INTRODUCTION

The tort known as ‘the rule in Wilkinson v Downton’ was created in the 1897 case of the same name, and arose from a practical-joke-gone-wrong in a pub at Limehouse, London. It is also known as the tort of ‘intentional infliction of emotional distress’, and whilst that phrase is something of a misnomer, it is certainly an intentional tort.

According to the original rule in Wilkinson v Downton, D is liable in tort if he conveys information to C, knowing that information to be untrue, and as a result of believing the information to be true, C suffers injury or harm. The scope of the tort has since been extended to cover verbal threats of physical harm against C, or the intentional and indirect infliction of injury on C from D’s acts.

Judicial sentiment about the tort has been anything but positive. It has been variously said that the tort is ‘a source of much discussion and debate in legal textbooks and academic articles, but seldom invoked in practice’ (per the Supreme Court in Rhodes v OPO); is ‘far more often discussed than applied’ (per Lord Hoffmann in Wainwright v Home Office); has ‘puzzled generations of lawyers’ (per Buxton LJ in Wainwright v Home Office); has a ‘somewhat uncertain scope’ (per the Irish decision in Sullivan v Boylan); is an ‘obscure tort, whose jurisprudential basis remains unclear’ (per the English Court of Appeal in A v Iorworth Hoare); and is, to sum up fairly bluntly, ‘peculiar’ (per W v Essex CC).

A brief history of the rule

The facts giving rise to this much-analysed decision were decidedly odd:

In Wilkinson v Downton, Mr Downton, D, was a frequent customer of Thomas Wilkinson’s pub at Limehouse. Mr Wilkinson went to the races at Harlow by train, and left his wife, Lavinia Wilkinson,
C, to manage the bar. D visited the pub, and falsely told C, as an unpleasant practical joke, that her husband had been injured in an accident involving a horse-drawn vehicle on his way back from the races, that he was lying in a pub in Leytonstone with two broken legs, and that C should fetch him. C immediately travelled by train to reach her husband, but could not find him. In fact, C's husband returned safely by train from the races later that evening. However, the effects of the practical joke on C were dramatic. She became violently ill. As well as vomiting, her hair turned white, and she suffered a severe psychiatric illness. **Held:** C could recover £100 damages for the emotional distress (psychiatric injury) suffered (by virtue of this newly-created tort), and further damages in fraudulent misrepresentation (or deceit, for the cost of the fruitless train journey).

### Not a trespass to the person

The rule in *Wilkinson v Downton* is a form of an action on the case. It is not a trespass to the person.

In *Wainwright v Home Office*, Lord Hoffmann said that the tort of *Wilkinson v Downton* ‘had nothing to do with trespass to the person’, because what happened to Mrs Wilkinson was an indirect interference with her person. Mr Downton’s joke was not a direct act indicating an immediate intention to commit a battery as the tort of assault requires. The House of Lords affirmed the view of the Court of Appeal below, that the tort was an action on the case. The rule in *Wilkinson v Downton* has common features with assault, in that under neither tort is there an application of actual force on C – but they have these marked distinctions:

- assault, as a trespass to the person, is actionable *per se*, i.e., without proof of damage. On the other hand, as an action on the case, the rule in *Wilkinson v Downton* cannot be actionable unless C has suffered some injury or damage;
- it is not necessary for C, in the tort of assault, to prove that his harm was reasonably foreseeable – even remote and unforeseeable harm will be compensable. On the other hand, for actions on the case, liability is limited to the type of damage that D should have foreseen as likely to result from his acts; and
- in an action for assault (as with all trespasses to the person), damages may be awarded for pure mental distress falling short of a psychiatric injury; whereas, for an action on the case (including the rule in *Wilkinson v Downton*), actionable injury will only be proven by C’s suffering a recognised psychiatric injury.

### An accident of history?

Lord Hoffmann remarked, in *Wainwright v Home Office*, that the rule in *Wilkinson v Downton* was really an accident of legal history. A decade earlier, in the 1888 case of *Victorian Railway Commr v Coults*, psychiatric injury was held not to be compensable in negligence, because that damage was deemed as too remote at law. That decision was eventually overruled in 1901 in *Dulieu v White* – but in the meantime, the case of *Wilkinson v Downton* came before

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12 [1901] 2 KB 669 (CA).
Wright J in 1897. Being unable to permit Mrs Wilkinson to recover her psychiatric injury in negligence, Wright J devised a rule of inflicted psychiatric injury – not negligently-inflicted, but with an ‘imputed intention’ to inflict, because D’s act was calculated to cause damage to C. Lord Hoffmann noted that Lord Wright’s concept of ‘imputed intention’ ‘sailed as close to negligence’ as was possible – and was fairly artificial, when D’s practical joke would probably have been treated as an act of negligently-inflicted psychiatric injury, had Coultas not put a bulwark in the way. Hence (in Lord Hoffmann’s opinion), the new tort was created solely to circumvent Coultas.

Interestingly, more recently, the Supreme Court, in Rhodes v OPO,\(^\text{13}\) doubted this interpretation of Wilkinson v Downton. Rather, the majority in Rhodes suggested that Wright J would have known that he was not bound to follow Coultas (as a Privy Council decision whose authority had already been doubted), and that he was able to distinguish Coultas because it did not involve a ‘wilful wrong’, whereas Wilkinson did.

