – but as a test to determine whether liability ought properly to be *precluded*. The 'justifiability' criterion would also not have replaced, but would have been in addition to, the likelihood of harm criterion: it would have been a counterpart of the notion of 'fair, just, and reasonable' in the tort of negligence, an additional 'control mechanism'[86] by which policy considerations can be taken into account to preclude non-actionable damage. Furthermore, the 'justifiability' criterion would not have been applied in the arbitrary and haphazard manner in which the Court of Appeal dealt with the notion of 'unjustifiability', but in line with the human rights jurisprudence. It would have allowed courts to hold that, although a defendant may be reckless as to the causing of harm, he should nevertheless not be liable under the tort in view of his right to freedom of expression.

In fact, such a mechanism goes further. Since any act by the defendant could potentially engage the rule in *Wilkinson* v *Downton*,[87] the tort has a scope of application beyond acts involving the publication of information. Where the defendant's freedom of expression is not a central concern, courts would still be able to preclude liability under the tort in line with any well-developed policy limitations which apply in relation to other torts .As Lord Rodger has observed in the context of the tort of negligence, 'the world is full of harm for which the law furnishes no remedy.'[88] So, for example, despite fulfilling the likelihood of harm criterion, a defendant's liability might nevertheless be precluded in an appropriate case where his freedom of self-determination[89] is at stake. To take another example, adapting one of Lord Rodger's illustrations in *D* v *East Berkshire Community Health NHS Trust*,[90] if a young man's fiancée deserts him for his best friend, an act which may be likely to cause him psychiatric injury, '[e]xperience suggests that such intimate matters are best left to the individuals themselves'.[91] Similarly, just as parents generally owe no duty of care towards their children for the purposes of the tort of negligence,[92] so should liability under the rule in *Wilkinson* v *Downton* generally be precluded where a child brings a claim against his parent.[93]

H. Conclusion

The confusion brought about to the rule in *Wilkinson* v *Downton* by the Court of Appeal's decision in *OPO* v *MLA* is regrettable. As a matter of precedent, the tort is engaged only where the defendant has an actual intention to cause physical injury, or is reckless as to the causing of such harm, the latter being determined by the likelihood of harm being caused by the defendant's act. The idea of 'imputed intention' does not form a separate category of mental state for the purposes of the tort. In most cases, the likelihood of harm criterion appropriately draws the line between cases where the defendant's act is justifiable and those where it is not. Other policy considerations which may justify precluding the application of the tort can be taken into account by developing a 'justifiability' criterion. This criterion ought to be developed in a principled manner, in line with the existing jurisprudence concerning human rights and with the policy limitations as developed in the context of other torts.

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[86] *D* v *East Berkshire Community Health NHS Trust* [2005] 2 AC 373 at [94].

[87] See text to n 27 above.

[88] n86 above at [100].

[89] Notably, in the context of liability for negligently inflicted psychiatric illness, the Law Commission recommended that, where a person wishes to carry out very dangerous activities which do not risk any physical injury to anyone but himself, he ought not to owe a duty of care to anyone who has a close tie of love and affection to him who may suffer psychiatric illness as a result, for this would be unacceptably to restrict the person's self-determination: Law Commission, *Liability for Psychiatric Illness* (Law Com No 249, 1998) [5.40].

[90] n86 above at [100].

[91] *ibid* at [100].

[92] n12 above. It has already been observed that the Court of Appeal dismissed OPO's negligence claim based on this authority.

[93] As Bean J rightly held at first instance in *OPO* v *MLA*, 'the policy arguments set out … in *Barrett* v *Enfield LBC* are also … applicable *mutatis mutandis* to *Wilkinson* v *Downton*': n 17 above at [35] (handed down in private), observed in n 5 above at [34].