

Interlocutory injunctions: the three tests

(1) The *American Cyanamid* test - is there a serious question to be tried?

(2) S.12(3) HRA 1998: Is C likely to succeed at trial to establish that publication should not be allowed?

(3) The *Bonnard v Perryman* test: Is it clear that no defence will succeed at trial?

1. [1975] 2 W.L.R. 316

2. [1891] 2 Ch 269

Greene v Associated Newspapers Limited [2005] QB 972

Reasons for rule in *Bonnard*:

(1) The importance the court attaches to freedom of speech, and especially "the dangers inherent in prior restraint".

(2) A judge must not usurp the constitutional function of the jury unless he is satisfied that there is no case to go to a jury.

(3) Until there has been disclosure of documents and cross-examination at the trial a court cannot safely proceed on the basis that what the defendants wish to say is not true; or, put another way, a court cannot know whether the plaintiff has a right to his/her reputation until the trial process has shown where the truth lies.

"We therefore have no hesitation in holding that there is nothing in section 12(3) of the Human Rights Act 1998 that can properly be interpreted as weakening in any way the force of the rule in *Bonnard v Perryman*".

Alternative causes of action:

(1) Data Protection Act 1998 – a statutory tort of inaccuracy?

- Prior to Defamation Act 2013 alternative claims have been run in libel and under DPA, e.g. *Law Society v Kordowski* [2011] EWHC 3185
- Post Defamation Act 2013: *Prince Moulay Hicham v Elaph Publishing* [2015] EWHC 2021: –C given permission to amend to add DPA inaccuracy/unfairness claim following strike-out of part of libel claim
- "*it is arguable that [C] has a principled interest in ensuring that there is an accurate record of his political activities in France relating to the Moroccan regime*" (Dingemans J)
- Appeal heard yesterday.

Alternative causes of action:

(2) Harassment

Protection from Harassment Act 1997

Merlin Entertainments LPC v Cave [\[2015\] E.M.L.R. 3](#)

- Staff at company running theme park receiving emails from disgruntled individual.
- Where the alleged harassment involved statements a defendant would seek to justify at trial, there might be cases where an interim injunction would be appropriate.
- The harassment must go beyond mere publication, and have additional elements of oppression, persistence or unpleasantness, distinct from the content of the statements.
- Before press publications were capable of constituting harassment, there had to be exceptional circumstances justifying a restriction of the freedom of expression, [Thomas v News Group](#) [\[2001\] EWCA Civ 1233](#).

Alternative causes of action

(3) Conspiracy to injure

Gulf Oil v Page [1987] Ch. 327

- Airborne slogan above Cheltenham racecourse: "Gulf exposed in fundamental breach".
- Injunction application: C succeeds on appeal.
- "It would be only in the rarest case that sufficient evidence of a dominant purpose to injure could be made out to warrant the grant of interlocutory relief".
- The court would scrutinise with the greatest care any case where a cause of action in conspiracy was joined to a cause of action in defamation and would require to be satisfied that such joinder was not merely an attempt to circumvent the rule in defamation.

Alternative causes of action:

(4) Breach of confidence/ misuse of private information

- Truth or falsity of allegations is irrelevant to determination of whether there has been a misuse of private information: *McKennit v Ash* [2006] EWCA Civ 1714.
- Article 8 may be engaged in a case concerning reputational harm: *Re Guardian News and Media* [2010] 2 AC 697.
- Has "the attack of [C's] reputation so seriously interfered with his private life so as to undermine his personal integrity?"

Terry v NGN [2010] EMLR 16

"I have reached the view that it is likely that the nub of LNS's complaint in this case is the protection of reputation, and not of any other aspect of LNS's private life"

Per Tugendhat at [95]

- There is no mention of any personal distress. Terry appears to have a very robust personality, as one might expect of a leading professional sportsman.
- This claim is essentially a business matter for Terry. Evidence prepared by business partners. Real basis for the concern of LNS is likely to be the impact of any adverse publicity upon the business of earning sponsorship and similar income.
- Defamation not relied on as cause of action. But *Bonnard* test applied anyway.

Hannon v News Group Newspapers Ltd [2015] E.M.L.R.1:

- Claim concerned articles about removal of C from flight by police after waking to find boyfriend behaving "inappropriately" with another woman. Other C a pilot arrested after being found to have exceeded alcohol limits on a plane shortly before taken off.
- Application to strike out claim on basis that the claim was an abuse of process, since it was a claim based on damage to reputation and yet was not brought as a defamation claim but a claim for misuse of private information/ breach of confidence.
- Application fails.
- Court will not be deflected from applying *Bonnard* where the substance of the complaint is defamation.
- But claim can be advanced on the grounds of another cause of action even if it relates in part to reputational damage.
- Is the "nub of the claim a complaint about falsity" and is it "brought in an alternative way to avoid the rules of the tort of defamation?"

Tillery Valley Foods v C4 [2004] EWHC 1075(Ch)

- Undercover footage of unhygienic practices in food processing plant
- Claim "cannot be squashed into the law of confidence"
- A "defamation action in disguise"

ERY v Associated Newspapers Ltd [2016] EWHC 2760 (QB)

- Information concerning the interview under caution and police investigation into C.
- A threatened publication may jeopardise both the claimant's reputation and his privacy. It is no answer to an application for an injunction to restrain a threat to the claimant's reasonable expectation of privacy that he could, alternatively, have pleaded a cause of action in defamation.
- "In the present case, I cannot agree that nub of the Claimant's claim is protection of reputation. There is a reputational element to it, but, since that is the case with many privacy cases, that does not take the Claimant far enough. Mr Caldecott has not persuaded me that the nub or essence of the claim is the protection of the Claimant's reputation to the exclusion of that cluster of interests which privacy is intended to protect."