Even this disagreement at the highest appellate level about what motivated Wright J’s decision demonstrates how the tort is still mired in uncertainty. However, the fact remains that, rather than disappearing with the advent of Dulieu v White, the rule in Wilkinson v Downton survived in English law. The tort certainly has not (to adopt the words of Lord Hoffmann in Wainwright\(^\text{14}\)) ‘disappeared beneath the surface of the law of negligence’ – although there have been precious few successful applications of it.

The framework

C’s claim under the rule in Wilkinson v Downton has the following precondition and elements:

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Nutshell analysis: The rule in Wilkinson v Downton

**Precondition for the tort to apply:**

- The requisite harm: a physical injury or a recognised psychiatric injury

**Elements of the tort:**

1. D committed an act of the relevant type, for which there was no justification or reasonable excuse
2. D possessed the requisite intent
3. D caused C to suffer the requisite harm
4. C’s harm was reasonably foreseeable

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Dealing with each element of the cause of action in turn:

**PRECONDITION: THE REQUISITE HARM**

Given that the tort of Wilkinson v Downton is not a trespass, but an action on the case, there must be proof that D’s tort caused actual damage to C. Actionable damage may take one of two types, under the tort: (1) some physical injury, or (2) a recognised psychiatric injury (although it is unsettled law as to whether a lesser form of mental harm should suffice).

\(^{13}\) [2015] UKSC 32, [61]–[62]. \(^{14}\) [2003] UKHL 53, [41].

The strict terms of Wright J’s judgment in *Wilkinson v Downton* have been departed from in important respects – and this is one of them. According to Wright J, the cause of action required C to prove that D had ‘wilfully done an action calculated to cause physical harm to [C], that is to say, to infringe her legal right to personal safety, and has in fact caused physical harm to her’. However, it has since been judicially accepted (see, e.g., *Wainwright v Home Office*) that, in this passage, Wright J’s reference to ‘physical harm’ to C includes, within its realm, pure mental harm (i.e., harm that occurs to C, absent any physical injury).

Each type of harm has given rise to some controversy under this tort:

**Physical injury**

The relatively sparse case law to date demonstrates that the dividing line between what has, and what has not, proven to be compensable under the rule in *Wilkinson v Downton* is fairly finely-drawn. The following Table demonstrates that proposition:

<table>
<thead>
<tr>
<th>'Physical damage', under the rule in <em>Wilkinson v Downton</em></th>
</tr>
</thead>
<tbody>
<tr>
<td>The following <strong>have</strong> sufficed as 'physical damage':</td>
</tr>
<tr>
<td>• where C suffered neurasthenia or shingles, and other physical ailments (as in <em>Janvier v Sweeney</em>);</td>
</tr>
<tr>
<td>• where C suffered severe vomiting, and hair whitening (as in <em>Wilkinson v Downton</em> itself).</td>
</tr>
<tr>
<td>However, the following <strong>have not</strong> sufficed as 'damage':</td>
</tr>
<tr>
<td>• where C suffered from weight loss and required a mild sedative to restore her sleeping patterns (per <em>Sullivan v Boyle</em> – the court said that it would be 'artificial to extend the rule in <em>Wilkinson v Downton</em> in this fashion').</td>
</tr>
</tbody>
</table>

However, the inclusion within the tort of any pure mental harm suffered by C has both expanded its application to different fact scenarios and given rise to divisive views about what type of mental harm should be sufficient to prove this precondition.

**A recognised psychiatric injury**

The current law

Under the currently-favoured view (and despite some judicial support for a contrary position), damages for mere distress, anger, fright, etc, suffered by C, cannot be recovered under the rule in *Wilkinson v Downton*, even if there was the requisite intention by D to cause precisely that type of harm. A recognised psychiatric injury on C’s part is required.

It will be recalled from above that a trespass to the person is actionable, whether C’s pure mental harm is a recognised psychiatric injury, or something which falls short of that.

It will also be recalled (from Chapter 5) that, under the tort of negligence (another action on the case, like the tort in *Wilkinson v Downton*), a recognised psychiatric injury is required,
as a pre-requisite to any recovery for negligently-inflicted psychiatric injury, but that there is some contention that the law of negligence should allow for a ‘lesser’ degree of damage. That disputed viewpoint has arisen among senior English judges under the tort in *Wilkinson v Downton* too.

As English law currently stands, anything less than a recognised psychiatric injury will not suffice under the rule in *Wilkinson v Downton*. There is ample appellate judicial support for that proposition. For example, Lord Hoffmann stated, in *Wainwright v Home Office*, that the rule, ‘does not provide a remedy for distress which does not amount to recognized psychiatric injury’.  

In *Wong v Parkside Health NHS Trust* too, Hale LJ (writing for the Court of Appeal) said, ‘[f]or the 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’. Differently-constituted Courts of Appeal also accepted this proposition in *Powell v Boldaz*, and in *A v Iorworth Hoare*. This principle has ruled out some claims at the outset:

