

INTERIM RELIEF:

IS THE RULE IN BONNARD V PERRYMAN STILL GOOD LAW IN
DEFAMATION INTERIM INJUNCTIONS FOLLOWING RECENT
CASELAW SUCH AS ZXC?

Sara Mansoori KC

COULSON V COULSON [1887] 3 TLR 846

Lord Esher MR

“...the jurisdiction was of a delicate nature. It ought only to be exercised in the clearest cases, where any jury would say that the matter complained of was libellous... The court must also be satisfied that in all probability the alleged libel was untrue, and if written on a privileged occasion that there was malice...”

BONNARD V PERRYMAN [1891] 2 CH 269

“But it is obvious that the subject of an action for defamation is so special as to require exceptional caution in exercising the jurisdiction to interfere by injunction before the trial of an action to prevent an anticipated wrong. ... and, unless an alleged libel is untrue, there is no wrong committed ... Until it is clear that an alleged libel is untrue, it is not clear that any right at all has been infringed”

GREENE V ASSOCIATED NEWSPAPERS LTD

[2005] 3 WLR 293

HRA 1998, Section 12(3): "No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed."

"61. This has got nothing at all to do with practice in defamation cases, where as we have observed .. the American Cyanamid guidelines are not applied. There are "special circumstances in defamation actions", as Sir Denys Buckley put it in Herbage v Times Newspapers Ltd"

GREENE V ASSOCIATED NEWSPAPERS LTD
[2005] 3 WLR 293

*“66. 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*”.*

TAVETA V FCR & OTHERS [2018] EWHC 1662

- Public law case for judicial review
- Not a defamation case
- Relevant as there is a line of authorities which state publication of reports by public authorities should be restrained only if the higher Bonnard threshold met.

TAVETA V FCR & OTHERS [2018] EWHC 1662

Nicklin J, expressed “serious reservations” about whether the higher Bonnard threshold could be justified at all:

(1) *“Since the decision in Greene, the right to trial by jury in defamation claims has been removed... A key plank of the justification for retaining the rule in Bonnard -v- Perryman has therefore gone”* [97(i)]

(2) *“Application of the rule in Bonnard -v- Perryman ... gives a presumptive priority to Art 10 right over Art 8 (including the right to reputation). It has been held in private law litigation that such presumptive priority is not justifiable”* [97(ii)]

TENSION CAUSED BY ART 8 RIGHT TO REPUTATION

Professor David Rolph, “Bonnard v Perryman (1891)” in
Landmark Cases in Defamation Law (Hart 2019) 27

“... the relationship between reputation and privacy under English law has now been enmeshed. The inversion of the relationship between reputation and privacy, treating privacy as the primary right and reputation as the subsidiary one should cause a rethinking of defamation law, including the rule in Bonnard v Perryman. The fact that reputation and privacy are treated as aspects of the same human right will make it difficult in the future to maintain differential approaches to injunctive relief for defamation and privacy.”

ZXC V BLOOMBERG

[2022] UKSC 5 [2022] AC 1158

- MOPI case involving publication of details from a Letter of Request.
- Interim injunction not granted but Nicklin J held would have been had Garnham J not been misled.
- UKSC held that a person under criminal investigation has, before being charged, a reasonable expectation of privacy in respect of information relating to that investigation.
- In light of previous decisions, does ZXC provide a good basis for challenging Bonnard in defamation interim injunctions?

DEFAMATION & PRIVACY TORTS - DIFFERENT PURPOSE AND RATIONALE

Greene v Associated Newspapers, CA:

A necessary component of libel action is that the allegation is false:

“if the allegation is or might be true the court has no business to stop the defendant from saying it.”

“...Once again we need to stress the distinction between a defamation case (where the claimant's right to a reputation has been put in issue and the issue cannot be effectively resolved before the trial) and a case which raises direct issues of privacy or confidentiality.” [81]

And:

“Confidentiality, once breached, is lost for ever, so that the granting or withholding of a pre-trial injunction is of critical importance to a claimant.” (citing Cream Holdings Ltd v Banerjee [2003] EWCA Civ 103, [2003] Ch 650) [60]

DIFFERENT PURPOSE AND RATIONALE

McKennitt v Ash [2008] QB 73, CA:

“The question in a case of misuse of private information is whether the information is private not whether it is true or false. The truth or falsity of the information is an irrelevant inquiry in deciding whether the information is entitled to be protected and judges should be wary of becoming side-tracked into that irrelevant inquiry”. [86]

DIFFERENT PURPOSE AND RATIONALE

UKSC in ZXC:

“111. However, the claimant did not bring a claim in defamation. The sole claim was in the tort of misuse of private information which is a separate, distinct and standalone tort. It has different constituent elements and serves a distinct purpose. In the tort of defamation, the falsity of the information at issue is of central importance. However, the purpose of the tort of misuse of private information is not confined to protection of an individual from publication of information which is untrue, rather its purpose is to protect an individual’s private life in accordance with article 8 of the ECHR, whether the information is true or false.”

BILL OF RIGHTS BILL

Section 4 of the proposed Bill of Rights Bill:

- (1) When determining a question which has arisen in connection with the right to freedom of speech, a court must give great weight to the importance of protecting the right.
- (2) In this section “the right to freedom of speech” means the Convention right set out in Article 10 of the Convention (freedom of expression) so far as it consists of a right to impart ideas, opinions or information by means of speech, writing or images (including in electronic form).

IN PRACTICE: ADOPT THE ZXC ROUTE?

If acting for Claimants:

- What is the publication about?
- Does it fall into “ZXC territory”?
- What is the client’s aim?

If media publications:

- Appreciate risk of interim injunctions being sought if publishing defamatory allegations that fall within “ZXC territory”.

IN PRACTICE: EXAMPLE ARTICLE

"Detective accused of taking bribes from Russian exiles."

"Allegations that a British security company with wealthy Russian clients paid a police officer in the extradition unit for sensitive information are being investigated by Scotland Yard..."

The officer under investigation has been identified as Detective Sergeant Gary Flood. His home and office were raided last month.

A spokesman for the Metropolitan Police said yesterday:

'We are conducting an investigation into allegations that a serving officer made unauthorised disclosures of information to another individual in exchange for money....'

IN PRACTICE: DEFAMATION OR PRIVACY

DS Flood complained that the Article meant that:

“there were strong grounds to believe, or alternatively that there were reasonable grounds to suspect, that he had abused his position as a police officer with the MPS extradition unit by corruptly accepting £20,000 in bribes from some of Russia's most wanted suspected criminals in return for selling to them highly confidential Home Office and police intelligence about attempts to extradite them to Russia to face criminal charges, that he had thereby committed an appalling breach of duty and betrayal of trust and had thereby committed a very serious criminal offence”

Alternative: The Article contains the following information about C in respect of which he had a reasonable expectation of privacy:

“that he was the subject of a criminal police investigation and suspected by the police of taking bribes in return for unauthorised disclosure of highly confidential information”.

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