In *Wainwright v Home Office*, D, prison officers, conducted a strip search for drugs of a mother, C1, and son Alan, C2, who were visiting a relative in Leeds Prison. The search was conducted in breach of prison rules. The room in which C1 was searched, was not private: it had an uncurtained window looking out across the street. During the search the mother was not touched, but the son, C2, was touched on the genitals. As a result of how he was searched, C2 suffered from PTSD. C1 suffered emotional distress but no recognised psychiatric injury. Both were humiliated and distressed. Held (at trial): both C1 and C2 recovered under the tort in *Wilkinson v Downton*. Held (on appeal): the tort was not proven for either party. The mother, C1, had no possible action under the tort of *Wilkinson v Downton*, given that she had merely suffered emotional distress. The son, C2, had a potential action because he had suffered the ‘correct’ damage, but he failed a later element of the tort (however, C2 recovered for battery). In *C v D*, a head teacher, D, videoed a pupil, C, 10 years old, and some of his schoolmates, whilst they were taking a shower (incident #1). Another time, at the school infirmary, D pulled down C’s trousers and underpants and stared at his genitals (incident #2). C conceded that removal of C’s trousers and pants did not involve sufficient touching or threat of touching as to amount to a battery or assault, respectively. Field J also held that negligence did not apply to these facts. Held: both incidents prima facie fell within the tort of *Wilkinson v Downton*. However, re incident #1, C had only suffered emotional distress, and that was not actionable. Re incident #2, that caused C to suffer psychiatric injury which rendered it compensable.

However, there is the view – which has received high-level judicial support in England – that the rule in *Wilkinson v Downton* should change from its present narrow ambit of what is compensable damage (discussed further below).

Furthermore, the law’s insistence upon a recognised psychiatric injury under the rule in *Wilkinson v Downton* applies, regardless of whether D’s act is lawful or unlawful.

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21 [2003] UKHL 53, [47].
25 [2006] EWHC 166 (QB, Field J), and see, especially, [87], [89].
In most of the leading *Wilkinson v Downton* cases, D’s act, whilst repugnant or contemptible, was not adjudged as being unlawful. The practical joke in *Wilkinson*, and the unseemly behaviour in *C v D*, were not unlawful acts. However, where D’s act is unlawful, it makes no difference: if psychiatric injury has not been suffered, but merely distress, that is not actionable under this tort.

In *Mbasogo v Logo Ltd*, President Mbasogo of the Republic of Equatorial Guinea, C, claimed that the leaders of a failed coup against him, D, caused him to suffer distress, by the thought that he, and his family, would be killed, and C sued D under the tort of *Wilkinson v Downton*. **Held:** the claim was refused, given that C was only attempting to recover for distress, without any bodily or psychiatric injury being proven.

In this case, the Court of Appeal was not prepared to recognise a new tort: a tort of ‘the intentional infliction of emotional distress (falling short of a psychiatric injury) resulting from D’s unlawful act.’ However, the Court did not rule out the development of the common law in that regard. It was unnecessary to consider that point further, though, because what occurred here was harassment; it would normally be covered by the Protection from Harassment Act 1997; that was not possible, because D’s acts were committed outside of the jurisdiction; and where Parliament has chosen to legislate for harassment, then the common law should not intervene, so as to create a new tort, i.e, the tort of intentionally causing damage to C by unlawful means.

**A possible change: a tort of intentionally causing mere distress?**

In English law, the door has been left open to the possibility of recovering damages for mere mental distress under the rule in *Wilkinson v Downton*.

This is primarily as a result of Lord Hoffmann’s dicta comments in two House of Lords cases: *Hunter v Canary Wharf Ltd* and *Wainwright v Home Office*. In the latter, he observed that he wished to ‘reserve opinion on whether compensation should be recoverable’, where there was ‘a genuine intention to cause distress’. More recently, in *Rhodes v OPO*, the majority of the Supreme Court noted that Lord Hoffmann had left the question open (however, in that case, it was common ground that the tort required either physical harm or a recognised psychiatric injury), while both Lords Neuberger and Wilson (in a separate concurring judgment) noted that, ‘there is plainly a powerful case for saying that, in relation to [the rule in *Wilkinson v Downton*], … it should be enough for C to establish that he suffered significant distress as a result of D’s statement’, without the need to prove something even more serious as a pre-requisite to compensation.

Further, in one of the rare successful English examples of the tort being successfully applied in C’s favour, the claimant in *Khorasandjian v Bush* only suffered distress – but *quia timet* injunctive relief was granted at the request of C, because the court was prepared to accept that there was ‘an obvious risk that the cumulative effect of continued and unrestrained further harassment such as she has undergone would cause [a recognised psychiatric injury].’

In *Khorasandjian v Bush*, Ms Claire Khorasandjian, C, 18, and Mr Garry Bush, D, 28, were friends, but their friendship broke down, and C decided that she would have nothing further to do with D.

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27 [2004] 2 AC 406 (HL) [44], [46].  
28 [2015] UKSC 32, [2015] 2 WLR 1373, [73], [119].  
However, D found that difficult to accept. He threatened violence against C, behaved aggressively when he saw her, followed her around shouting abuse, pestered her with telephone calls to her parents’ home and at her grandmother’s, such that the telephone number had to be changed, stole her handbag and told her that he would keep it as a memento of her, and scratched her car’s paintwork. D was arrested by the police, spent some time in prison, and was fined for offences under the Telecommunications Act 1984 in respect of his telephone calls to C, viz making calls for the purpose of causing annoyance, inconvenience, etc. C alleged that D’s aggressive behaviour and harassment had continued with the persecution by telephone calls. Held: the tort of Wilkinson v Downton was proven sufficiently to restrain those threats on a quia timet basis.

Hence, the circumstances of this case were somewhat unusual, and notably, the case was not discussed at any length by the House of Lords in its subsequent analysis of the tort in Wainwright v Home Office.

There are, essentially, three justifications put forward for the view that mere distress should be sufficient:

(i) as a quid pro quo for an intentional tort directed against C, mere distress on C’s part should be recoverable. In Hunter, Lord Hoffmann observed that, ‘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 … [t]he policy considerations are quite different [for intentional torts].’ In other words, defendants should be held to greater account for their intentional misdeeds than for their unintended and accidental acts.

(ii) by insisting upon a recognised psychiatric injury, rather than permitting recovery for mere mental distress, the rule in Wilkinson v Downton leaves a gap. Where there are outrageous or even hostile intentional acts done by D, with the specific intention of causing C mental distress, and which fall short of a recognised psychiatric injury, there is no tort in English law that protects C against that act of D’s.

Repetitive nuisance phone-calls from a jilted boyfriend to his former girlfriend were actionable in Khorasandjian v Bush under the tort of private nuisance – but such an action would not now be possible under that tort (given that C, the girlfriend, would now lack the relevant standing to sue, with no proprietary or possessory interest in the house which was owned by her parents, as discussed in Chapter 16). Lord Hoffmann noted, in Hunter v Canary Wharf Ltd, that Khorasandjian was better seen as a case of intentional harassment giving rise to distress, rather than in private nuisance – but given the better view that there is no such tort if mere distress is all that is suffered, that gives rise to the ‘perceived gap’. However, in Wong, the specific submission that English law should allow the recovery of damages for distress, falling short of psychiatric injury, where there was an intention to cause such distress, was explicitly rejected.

In Wong v Parkside Health NHS Trust, Mrs Wong, C, complained of a campaign of harassment against her in 1995 by three fellow employees, D1, and an inadequate response by her employers, D2. C was employed as a wheelchair administrator. Her co-employees felt that another person should have got C’s job, and were rude and unfriendly to C from the beginning – not explaining the work properly to her, criticising her performance in the job, locking her out of her office, interfering with her desk and personal effects, hiding things that she needed, threatening her with reprisals from an ex-convict if

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she told their employers about a co-employee's absences, setting off her car alarm, and frightening her by throwing something against the office window. C suffered emotional distress from this campaign of harassment, but no recognised psychiatric injury. **Held:** the tort of *Wilkinson v Downton* was not proven. The tort did not compensate for mere emotional distress.

Of course, as explicitly noted in *Hunter*, and in *Wong*, the statutory tort available under the Protection from Harassment Act 1997 (discussed in an online chapter) probably stultified the attempts of the English common law (especially under the tort of *Wilkinson v Downton*, and under the tort of misuse of private information) to fill that gap. Indeed, Hogan J noted, in *Sullivan v Boylan* (where Irish law is the same as English law on this point) that, 'just because the common law might have so developed, or might yet so develop at some stage in the future, does not take from the fact that the existing law of torts is still basically ineffective to protect [C] in a case of this kind ... [for] protection of the person and the inviolability of the dwelling.'

In fact, the rule in *Wilkinson v Downton* has not developed in English law in quite the same way as it has elsewhere in the Commonwealth.

**The comparative corner: A Canadian vignette**

In *P (MN) v Whitecourt General Hospital*, the Alberta Queen’s Bench confirmed that, in Canadian jurisprudence, the rule in *Wilkinson v Downton* allows recovery for a lesser degree of mental injury, amounting to mere distress or fright.

(iii) the third problem with the tort of *Wilkinson v Downton* requiring that C suffered a recognised psychiatric injury is that, if there is some doubt as to whether D acted intentionally or negligently, it is usually safer to argue that negligence on D’s part was evident, and hence, bypass the tort of *Wilkinson v Downton* altogether. This has been the prime reason for rendering the tort a fairly useless cause of action. Lord Hoffmann noted, in *Wainwright*, that the lack of recognition of ‘distress’ as a compensable damage leaves the tort of *Wilkinson v Downton* ‘with no leading role in the modern law’. To permit C to be able to recover under the tort for mere distress falling short of a recognised psychiatric injury would have infused it with much more utility and application.

However, the present reality is that the emotionally-distressed C presently has no claim under the tort of *Wilkinson v Downton*, as President Mbasogo of the Republic of Equatorial Guinea, for example, found to his cost. In *Mbasogo v Logo Ltd*, the Court of Appeal held that Lord Hoffmann’s dicta in *Hunter* and *Wainwright* ‘was far from saying that compensation should be recoverable, even in cases where there is a genuine intention to cause distress.’ In similar tones, in *C v D*, Field J said that it was ‘clear’ that Lord Hoffmann ‘was not definitively promulgating a new basis of tortious liability for “mere distress”’ in *Wainwright*, and hence, that decision ‘afford[ed] no basis for holding D liable to C for the video incident.’

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35 [1997] AC 655 (HL) 707 (Lord Hoffmann).  
36 [2001] EWCA Civ 1721, [29]–[30].  
37 [2013] IEHC 104, [43].  
39 [2003] 3 WLR 1137 (HL) [41].  
41 [2006] EWHC 166 (QB) [101].
In further judicial support for the present English law ruling out any tort for the intentional infliction of humiliation or mere distress, Lord Scott remarked, in *Wainwright*,\(^2\) that there are some of life’s trials and tribulations which could entail humiliation or distress, but which the law should properly not compensate for. Initiation ceremonies at, say, schools, university colleges or military regiments were mentioned (‘why, absent any of the traditional nominate torts such as assault, battery, negligent causing of harm etc, should the law of tort intrude?’), as were scenarios where a shop assistant, bouncer or barman may be publicly offensive to a customer, causing personal humiliation and emotional distress (‘that is no sufficient reason why the law of tort should be fashioned and developed’ to compensate that customer).

Furthermore, the various arguments raised against the permission of pure mental distress claims in negligence (e.g., floodgates concerns, distributive justice), as discussed in Chapter 5,\(^3\) apply with equal vigour in the context of this tort.

In summary, and despite the reasoning to the contrary, proof of a recognised psychiatric injury remains a precondition for the tort of *Wilkinson v Downton* in English law.

**ELEMENTS OF THE TORT**

**Element #1: The requisite act that does the harm**

The acts by D that trigger the tort of *Wilkinson v Downton* can constitute three types: (1) conveying false information to C, knowing that information to be untrue, but which C believes to be true; (2) making verbal threats of physical harm against C; or (3) committing some physical act intended to inflict harm on C (but without any immediate threat of physical harm being present, otherwise assault would apply).

Each of these is borne out in the case law to date. Dealing with each in turn:

**False information.** This was the relevant act in *Wilkinson v Downton* itself, because D knew that C’s husband had suffered no injury. To make out the tort, it is not sufficient that the information given to C was, objectively speaking, untrue – D must know that it was false.

In *Janvier v Sweeney*,\(^4\) Mlle Janvier, C, a Frenchwoman, was a paid companion in London. Her German fiancé was interned at the Isle of Man during WWI. Mr Sweeney, D1, was a private detective, and wanted to acquire some letters, purportedly written by Major X, in the possession of a lady residing in the same house as C, to check whether they were forgeries. D1 told his employee, Mr Barker, D2, to visit the house and to ask C whether she had seen these letters in the house, and to say that she would be offered some recompense if she produced the letters for D1’s inspection. Instead, D2 visited C and pretended to be from Scotland Yard and said that he was ‘representing the military authorities’, and that C ‘was the woman they wanted, as she had been corresponding with a German spy’. This was said to try to persuade C to look for and hand over Major X’s letters. The information given by D2 as to his position and his suggestion that C was in danger of arrest was clearly false; but C did believe what D2 told her, and suffered severe shock, and physical injury in the form of shingles and other ailments. **Held:** C could recover under the rule in *Wilkinson v Downton* (against D2 directly, and against D1 vicariously). In fact, this was a stronger case than *Wilkinson*, because there, D2 only intended to play a practical joke and cause C a fright; here, D2 intended to blackmail C, and so committed a wrongful act.

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On the other hand, if D actually believed the information to be true; or subjectively speaking, was uncertain whether it was false; or objectively speaking, it could not be said whether the information was false – then the tort will not be proven.

In Sullivan v Boylan, Mrs Sullivan, C, engaged building contractors, Boylan Building Contractors, to carry out extension and refurbishment works. A dispute arose about the building works. The building contractors alleged that C owed them 7,000–20,000 euros. They put the matter into the hands of a debt collector, Mr McCartan, D, who then demanded the money from C. C received visits from D, repeated phone calls and emails, threats to expose her ‘obligation to pay the debt’ to her neighbours, threats that her property would be charged and judgment obtained against her, etc. According to the judgment, C ‘found the entire episode frightening and deeply traumatic. She felt that there was no one to whom she could turn, as her parents were elderly and she did not want to cause them needless anxiety. She lost weight and was prescribed a mild sleeping tablet by reason of the extreme stress to which she had been subjected’. The judge described D’s behaviour as ‘contemptible, irresponsible and outrageous. He has sought to harass, bully, defame, vilify and intimidate [C], and to all but imprison her in her own home’. Held: the tort of Wilkinson v Downton was not proven. D spoke falsely in asserting that monies were due from C to Boylan Contractors (whether that was so was yet to be determined). However, D believed that the monies were due (and it might eventually turn out to be true).

Hence, to prove the first element of the rule in Wilkinson v Downton, it is not necessary for C to prove that there has been an assault or a threat of force against him. False information given to C, which C believes to be true, will be sufficient.

Verbal threats. Where D verbally threatens C, which has the effect of pestering and intimidating C, causing C to suffer injury or harm, the rule in Wilkinson v Downton will potentially apply.

In Khorasandjian v Bush, D threatened violence against C in his persistent phone calls, which amounted to persecution by means of verbal threats. The basis of the tort was proven to permit injunctive relief against D. In Wong v Parkside Health NHS Trust, the Court of Appeal acknowledged that the threat by D to have an ex-convict retaliate against C if C complained about D’s absences from work could potentially give rise to the tort (although the tort failed for numerous other reasons, including that only mere distress was suffered by C).

Although it has not arisen in any English case as yet, Commonwealth authorities have permitted the tort to apply, where the verbal threat by D was said otherwise than in the actual presence of C. This is the so-called scenario of the ‘distant victim’.

Comparative corner: Commonwealth vignettes

In Bunyan v Jordan (1937: HCA), Latham CJ noted that none of the Wilkinson v Downton cases ‘has gone so far as to suggest that a man owes a duty to persons who merely overhear statements that were not addressed to them.’ More recently, in Carter v Walker (2010), the Victorian Court of Appeal summarised the Commonwealth authorities in which ‘distant victims’ had been able to rely on the tort as follows: in Stevenson v Basham (1922: NZSC), C overheard her landlord, D, demanding possession of the premises, and saying to her...
Other acts. Although it has sometimes been judicially said that a claim under the *Wilkinson v Downton* tort ‘requires a deliberate and wilful misstatement of fact’ (per *AB v Leeds Teaching Hospital NHS Trust*[^47]), that view is, with respect, too narrow a construction of the tort. As evidenced by the cases in the Table below, the rule in *Wilkinson v Downton* has been either proven, or at least potentially available, on the basis of acts that do not constitute verbal threats and false words, but nevertheless, inflict the requisite intentional harm on C.

**Acts that may trigger the tort in *Wilkinson v Downton***

- D’s act of spitting towards C, when knowing himself to be infected by an infectious virus (e.g., HIV or Hepatitis C), potentially invoked the tort in the Irish case of *Carey v Minister for Finance*[^48]. This scenario is distinguishable from fear-of-the-future cases in negligence (e.g., the CJD litigation), because in the former, D acts intentionally;
- D’s acts of locking C out of her office, setting off her car alarm, and throwing things against her office window to frighten her, were sufficient acts, in *Wong v Parkside Health NHS Trust*, to potentially trigger the tort;
- D’s conducting a strip search of Cs before they visited their relative in prison, which was not conducted in accordance with prison rules, was sufficient in *Wainwright* (although the tort failed on other grounds);
- D’s acts of videoing C whilst he was in the shower, and later staring at C whilst naked, were sufficient in *C v D*[^49] to trigger the operation of the tort.

Notably, if any physical act were to constitute a threat of immediate application of force/harm to C, then the appropriate tort would be that of assault, as a trespass to the person. To the contrary, and as explained earlier[^50], the tort in *Wilkinson v Downton* is not a trespass to the person.

**SWD.7** The words or conduct referred to in the previous principle must have no justification or reasonable excuse, for which the burden of proof is on C.

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[^46]: [2010] VSCA 340, [264], [268].
[^48]: [2010] IEHC 247, [3.5].
[^50]: Cross cite p 462.
At first glance, this principle appears to take the form of a defence, for which D would ordi-
narily bear the burden of proof. However, according to the Supreme Court’s latest analysis of
the tort in *Rhodes v OPO*, C bears the burden of proving that the words or conduct were not
justified or were made without reasonable excuse, and this forms part of the so-called ‘conduct
element’. In that case, the publication of a book containing graphic autobiographical detail
did not satisfy the first element of the tort.

In *Rhodes*, concert pianist James Rhodes proposed to publish a book with his publisher, D, which
detailed the violent sexual abuse perpetrated upon him from the age of six, and how music had
‘quite literally saved my life’. This claim under *Wilkinson v Downton* was brought on behalf of his
son, Jack, C, 12, who (it was alleged) would suffer psychiatric harm if the book was published. D
accepted that the publication of such autobiographical information would upset and embarrass C,
but that it would not be harmful if handled in the correct way (viz, the child, residing in another
jurisdiction, was unlikely to read the book until he was much older). Held: the tort failed. There was
every justification for this publication; ‘a person who has suffered in the way ... 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.’

### Element #2: The requisite intention

#### Three levels

To prove the tort, D’s intent can be one of two types: (1) wilfully intending to cause the requi-
site injury to C by his act; or (2) deliberately acting in a way that was calculated to cause C the
requisite injury. Where that injury is a recognisable psychiatric injury, then it is sufficient if D
deliberately acts in a way that was calculated to cause C severe distress which in fact resulted
in that psychiatric injury. However, it remains unsettled as to whether D’s behaving recklessly
towards C is sufficient to prove the tort.

This is the most difficult element of the tort – and, unfortunately, it has become even less clear,
in light of dicta contained in a recent Supreme Court decision.

A ‘genuine intent’ to cause C physical or psychiatric injury clearly can comprise the type of
intent that will trigger the tort. In *Wong v Parkside NHS Trust*, Hale LJ remarked that if D ‘ac-
tually wanted to produce such harm’ to C, that was sufficient for the tort; while in *Wainwright v
Home Office*, Lord Hoffmann referred to the tort potentially applying where there was a
‘genuine intent’ to cause C harm. That is a subjective enquiry – did D intend to cause C harm?

However, something lesser than that will do. In *Wilkinson v Downton* itself, D did not wil-
fully intend to cause bodily or psychiatric harm to C – the whole episode was intended as a
practical joke, just to give C a fright. Wright J said that D committed ‘an act so plainly calcul-
lated to produce some effect of the kind which was produced, that an intention to produce it
ought to be imputed to [D]’. The difficulty, though, is what a ‘calculated intent’ means, and how

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51 [2015] UKSC 32, [2015] 2 WLR 1373, [74], and with quote in case description at [76].
52 [2001] EWCA Civ 1721, [10].
53 [2003] UKHL 53, [46]-[47].
to prove it. In Wong, the Court of Appeal described a sufficient intent in these terms: that D ‘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 the result of his behaviour, and his deliberately engaging in that behaviour.’\(^{54}\) Unlike the first limb of intent, this limb is objectively-construed – did D deliberately engage in the behaviour, and was there a likelihood of C’s suffering harm as a result? In Rhodes v OPO,\(^{55}\) the Supreme Court clarified that, although it is sufficient if D intended to cause C the requisite injury, it is also sufficient if D intended to cause severe distress which in fact resulted in psychiatric injury (the facts of Wilkinson itself).

The question of recklessness, and whether that is sufficient to make out the tort, remains frustratingly unclear. In Wainwright, Lord Hoffmann noted that a sufficient intent for the tort is proven if D ‘acted without caring whether he caused harm [to C] or not’\(^{56}\). In C v D,\(^{57}\) Field J pointed out that this third type of intent can be useful, where it was not likely that the injury to C would occur. However, these views have been thrown into confusion by the more recent decision of the Supreme Court in Rhodes v OPO,\(^{58}\) where the majority considered that recklessness (howsoever it should be defined) should not be included in this element of the tort (albeit that anything said on this issue was dicta only, as the case was resolved under the first element). In coming to that conclusion, the majority did not expressly overrule the wider Wainwright view, and did not cite C v D at all.

### The levels of intent

<table>
<thead>
<tr>
<th>Unintentional, careless, conduct</th>
<th>Acting recklessly</th>
<th>Acting in a way calculated to do C harm</th>
<th>Willful intent to harm</th>
</tr>
</thead>
<tbody>
<tr>
<td>- within the province of negligence, and not the rule in Wilkinson v Downton</td>
<td>- whether this is within the province of the rule in Wilkinson v Downton is presently unclear</td>
<td>- this is within the province of the rule in Wilkinson v Downton</td>
<td>- within the province of the rule in Wilkinson v Downton, although that level of intent will also come within the province of trespass (if there is a capacity to carry out the threat, etc)</td>
</tr>
</tbody>
</table>

Notwithstanding that there remains some uncertainty about what type of intent would suffice to make out the second element of the tort of Wilkinson v Downton, proving it has been impossible in some scenarios, even where there was some fairly unfortunate behaviour directed specifically towards C – the tort failed in each of the following cases on this element:\(^{59}\)

In Wong v Parkside Health NHS Trust, facts previously, held: D did not intend to cause C harm on the facts, but only to inconvenience her. Nor was D’s conduct of a nature that was sufficiently likely

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\(^{54}\) [2001] EWCA Civ 1721, [12].
\(^{55}\) [2015] UKSC 32, [87].
\(^{56}\) [2003] UKHL 53, [45].
\(^{57}\) [2006] EWHC 166 (QB) [99]–[100], drawing upon the observations of Lord Woolf CJ in Wainwright v Home Office [2001] EWCA Civ 2081 (CA), and whose remarks on this point were not disapproved on HL appeal.
\(^{58}\) [2015] UKSC 32, [87].
\(^{59}\) See too: Bici v MOD [2004] EWHC 786 (QB) (tort of Wilkinson v Downton failed; no requisite recklessness or intent by the soldiers, D, firing at C’s car in Kosovo).
to result in psychiatric injury, such that D's behaviour was calculated to cause C harm. This was 'a catalogue of rudeness and unfriendliness, behaviour not to be expected of grown-up colleagues in the workplace, but not behaviour [that would trigger the tort]'. In Wainwright v Home Office, facts previously, held: the two prison officers who conducted the strip-search did not intend to humiliate or distress Cs; they had acted in good faith; their conduct of the strip search was carried out in a matter-of-fact way, they spoke to each other about unrelated matters during it. There was 'sloppiness' and negligence in failing to comply with the prison rules, but nothing more than that.

In contrast, the requisite level of intent was present in the following cases – although of different types:

In Sullivan v Boylan, facts previously, held: the threats to C were sufficient to be wilfully calculated to cause harm to C. This was the only one of the elements of the tort proven in this case. In C v D, facts previously, held: re incident #2, D did not intend C to suffer harm, and nor were his acts calculated to cause such harm; nor were they done with the knowledge that they were likely to cause C harm. However, D had been reckless as to whether he caused such injury to C, and that was sufficient to prove liability under the tort of Wilkinson v Downton.

However, whether C v D would be decided the same way now, post Rhodes v OPO, remains uncertain (as mentioned, unfortunately, the case was not cited in the Supreme Court judgments). Indeed, the description of the requisite intent in Rhodes has, with respect, introduced an unwelcome degree of uncertainty into the second element of the tort.

Professional defendants

The requisite intent will always be a difficult element to prove, where D is a professional. For example, in Powell v Boldaz, where a claim based upon the rule in Wilkinson v Downton was brought against various doctors, the claim was rejected by the Court of Appeal, on the basis that 'the facts do not begin to establish the necessary degree of foresight for imputed intent' on the part of the medical Ds. Indeed, one may conjecture that, consistent with the outcome in that case, it is almost inconceivable that the requisite intent on a professional's part to cause C injury could be proven.

Element #3(a): Causation

The type of harm which C must suffer – either a recognised psychiatric injury, or physical injury – was set out under ‘Precondition’, earlier. The tort does not compensate for actions for pure mental harm amounting only to mere distress (as confirmed in Wong v Parkside NHS Trust).

There must be a causal link between D’s act and C’s damage, otherwise the tort cannot be proven. It is sufficient if D’s act caused, or materially contributed to, the harm suffered by C.

As always, proof of a causal link is a question of fact.

In Wong v Parkside NHS Trust, facts previously, held: the tort was not proven. The most serious issue was the threat by D to have an ex-convict retaliate against C if C complained about D’s absences from work. However, C conceded that this threat had not caused her emotional distress, but that its

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trigger had been earlier incidents of rudeness and unfriendliness. Hence, the most serious incident, which arguably could have satisfied the intent required for the tort, did not cause her injury.

However, there are indications in English law that, under the tort of *Wilkinson v Downton*, a weaker causal link may suffice, in comparison with the 'but-for' test which is the general rule in that other action on the case, negligence. There may be a number of causes of C's injury – and D’s behaviour towards C was just one.

According to *C v D*, it is not necessary for D's act to cause C's injury on the balance of probabilities. It is sufficient if D’s act was a 'material contribution', or 'a more than trivial cause', of C’s injury.\(^\text{61}\) Citing both *Bonnington Castings Ltd v Wardlaw*,\(^\text{62}\) and *McGhee v National Coal Board*,\(^\text{63}\) Field J held that C had to prove that the abuse he suffered at D’s hands had made a material contribution to his injury, and that a court should apportion the damage caused by D’s act, and that caused by other sources, 'on a common sense basis.'

In *C v D*, facts previously, there were several causes that contributed to C’s psychiatric injury: a lifelong condition of Anti-Social Personality Disorder and other innate characteristics; the other abuse incident #1; his dysfunctional family; the brutal way that C was treated by senior boys at boarding school; his mother's indifference when he told her of the infirmary incident which led to the breakdown of his relationship with his parents because of his strong sense of betrayal; and the infirmary incident #2. All of these were contributing causes to C's mental condition. Held: the infirmary incident caused C to suffer psychiatric injury, for the purposes of this tort, because it made 'a material contribution to C's mental condition.'

Furthermore, where D’s act was to give C false or misleading information, then it is that information which must itself cause the injury to C. It is not enough if the information is false, but an intermediate act causes the injury to C. That is just too indirect.

In *W v Essex CC*,\(^\text{64}\) parents W, as Cs, sued Essex CC and Anthony Golden, a social worker employed by the Council, D, because a foster-child, G, 15 years old, was placed with the family, in breach of a specific oral assurance that someone known or suspected of being a sexual abuser would not be fostered with them. In answer to a specific question, Cs were (wrongly) told that G was not known or suspected. In fact G (as D knew) had received a caution for indecent assault on his sister. Whilst placed with the family, G sexually abused all of C's children, aged 7–12 years. The parents suffered psychiatric shock. Held (CA): the facts did not fit the *Wilkinson v Downton* tort. The parents were not injured by the misinformation given to them by D. They were injured indirectly, by the consequences of the misinformation. The tort was not proven. Held (HL): this issue was not revisited on appeal.

Element #3(b): Remoteness

\(^\text{SWD.10}\) A consequence of the tort in *Wilkinson v Downton* being an action on the case is that it is only reasonably foreseeable damage which will be recoverable.

Of course, for torts of trespass, such as battery or assault, there is no requirement that the damages suffered must be foreseeable – they can be extremely unlikely, and yet still be compensable in trespass.

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61 [2006] EWHC 166 (QB) [100], [102]–[104].
62 [1956] AC 613 (HL).
63 [1973] 1 WLR 1 (HL).
For C who seeks to make out the tort of *Wilkinson v Downton*, it is necessary that the recognised psychiatric injury was reasonably foreseeable in a person of normal fortitude.

It will be recalled, from Chapter 5, that psychiatric injury must have been foreseeable in persons of normal fortitude, for secondary victims to recover in negligence; but that, for some primary victims, D must take that type of victim as he finds him, psychiatric vulnerabilities and all. The normal fortitude rule arises again in the context of the tort in *Wilkinson v Downton* – and it is the approach taken towards secondary victims in negligence which was reflected in the judgment of Wright J in the leading case itself: the court must have regard to ‘the effect [that] was produced on a person proved to be in an ordinary state of health and mind.’ The application of the normal fortitude rule to the tort of *Wilkinson v Downton* was further confirmed, in dicta, in *Page v Smith*.

**REMEDIES**

The main remedy for the tort of *Wilkinson v Downton* is compensatory damages. To date, neither aggravated nor exemplary damages have been awarded for the tort in English law.

Injunctive relief may also be awarded, as *Khorasandjian v Bush* demonstrated. To provide an example of the various recoverable heads of compensatory damages awarded in one leading case discussed in this chapter:

In *C v D*, C was awarded general damages of £20,000 for a ‘period of painful mental abnormality’ following the head teacher's behaviour toward him (C's prognosis for recovery was considered 'good'). C received special damages for loss of earnings because he did not enter into University life, as expected, and from which he would have graduated prior to trial. Taking into account: net earnings; the contingencies of life; accelerated receipt; and the possibility that there might be some significant benefit to C in entering professional life when he was older, C was awarded £15,000 for this head. C also recovered £3,000 for future private psychotherapy treatment (approximately 90 sessions, at £80 per session, but with the contingency that 'not everyone feels that they want to proceed with psychotherapy after the assessment, and people drop out even if they get started on the course'); and £5,000 for loss of parental support, given that C became estranged from his parents, blaming them for not having taken his allegations against the headteacher seriously, and hence, no parental support for education or accommodation expenses was forthcoming, albeit that the court 'must take into account the fact that support of children is very much a discretionary matter for their parents'. Given the tort's intentional nature; the close analogies between this tort and the tort of trespass to the person; and the abolition of the ‘cause of action’ test in *AB v South West Water Services Ltd*, there appears to be no legal reason as to why aggravated damages, and possibly exemplary damages, should not be capable of being awarded for the tort, in an appropriate case. The anomalies associated with exemplary damages, and their restricted availability, have been discussed elsewhere in Chapter 11.

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